

P.E.R.C. NO. 2015-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-023

NORTH HUNTERDON VOORHEES
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies in part, and dismisses without prejudice in part, the request of the North Hunterdon-Voorhees Regional School District Board of Education to restrain arbitration of a grievance filed by the North Hunterdon-Voorhees Education Association. The Association asserts the Board violated contractual evaluation procedures and imposed discipline without just cause by rating a teacher "ineffective" in two categories of her annual evaluation. The Commission finds that the alleged violation of contractual evaluation procedures regarding disclosure of documents used for evaluation is arbitrable, and that the dispute over whether the challenged ratings were disciplinary may be resubmitted to the Commission if arbitration over the procedural dispute does not also resolve the dispute over the teacher's ratings.

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, Riker Danzig Scherer Hyland &
Perretti, attorneys (Brenda Liss, of counsel and on the
brief; John Atkin, on the brief)

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

DECISION

On September 13, 2014, the North Hunterdon-Voorhees 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 North Hunterdon-Voorhees Education Association. The Association asserts that the Board violated contractual evaluation procedures and imposed discipline without just cause on a special education teacher by rating her as "ineffective" in two categories on her annual summative evaluation for the 2013-2014 school year. We will allow arbitration of the claim that the Board violated

contractual evaluation procedures, but defer deciding whether the Board used the evaluation process to discipline the teacher.

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

The Association represents the Board's non-supervisory employees including classroom teachers. The parties entered into a collective negotiations agreement (CNA) effective from July 1, 2012 to June 30, 2015. The grievance procedure ends in binding arbitration. Article 9, section (B)(1), of the CNA reads:

Any materials regarding an employee from any source including administration, parents, students or other persons that are used in any manner in evaluating the professional competency of any employee shall be promptly investigated and called to the attention of the employee in writing, prior to filing in said employee's personnel file. This material shall be signed by the employee within three (3) working days of receiving it. The employee will then receive a duplicate copy.

During the 2013-2014 school year, a special education teacher received, prior to her year-end evaluation, three separate evaluations based on classroom observations that occurred on October 8 and December 12, 2013 and on June 2, 2014. These reports contain only positive comments in all rating categories.

Sometime after June 2, but before June 12, 2014, the teacher received her annual summative evaluation for the 2013-2014 school year. The evaluation, prepared by the same administrator who

issued the three evaluations based on classroom observations, gave the teacher bottom ratings in "Learning Environment" and "Professionalism." As a result her overall rating dropped to "Partially Effective."^{1/}

On June 12, the teacher, an Association representative and the administrator met to discuss the evaluation. The Administrator disclosed that he had relied upon incidents described in e-mails he had received but had not given copies to the teacher nor placed them in her personnel file. The next day he provided the teacher with a copy of the e-mails.^{2/} They addressed:

- An October 2013 e-mail sent by the teacher to a parent regarding her child's progress that referred to a course by a title no longer in use.^{3/} A counselor who had been copied by the teacher, sent an e-mail to the administrator expressing concern about the error, but did not copy the teacher.^{4/}

1/ The four rating levels are: Highly Effective (3.5 to 4); Effective (2.65 to 3.49); Partially Effective (1.85 to 2.64) and Ineffective (1 to 1.84). The teacher's numerical score was 2.58. Her prior annual rating was Effective.

2/ According to the Association representative, the administrator declined to immediately turn over the documents saying he had to check on privacy issues.

3/ The former title was "English I, Non-College Prep," which was apparently changed to "English I."

4/ The teacher's e-mail that was copied to the counselor identified the student, but the counselor's separate e-mail to the administrator did not.

