P.E.R.C. NO. 2017-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DELAWARE VALLEY REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2016-077

DELAWARE VALLEY REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the request of the Board of Education for a restraint of binding arbitration of two grievances challenging two memoranda placed in a school nurse's personnel file. Finding that the memorandum from the principal was predominately evaluative and that the memorandum from the superintendent was a disciplinary reprimand, the Commission grants a restraint of arbitration as to the former and denies a restraint of arbitration as to the latter.

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.

P.E.R.C. NO. 2017-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DELAWARE VALLEY REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2016-077

DELAWARE VALLEY REGIONAL
EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Fogarty & Hara, attorneys (Stephen R. Fogarty, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (James R. Zazzali, Jr., on the brief)

DECISION

On June 7, 2016 the Delaware Valley Regional Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of two grievances filed by the Delaware Valley Regional Education Association (Association). The grievances allege that the Board's issuance of two memoranda placed in a school nurse's personnel file violated Article III, Sections B and C of the parties' collective negotiations agreement (CNA).

The Board filed briefs, exhibits and the certifications of Principal Adrienne E. Olcott, and Superintendent Daria Wasserbach. The Association filed a brief, exhibits and the certifications of Grievant and Association President James Gessner. These facts appear.

The Association represents employees in the following titles: teacher, custodian, athletic trainer, school nurse, aide, area coordinator, librarian, social worker, guidance counselor, L.D.T.C., secretary, psychologist, and speech therapist. The Board and Association are parties to a CNA effective from July 1, 2012 through June 30, 2015. The grievance procedure ends in binding arbitration.

Article III of the CNA is entitled "Grievance Procedure" and provides in pertinent part:

> B. Grievances: Any individual member of the Association shall have the right to appeal any violation, interpretation and application or policies in this Agreement and administrative decisions affecting him/her through administrative channels. He/She shall have the right to present his/her appeal or designate representatives of the Delaware Valley Education Association to appear with him/her at Steps One and Two. At Steps Three and Four, he/she may appear with anyone of his/her own choosing provided a representative of the Association is present.
>
> C. Grievance Procedure: . . .
>
> Step One - Any employee listed in Article I, Section A, who has a grievance shall, within seven (7) schools days, discuss it first with his/her Principal or immediate supervisor in

> an attempt to resolve the matter informally at that level, and having the grievance adjusted without intervention of the Association, provided this adjustment is not inconsistent with terms of this Agreement.

The grievant has been employed by the Board as a certified school nurse since 2004. On October 21, 2015, the nurse conducted an examination of a student for self-inflicted injuries. On October 26, the nurse was suspended, with pay, pending further investigation of the incident. Upon her return to work on November 23, the nurse received from the superintendent an "evaluative memorandum" of the same date, a copy of which was placed in the nurse's personnel file. The subject line and body of the memorandum provide:

> RE: Evaluative Memorandum Regarding Your Inappropriate Examination of a Student
>
> Dear Ms. Pisano:
>
> This Evaluative Memorandum memorializes my serious concern regarding the events that occurred in the Health Office on October 21, 2015. Specifically, at approximately 12:00 p.m. that day, a teary-eyed student arrived at the Health Office accompanied by a friend. The substitute nurse brought the student to a private room adjacent to the front desk where the student acknowledged a history of self-harm, specifically cutting her arms. The Student Assistance Counselor was then called to the Health Office and joined the student and substitute nurse. Upon examination by the substitute nurse, the student presented a "rash-like" mark on her inner forearm. The student was advised that it was necessary to examine the rest of her body for additional evidence of self-harm. The student denied harming any body part besides her arms.

