

P.E.R.C. NO. 2016-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-033

ELIZABETH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, a board of education's request for a restraint of binding arbitration of a grievance filed by a teacher's association. The grievance alleged that the board violated the parties' negotiated agreement when a school principal issued a letter of reprimand to a teacher. The Commission restrained arbitration with respect to the first part of the letter, finding that its comments were predominately evaluative in nature and therefore within the board's managerial prerogative to observe and evaluate employees. Conversely, the Commission declined to restrain arbitration with respect to the second part of the letter, finding it to be disciplinary in nature.

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, DeCotiis, Fitzpatrick & Cole, LLP, attorneys (Jonathan Williams, of counsel and on the brief; Arlene Quinones Perez, of counsel and on the brief; Amanda Miller, on the brief)^{1/}

For the Respondent, Bucceri & Pincus, attorneys (Gregory T. Syrek, of counsel and on the brief)

DECISION

On November 25, 2015, the Elizabeth Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Elizabeth Education Association (Association). The grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) by placing a letter of reprimand in the grievant's file without just cause.

The Board filed a brief, exhibits, and the certification of the Principal of Jerome Dunn Academy, School No. 9 (Principal).

^{1/} When the petition was filed, the Board was represented by other counsel.

The Association filed a brief.^{2/} The Board also filed a reply brief. These facts appear.

The Association represents the school district's teaching staff members, excluding supervisors and administrators, and its clerical and secretarial staff members, among other positions. The Board and the Association were parties to a CNA in effect from July 1, 2012 through June 30, 2015. The grievance procedure ends in binding arbitration.

Article IV, entitled "Employee Rights," provides in pertinent part:

A. No employee shall be disciplined or reduced in compensation in any manner or form or discharged without just cause. Any such action asserted by the Board, or by any agent or representative thereof, shall not be made public unless formal charges are made, and shall be subject to the grievance procedure herein set forth.

The grievant is a tenured teacher employed by the Board. She was assigned to teach English as a Second Language at Jerome Dunn Academy School No. 9 during the 2014-2015 school year, and the Principal was her immediate supervisor.

The Principal certifies that on February 12, 2015, a parent told her that the grievant had informed the parent that her child was being bullied by his assigned teacher and that the assigned

^{2/} Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

teacher did not like the child.^{3/} However, the grievant did not report the alleged bullying to the Principal or any other administrator. The Principal certifies that the grievant's conversation with the parent was inappropriate and violated school district policies and procedures. As a result, the Principal sent a memorandum to the grievant dated February 12, 2015, the body of which provides as follows:

[Grievant], on several occasions, we discussed your professional responsibilities at Jerome Dunn Academy No. 9. In line with Charlotte Danielson's, A Framework for Teaching, Domain 4 - Professional Responsibilities, Component 4F: Showing Professionalism, you have shown lack of discretion in the following elements:

- Integrity and ethical code
- Decision making
- Compliance with all school and district regulations.

Moving forward, you are expected to:

- Only speak to parents/guardians in the presence of an administrator.
- In the case of a special needs student, only speak to parents/guardians in the presence of Child Study Team member, when applicable, and/or an administrator.

A copy of this memorandum will be placed in your personnel file. In the future, I trust you will follow all district policies and perform all your professional responsibilities more attentively. Further action will be taken should this pattern continue.

^{3/} The grievant was not the subject student's assigned teacher.

Please see me if I can be of further assistance.

The Principal certifies that her memorandum "was predominately based upon evaluative and not disciplinary reasons."

By memorandum to the Principal dated February 17, 2015, the grievant denied that she had shown a lack of discretion in the area of professionalism. She stated that to the contrary, she had always dealt with staff, students, and their parents in a highly professional manner; that student well-being and learning was her greatest goal; that she had always followed district regulations; that she tried making proper decisions regarding how to best service her students; that her actions had always been aboveboard and honest; and that her integrity and ethics had never before been questioned. The grievant added that she was offended by being told to speak to parents only in the presence of an administrator, and she referred to the Principal's memorandum as a reprimand.

On February 23, 2015, the Association filed a grievance on the teacher's behalf seeking the removal of the Principal's memorandum from the grievant's personnel file and all other district and school-based files. On March 23, 2015, the Association filed a mutual request that the grievance be submitted for binding arbitration. This scope petition ensued.

The Board argues that the Principal's memorandum was predominately evaluative in nature and intended to enhance

teaching performance and provide a course of action for the grievant to follow in such situations in the future. The Board also contends that the teacher failed to adhere to district policy and the precepts of the Danielson model and that she also exhibited poor judgment by having an inappropriate conversation with a parent.

The Association argues that the Principal's memorandum is predominately disciplinary in nature, citing, among others, Pequannock Tp. Bd. of Educ., P.E.R.C. No. 2008-17, 33 NJPER 240 (¶91 2007), and North Haledon Bd. of Educ., P.E.R.C. No. 2015-26, 41 NJPER 403 (¶126 2015) in support of its position. It maintains that the Principal's memorandum was issued after a complaint and investigation; was based on the statements of a third party rather than the observations of a supervisor; was not part of the normal evaluation process and does not assess the grievant's teaching performance; accuses the grievant of violating Board policies; threatens further action; and was placed in the grievant's personnel file.