- A December 2013 e-mail from a secretary who coordinates substitute assignments to the teacher advising that the secretary had to be advised when a change in a sub's class assignment was made.
- A January 2014 e-mail describing an alleged confrontation between the teacher and another teacher that occurred in a classroom. The e-mail, which was copied to the teacher's evaluator, but not to either of the teachers involved, concluded that the two teachers had a personality conflict which needed to be worked out, but that no discipline was warranted.
- A June 9, 2014 e-mail from the Dean of Students to the teacher's evaluator advising that the Dean told the teacher that she was wearing inappropriate clothing. The e-mail reflected that the Dean was skeptical that the teacher would resolve the issue although she told the Dean she would do so.^{5/} The teacher was aware of the Dean's position, but was not aware that the Dean had sent an e-mail to her administrator/evaluator. She was not copied on the e-mail.

On July 8, 2014, the Association filed a grievance asserting that the evaluator had provided no evidence to justify the ineffective ratings for learning environment and professionalism and demanded that the ratings for those categories be revised to show that at a minimum, her performance in those areas was "partially effective." The grievance was denied at the subsequent steps of the grievance procedure. On August 27, the Association demanded arbitration asserting that the teacher's

5/ The e-mail, referring to the teacher, reads: "She said she would take care of it in the ladies' room but walked directly to her classroom. Hopefully she had a mirror in there to help her position the pin high enough for the sweater to stay closed and cover the neckline of her dress."

rating should be adjusted to "Effective," and that the adverse ratings, which were not explained with any specificity, constituted discipline without just cause. This petition ensued.

The Board asserts that the grievance is non-arbitrable because evaluations are a managerial prerogative, an arbitrator does not have authority to award the relief sought and the issues presented by the grievance are preempted by education statutes.

The Association counters that the grievance is arbitrable because: the Board breached contractually mandatorily negotiable arbitration procedures; the circumstances, particularly the contrast between the observation reports and the year-end evaluation, show that the latter document was intended to discipline the teacher for alleged non-teaching related conduct; the relief sought does not affect the arbitrability of the grievance; and education laws do not preempt arbitration.

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 contractual merits of this grievance.

This grievance raises two distinct but related issues; the adherence to negotiated evaluation procedures and whether the employer has used a formal evaluation process to discipline an employee. See, respectively, Lacey Township Bd. of Educ. v. Lacey Township Educ. Ass'n, 259 N.J. Super. 397, (App. Div. 1991) aff'd o.b. 130 N.J. 312 (1992) and 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).

Lacey Township Bd. of Educ. supra., upholds a grievance arbitration award directing that an evaluation report be expunged because, in violation of specific contract language, the teacher was not given a copy of a required document prior to a conference with her evaluator. Said the Court:

We conclude that the arbitrator's remedy did not substantially interfere with the school administration's management prerogatives and did not violate any statutory policy. The Board negotiated the requirement that the evaluated teacher receive a copy of the evaluation before the conference. . . The remedy of expungement merely eliminated a document. The evaluation reflected in that document did occur, presumably to the benefit of the teacher and the evaluator. Nothing in the remedy prohibited subsequent evaluation of the same teacher.

[259 N.J. Super at 399-400; citation omitted]

The Association's arguments regarding the administrator's alleged violation of the contractual requirement to disclose any

documents to a teacher that are used in evaluating professional performance is an issue that may be resolved through binding arbitration. If the grievance is sustained and the Board is directed to re-evaluate the teacher, the rating could be raised.^{6/} Doing so could resolve the remainder of the dispute.^{7/}

If the dispute persists and it becomes necessary to determine, under the Holland standards, whether the disputed ratings in the annual evaluation were disciplinary, the Board can seek to restrain arbitration of that issue.

ORDER

The request of the North Hunterdon-Voorhees Regional High School District Board of Education to restrain arbitration is:

A. Denied to the extent the grievance asserts that the Board violated Article 9, section (B) (1).

^{6/} The arbitrator may not revise the final rating. See Lacey, 259 N.J. Super. at 399.

^{7/} The teacher's rating for 2013-2014 was 2.58. A score of 2.65 or above would change her evaluation to "Effective."

B. Dismissed, without prejudice, as to the Association's claim that the Board's 2013-2014 annual summative evaluation of the teacher, in whole or in part, was discipline without just cause.

BY ORDER OF THE COMMISSION

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

ISSUED: June 25, 2015

Trenton, New Jersey