> Reluctantly, the student allowed her shirt to be raised to allow the substitute nurse to inspect her torso and back. At this time, you joined the student, the substitute nurse and the Student Assistance Counselor in the private room. You then informed the student that it was necessary to examine her thighs. Then you instructed the student to lower her pants to her knees, allowing you to examine her thighs for evidence of self-harm. While a blanket was wrapped around her waist, the student's buttocks were exposed. No evidence of self-harm was found anywhere other than the student's arm. The student was then released to the Student Assistance Counselor for a risk assessment. At no time did you contact the student's parents or obtain their consent.
>
> As a threshold matter, your examination of the student was a clear violation of New Jersey law. N.J.S.A. 18A:40-4 et seq. governs the examinations of students performed by school personnel. N.J.S.A. 18A:40-4 only allows the school physician, or health care personnel "under the immediate direction" of the school physician, to conduct examination of pupils. Here, the school physician was not involved in the examination, nor were you acting under the school physician's immediate direction.
>
> In addition, the method of examination you used, lifting the student's shirt and ordering her to lower her pants to her knees, was a violation of N.J.S.A. 18A:40-5. That provision requires school personnel to provide written notice to a student's parent or guardian prior to an examination as well as the inclusion of a request that a parent or guardian be present for the examination. With this examination, you never provided any notice to the student's parents, let alone invited them to be present. Moreover, your method of examination is prohibited by law. N.J.S.A. 18A:40-5 only allows the examiner to "require pupils to loosen, open, or remove their clothing above the waist..." Nowhere

does the provision allow the examiner to require the student to lower her pants as you did.

Furthermore, your statements that your examination was consistent with scholarly nursing publications do not change my analysis. No scholarly publication can override the requirements of State law, which clearly prohibited the actions you took. The District maintains that the proper course of action for you to take was to contact the student's parents to either consent or be present at the examination, or, if you thought the student presented and immediate danger to herself or others, you should have implemented Board Policy 8441, Care of Injured and Ill Persons, to have the student excluded from school to undergo an immediate psychiatric evaluation. The option you chose, to order the student to raise or lower her clothes without contacting the parents or search for evidence of self-harm, is clearly prohibited by law.

Additionally, your behavior that day failed to live up to the high professional expectations placed on staff members in our District, as set forth in Board Policy 3281, Inappropriate Staff Conduct. This policy emphasizes the importance of professionalism and the District's responsibility to protect the health, safety and welfare of all students. The examination you conducted violated this expectancy. Instead of performing your role of protecting the health, safety and welfare of the student, your conduct humiliated, demeaned, and embarrassed a student who was in an extremely vulnerable position at the moment. The District cannot tolerate such action and expects it will never reoccur.

Based upon the foregoing, I have determined that your actions constitute violations of State statutes and Board Policy. Such conduct shall not be tolerated in the future and will be met with appropriate

> consequences. This Evaluative Memoranda, as well as your observations will form the basis for your 2015-2016 Annual Performance Report.
>
> Please contact me if you have any questions regarding the District's professional expectancies of you as one of the School Nurses or if you need additional assistance with respect to meeting these professional standards.

On or about December 21, the nurse submitted a rebuttal to the superintendent's memorandum, contesting its accuracy. On the same date, the Association filed a grievance alleging that the nurse was disciplined without just cause and that there were "procedural errors by not following the contract when she was given" the October memorandum.

During the nurse's suspension with pay, a substitute nurse noticed that the medication she was about to administer to a student had expired. A review of the school health office was conducted. On January 19, 2016, the nurse received an "evaluative memorandum" from Principal Olcott, a copy of which was placed in the nurse's personnel file. The memorandum noted the discovery of the following: a large quantity of expired medications, medical supplies, and food and drink items, some dating as far back as 2009; student prescription bottles scattered in multiple locations, some commingled with over-the-counter medications, many of which were not properly identified; several prescriptions bottles with expiration dates crossed out with new dates handwritten on the containers; the field trip

supply bag contained student medications not stored in accordance with their instructions; student files and physical examination documents not stored in their proper locations; student physical examination lists that were not updated; and the absence of action plans for students with allergies and asthma. The memorandum also stated that a corrective action plan would be imposed to address the nurse's "unacceptable conduct."

On February 1, 2016, the nurse submitted a rebuttal to the principal's memorandum. On the same date, the Association filed a grievance seeking the removal of the memorandum from the nurse's personnel file. Like the earlier grievance, this one alleges that the nurse was disciplined without just cause and that there were "procedural errors by not following" the CNA.

The Board denied both grievances at every step. On April 4, the Association demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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.
>
> [Id. at 154.]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Board may have.

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 set forth the following approach:

> 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.
>
> [Id. at 826.]