In response, the Board argues that the Principal's memorandum should be classified as evaluative because it did not "implement discipline, refer to itself as disciplinary, [or] contain any recommendations for discipline or future discipline." Although acknowledging that the memorandum calls for further action should "this pattern continue," the Board argues that this

would simply allow implementation of appropriate additional steps to guide the grievant in how to perform all of the duties of being an effective teacher inside and outside the classroom.

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.

As such, we do not consider the contractual merits of the grievance or whether the Principal had just cause to issue the memorandum.

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 distinguished between evaluations of teaching performance and disciplinary reprimands:

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.

We do not find the cases relied upon by the Association to be sufficiently similar to this matter so as to control the outcome here. For instance, in *Pequannock Tp. Bd. of Educ.*, P.E.R.C. No. 2008-17, 33 NJPER 240 (¶91 2007), at issue was the nature of an administrator's memorandum addressing a teacher's use of school equipment to send an email to her fellow teachers

encouraging them to write in a particular person as a candidate for board office. We determined that the memorandum was not evaluative but disciplinary in nature and, accordingly, declined to restrain arbitration. And in *North Haledon Bd. of Educ.*, P.E.R.C. No. 2015-26, 41 NJPER 403 (¶126 2015), the subject grievance sought the removal from the teacher's annual evaluation of references to a separate document that described itself to be a "reprimand" for the teacher "defacing of the sign-in book" and "admonished [the teacher] to conduct [herself] appropriately on a going forward basis" under threat that "any further misconduct on [her] part may result in further disciplinary action." We found the document to be a disciplinary reprimand and declined to restrain arbitration inasmuch as excising the reference to the document from the evaluation would not impact the board's ability to evaluate the teacher's performance.

In contrast to the writings in *Pequannock Tp. Bd. of Educ.* and *North Haledon Bd. of Educ.*, the memorandum in dispute here does not so clearly have the earmarks of a disciplinary reprimand that we can confidently categorize the document as such. It does not refer to itself as a reprimand, explicitly mention discipline, or accuse the teacher of misconduct, and the first part of the document mentions Danielson's Framework For Teaching (the "Framework").

The Framework is a New Jersey Department of Education-approved tool used as part of the system for assessing the effectiveness of the district's teaching staff.^{4/} It purports "to identify those aspects of a teacher's responsibilities that have been documented through empirical studies and theoretical research as promoting improved student learning."^{5/} It divides the "complex activity of teaching" into 22 components clustered into four domains of teaching responsibility. One domain, or teaching responsibility, is "showing professionalism," which has four components.

In her memorandum to the grievant, the Principal sets forth three of these components: integrity and ethical code, decision making, and compliance with school and district regulations. We understand the Principal's initial comments, construed within the context of the evaluation tool, to mean that she thought the teacher displayed poor judgment by not reporting the alleged bullying to the Principal and instead communicating it to the

4/ See N.J.S.A. 18A:6-122, requiring annual submission of the district's evaluation rubric to the Department of Education. For further information on the evaluation process developed pursuant to 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.*, see <http://www.state.nj.us/education/AchieveNJ/teacher/>.

5/ For access to or a description of the Framework for Teaching visit <http://www.danielsongroup.org/framework/> or <http://teachscape.com/solutions/framework-for-teaching#overview>.

student's parent. We think the Principal had the right to convey her concerns in that regard to the teacher as an aspect of the Board's managerial prerogative to evaluate teaching performance.

We cannot say the same about the second part of the memorandum, specifically, the directive that the teacher speak to parents only in the presence of an administrator or child student team member. We fail to see how the Principal's directive, without more, would serve to enhance the teacher's performance or promote improved student learning. It is doubtful that speaking to parents only in the presence of another teaching staff member, in and of itself, would bring about improvement on the components of acting with integrity, solving problems with students' needs as a priority, and adhering to district policy. We view the directive as a sanction intended to restrain the teacher from communicating information to a parent that the teacher believed the parent should have, but the Board did not.

As we noted in North Haledon Bd. of Educ., supra, we have allowed grievances seeking to excise references within evaluations to previously issued discipline to proceed to binding arbitration. We think a balanced approach calls for a similar result here. Permitting an arbitrator to excise the directive from the memorandum at issue here, if determined to have been issued without just cause, will not interfere with the Board's ability to provide the teacher feedback as to her performance

relative to her professionalism as defined by the Framework. We add, however, that the arbitrator may not reconsider the Board's policies, negate the Principal's right to investigate alleged noncompliance with them, or prevent the Principal from communicating her findings and concerns to an employee.

Bloomfield Bd. of Educ., P.E.R.C. No. 92-68, 18 NJPER 56 (¶23024 1991).

ORDER

The request of the Elizabeth Board of Education for a restraint of binding arbitration is denied with respect to the following portion of the subject memorandum but is granted as to the balance of the document:

Moving forward, you are expected to:

- Only speak to parents/guardians in the presence of an administrator.
- In the case of a special needs student, only speak to parents/guardians in the presence of Child Study Team member, when applicable, and/or an administrator.

BY ORDER OF THE COMMISSION

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

ISSUED: May 26, 2016

Trenton, New Jersey