

P.E.R.C. NO. 2016-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FLEMINGTON-RARITAN REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-078

FLEMINGTON-RARITAN EDUCATIONAL
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Board of Education for a restraint of binding arbitration of a grievance filed by the Association seeking to change a teacher's evaluation and reprimand the evaluator and school principal. Applying Local 195's balancing test, the Commission finds that the predominate interest in dispute is the Board's managerial prerogative to evaluate a teacher's performance.

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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FLEMINGTON-RARITAN REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-078

FLEMINGTON-RARITAN EDUCATIONAL
ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Comegno Law Group, P.C., attorneys
(Jeffrey R. Caccese, of counsel and Brandon R. Crocker,
of counsel)

For the Respondent, Selikoff & Cohen, PA, attorneys
(Keith Waldman, of counsel and Kathleen L. Kirvan, of
counsel)

DECISION

On June 8, 2015, the Flemington-Raritan Regional Board of Education filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by the Flemington-Raritan Education Association. The grievance alleges that there are inaccuracies in a teacher's evaluation report and seeks to have the report corrected so that it accurately depicts the lesson that was observed.^{1/}

^{1/} The grievance also requested that the Board provide the Association with a copy of an audio recording made by the teacher, which the Board did on March 6, 2015, thereby
(continued...)

The parties have filed briefs and exhibits. The Board submitted the certification of School Principal Karen Gabruk. The Association submitted the certification of Association President Susan Vala. These facts appear.

The Association represents all non-supervisory, certified personnel, including teachers, and certain non-certified support staff employed by the Board. The Board and Association are parties to a collective negotiations agreement (CNA) effective from July 1, 2010 through June 30, 2014. The grievance procedure ends in binding arbitration.

Article 15 of the CNA, entitled "Teacher Observation and Evaluation," provides in pertinent part:

A.2. The teacher shall receive the observation report prepared by his evaluator within five (5) school days of such observation. The teacher shall receive the observation and/or evaluation report at least one (1) day before any conference to discuss same. Said conference shall be held with the evaluator. No such report shall be submitted to the Central Office, placed in the teacher's file, or otherwise acted upon without prior conference with the teacher. No teacher shall be required to sign a blank or incomplete form. Every observation and evaluation form will provide sufficient space for optional response by the teacher.

* * * *

E. No material derogatory to a teacher's conduct, service, character or personality shall be placed in his/her personnel file unless the teacher has

1/ (...continued)
resolving that aspect of the grievance.

had an opportunity to review such materials by affixing his/her signature to the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. The teacher also shall have the right to submit a written answer to such material and his/her answer shall be reviewed by the Superintendent or his/her designee and attached to the file copy.

On December 12, 2014, Vice Principal Kelliann TenKate conducted an unannounced observation of a kindergarten teacher. Without TenKate's knowledge or approval, the teacher audio-recorded the lesson TenKate observed. TenKate prepared a report of the evaluation, provided the report to the teacher on December 16, and reviewed it with her during a post-observation conference held on December 23, 2014. (Exhibit C to Gabruk Certification)

During or prior to the conference, the teacher provided TenKate a written rebuttal to the evaluation in which she challenged the "partially proficient" scores she received on two components. (Exhibit D to Gabruk Certification) The teacher claimed that the evaluation contained inaccuracies as to what transpired during the observation, and she attempted to demonstrate them by setting forth portions of the transcribed audio-recorded lesson in her rebuttal. After meeting with the teacher for her post-observation conference, TenKate declined to change the evaluation report.

On the teacher's summative evaluation for the 2014-2015 school year, she received an overall "effective" rating, and

TenKate recommended that the teacher receive her increment.

(Exhibit F to Gabruk certification)

In Association President Vala's certification, she quotes the paragraph of Article 15 of the CNA pertaining to placing "derogatory material" into a teacher's personnel file. She then states that the subject teacher's "attempt to exercise her right under Article 15 to rebut inaccuracies in her evaluation [] was rejected by her supervisor."

On January 22, 2015, the Association filed a grievance on the teacher's behalf. By letter dated February 3, 2015, the Superintendent denied the grievance, stating:

First, [the teacher's] observation will not be changed. The observation and the evaluation are both accurate, and were completed consistent with all relevant authority....[The teacher's] observation and evaluation were completed in accordance with Article 15 of the Collective Negotiations Agreement and Board of Education Policy 3221. Pursuant to the CNA, [the teacher] had the ability to provide an optional response on the evaluation form.

The Association moved the grievance to the next step of the process. By letter dated March 24, 2015, Board counsel communicated the Board's denial of the grievance to the Association, stating in relevant part:

In response to the Association's request to have the observation corrected, the observation was appropriate and will stand. If [the teacher] would like to respond to the observation, she may do so.... With that said, any response by [the teacher] to her

observation should not be based on the content of the recording because the recording was a violation of Board policy.

On April 10, the Association demanded arbitration, seeking not only to change the teacher's evaluation, but also to "reprimand" TenKate and the principal "for their illegal and inappropriate actions." This petition ensued.