The Board asserts that both memoranda were evaluative and resulted from the nurse's failure to meet the professional expectations for certified school nurses. It argues that it has a managerial prerogative to address concerns that the nurse's actions violated State laws, regulations, and Board policies and to make subjective educational determinations about her professional and legal obligation to fulfill the medical and administrative expectancies of a school nurse. The Board cites Holland for the distinction between arbitrable actions borne from disciplinary intent versus non-negotiable evaluations of teaching performance (or "nursing performance"). In support of its argument, the Board cites Franklin Borough Bd. of Ed., P.E.R.C. No. 99-2, 24 NJPER 407 (¶29186 1998), a case in which a nurse's increment was withheld based on her performance evaluations.

The Association asserts that under the Holland analysis, the two memoranda constitute discipline, not evaluations. It argues that the following factors indicate that the letters were

primarily disciplinary reprimands: the letters were issued apart from the normal evaluative process; investigations preceded the letters; the letters were placed in the nurses's personnel file; one of the letters contains a threat of future punishment; both letters use a disciplinary tone; and the Board allegedly refused to engage in an informal process contemplated by the grievance procedure in order to resolve the matters or receive the grievant's input. The Association cites Freehold Tp. Bd. of Ed., P.E.R.C. No. 89-80, 15 NJPER 97 (¶20044 1989) in support of its contention that the Superintendent's November 2015 memorandum was disciplinary and therefore arbitrable because it was issued as a result of an investigation apart from the normal evaluation process.

The Board replies to the Association's asserted procedural violation, noting that an informal effort was made to discuss and resolve the issues. The Board points out that Superintendent Wasserbach's memorandum details some of the nurse's statements in defense of her examination of the student. The Board argues that the CNA places the onus on the employee to initiate and advance informal discussions relating to a grievance. In response to the Association's assertion that the memoranda are disciplinary, the Board acknowledges that it engaged in an investigation to determine facts regarding the nurse's alleged professional misconduct but asserts that the memoranda were evaluative because

they were intended to point out her conduct as a school nurse that was contrary to law and policy. In support of its argument, the Board cites Marlboro Tp. Bd. of Ed., P.E.R.C. No. 2016-84, 42 NJPER 570 (¶159 2016), a case in which a nurse's increment was withheld based on her nursing performance as demonstrated by her alleged deficiencies with regard to a specific student examination.

Initially, as both parties have cited reprimand cases and increment withholding cases, it is necessary to clarify distinctions between the analyses applied to each type of case. An increment withholding predicated on evaluations or memoranda, or some combination thereof, cannot be arbitrated if the subjects of those documents relate predominately to the evaluation of a teaching staff member's teaching performance. See N.J.S.A. 34:13A-27(d); Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), aff'g P.E.R.C. No. 97-40, 22 NJPER 390 (¶27211 1996); and Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144, 146 (¶22057 1991). But if those documents are challenged as constituting the imposition of discipline, then the subjects of the documents are not determinative. See N.J.S.A. 34:13A-29(a); Holland. Rather, the content, language/tone, and context of the documents are all relevant in considering whether they, on balance, read more like benign forms of constructive criticism

intended to improve teaching performance, or more like reprimands intended as a form of discipline. Holland. If the former (more evaluative), then the documents are not subject to arbitration; if the latter (more disciplinary), then the documents are subject to binding arbitration.

A memorandum that does not concern teaching performance could be non-punitive in tone and therefore not arbitrable, even though an increment withholding based on that same memorandum would be arbitrable because it does not predominately relate to an evaluation of teaching performance. For example, we have deemed issues of absenteeism and tardiness not to be evaluations of teaching performance, so increment withholdings based on those reasons are arbitrable. See, e.g., Edison, supra; Elizabeth, supra; Elizabeth Bd. of Ed., P.E.R.C. No. 2015-55, 41 NJPER 401 (¶125 2015); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-48, 41 NJPER 344 (¶109 2015); Woodbridge Tp. Bd. of Ed., P.E.R.C. No. 2009-53, 35 NJPER 78 (¶31 2009); Atlantic City Bd. of Ed., P.E.R.C. No. 98-43, 23 NJPER 567 (¶28283 1997). However, when analyzing whether comments or memoranda concerning absenteeism or tardiness are arbitrable disciplinary reprimands, the Commission has consistently held that informational comments regarding such non-teaching performance concerns are not arbitrable if they are neutral and non-punitive. See, e.g., Marlboro Bd. of Ed., P.E.R.C. No. 97-121, 23 NJPER 293 (¶28133 1997); Hillside Bd. of

Ed., P.E.R.C. No. 94-33, 19 NJPER 547 (¶24259 1993); N. Plainfield Bd. of Ed., P.E.R.C. No. 93-58, 19 NJPER 110 (¶24050 1993); Ridgefield Park Bd. of Ed., P.E.R.C. No. 92-66, 18 NJPER 54 (¶23022 1991); N. Plainfield Bd. of Ed., P.E.R.C. No. 89-94, 15 NJPER 252 (¶20102 1989); Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 88-129, 14 NJPER 413 (¶19165 1988); and Neptune Tp. Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988).