The Board argues that arbitration must be restrained because it is preempted by the "Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act," P.L. 2012, c. 26, codified in part at N.J.S.A. 18A:6-117 et seq., and its implementing regulations, N.J.A.C. 6A:10-1.1 et seq. As to the latter, the Board argues that N.J.A.C. 6A:10-4.4(c)(6) provides the exclusive mechanism by which a teacher may rebut an evaluation report and that it would be inconsistent with TEACHNJ if an arbitrator was permitted to alter or amend an evaluation report. That section of the regulation provides:

The teacher shall submit his or her written objection(s) of the evaluation within 10 teaching staff member working days following the conference. The objection(s) shall be attached to each party's copy of the annual written performance report.

The Board states, and the Association does not refute, that the teacher in question availed herself of the opportunity to submit her written objections to the evaluation, and that her rebuttal was attached to the report that was placed in her personnel file.

The Board also argues that even in the absence of the preemptive effect of TEACHNJ and its regulations, arbitration must be restrained because the Board has a managerial prerogative to observe and evaluate employees. It asserts that nothing in TenKate's evaluation report of the teacher was disciplinary in nature.

The Association argues that TEACHNJ only preempts negotiations over a district's choice of its evaluation rubric. It also acknowledges that a board of education has a managerial prerogative to evaluate its employees and that evaluations of performance are not arbitrable. However, the Association maintains that this matter "narrowly focuses" on the Board's violation of contractual procedures for evaluations, which may be subject to arbitration.

The Commission's inquiry on a scope of negotiations petition is quite narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of the union's claimed violation of the agreement, as well as the employer's contractual defenses, are not in issue. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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.

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively, thereby eliminating the employer's discretion to vary that condition. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). Moreover, if the regulation sets a minimum or maximum term or condition of employment, then negotiation will be confined within those limits. Id. at 46.

In Bethlehem, one of the issues before the Court was whether regulations adopted by the State Board of Education in 1978 concerning the evaluation of tenured teachers served to preempt collective negotiations on the subjects they covered. In its analysis, the Court stated:

We need not discuss the preemptive effect of those provisions that address the substantive aspects of teacher evaluation. Such matters,

which involve sensitive educational policy decisions, could not be the subject of mandatory negotiations, even in the absence of preempting legislation. As a general rule, negotiation is required only regarding those terms and conditions of employment "which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy." Board of Ed. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 at 591, quoting State Supervisory, 78 N.J. at 67. While the policy established for evaluating tenured teachers intimately and directly affects the work and welfare of those public employees, it also involves the exercise of inherent management prerogatives. A negotiated agreement on that subject would significantly interfere with the determination of governmental policy. Therefore, regardless of the presence of preempting legislation, there can be no negotiation on the subject of criteria for evaluating teaching staff.

[Bethlehem Township Bd. of Educ. v. Bethlehem Township Educ. Ass'n, 91 N.J. 38, 46-47 (1982) (citations omitted).]

Conversely, the Court said that mandatory negotiation is permitted on procedural aspects of teacher evaluation not covered by regulations or addressed only to the extent of establishing a maximum or minimum limit. Id. at 47.

Initially, we find that the grievance, despite being couched in terms of procedure, actually goes to the substance of the teacher's evaluation. TenKate rated the teacher "partially effective" on the evaluative component of "creating an

environment of respect and rapport," finding that "[t]he quality of interactions between teacher and students, or among students, is uneven, with occasional disrespect." That finding is among possible "critical attributes" that the Board's evaluation rubric provides for the evaluator to describe a teacher whose performance on the component is considered to be partially effective. As required by the evaluation rubric, TenKate identified evidence in her report that supported the critical attribute she selected to describe the teacher's performance. The evidence consisted of student actions and behaviors and teacher responses observed by TenKate at certain time intervals.

TenKate also evaluated the teacher "partially effective" on a second component of the evaluation rubric, "managing student behavior," selecting two critical attributes that, per the rubric, purportedly describe a partially effective teacher. As with the other component, TenKate described student actions and behaviors and teacher responses in support of her findings.

In the teacher's rebuttal, she challenged the ratings on the two components by describing student behaviors and interactions that, according to the teacher, would have supported a rating of at least effective, if not highly effective. Presumably relying on her audio-recording of the lesson, the teacher suggested in some cases that TenKate's report omitted relevant parts of an interaction or misquoted the teacher. The teacher then argued

that her version of the transaction or incident demonstrated appropriate behavior on her and her students' parts, requiring a higher rating than TenKate had given. Thus, the teacher was challenging TenKate's assessment of the teacher's performance, not TenKate's adherence to procedural aspects of teacher evaluation. Moreover, the teacher's supposedly accurate description of the lesson does not demonstrate that TenKate's ratings were unwarranted. Lastly, nothing in TenKate's report was disciplinary, as opposed to evaluative, in nature.^{2/} Holland Tp. Bd. of Educ., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17314 1986), aff'd NJPER Supp.2d 183 (¶161 App. Div. 1987) (distinguishing between disciplinary reprimand and evaluative material).

On balance, while teachers have an interest in being accurately evaluated, this dispute predominately involves the Board's prerogative to apply evaluation criteria and evaluate a teacher's performance. Therefore, it may not be submitted to binding arbitration, regardless of whether TEACHNJ or its regulations preempt procedural aspects of teacher evaluation.

2/ The grievance here challenges the evaluation of the teacher, not separate action, if any, taken against her on account of her recording the lesson TenKate observed allegedly in violation of Board policy. We make no finding regarding any such separate action or whether the teacher's action violated the policy.

ORDER

The request of the Flemington-Raritan Regional Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: April 28, 2016

Trenton, New Jersey