Conversely, a memorandum regarding teaching performance could be arbitrable as a reprimand even though an increment withholding based on it would not be arbitrable. In Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994), the Association filed a grievance challenging a memorandum described as a formal reprimand of a teacher concerning allegedly inappropriate verbal interactions with students in class and a second grievance contesting the withholding of the teacher's increment based on those same allegations. The Commission restrained arbitration of the increment withholding, finding that it centered on his interactions with students, parents, and staff and was predominately an evaluation of teaching performance. Id. at 231-232. In contrast, the Commission declined to restrain arbitration over the memorandum despite the performance-related subject matter of inappropriate verbal interactions with students in class, stating:

> Nogueira's memorandum formally reprimanded Kahn for his "inappropriate comments, lack of

> sensitivity, and poor judgment." It urged that Kahn make every effort to avoid future incidents of this nature and warned that such incidents could result in additional investigation and possible discipline. N.J.S.A. 34:13A-29 provides that binding arbitration must be the final step in the grievance procedure to review all forms of discipline except tenure charges and increment withholdings based predominately on an evaluation of teaching performance. The subject of the memorandum is only one factor among many that must be considered in determining whether the memorandum is disciplinary. And the fact that an increment was later withheld for substantially similar reasons does not insulate an earlier reprimand from review. See Englewood Bd. of Ed., P.E.R.C. No. 91-118, 17 NJPER 341 (¶22153 1991), aff'd App. Div. Dkt. No. A-6030-90T2 (4/3/92). This memorandum, although in part triggered by an alleged deficiency in teaching performance, is punitive and therefore reviewable by an arbitrator.
>
> [Red Bank Reg. Bd. of Ed., 20 NJPER at 231.]

In this case, we agree with the Board that the subjects of the memoranda in dispute concern the grievant's nursing performance because they allege deficiencies in the conduct of a student examination and in various nurse's office recordkeeping and medicine maintenance requirements. See, e.g., Marlboro Tp. Bd. of Ed., P.E.R.C. No. 2016-84, 42 NJPER 570 (¶159 2016); Orange Tp. Bd. of Ed., P.E.R.C. No. 2006-14, 31 NJPER 291 (¶114 2005); Wildwood Bd. of Ed., P.E.R.C. No. 2000-67, 26 NJPER 116 (¶31049 2000); and Franklin Bor. Bd. of Ed., P.E.R.C. No. 99-2, 24 NJPER 407 (¶29186 1998). Thus, if this were an increment

withholding case it would appear based on this record that the memoranda predominately relate to an evaluation of teaching (nursing) performance and arbitration challenging the withholding would be restrained, leaving the nurse with the option to file an appeal with the Commissioner of Education. Id.; N.J.S.A. 34:13A-27(d); N.J.S.A. 18A:29-14. However, as this case involves two memoranda alleged to be reprimands that the nurse seeks to have removed from her personnel file, the requisite Holland analysis must be applied.

In Union Beach Bd. of Ed. and Union Beach Ed. Ass'n, P.E.R.C. No. 87-44, 12 NJPER 828 (¶17317 1986), a school social worker was issued a memorandum stating that she had refused to accept a referral in a child abuse case and had subsequently acted uncooperatively, unprofessionally, and argumentatively in a meeting with the superintendent. The memorandum stated that the incident caused great concern and warned that such behavior could result in a recommendation to withhold her increments. Id. Finding that the memorandum was a reprimand for insubordination as opposed to an evaluation of teaching performance, the Commission held the dispute was arbitrable. Id. at 829. The Appellate Division affirmed. Union Beach Bd. of Ed., NJPER Supp.2d 183 (¶160 App. Div. 1987).

Likewise, in Bloomfield Bd. of Ed., P.E.R.C. No. 92-68, 18 NJPER 56, 58-59 (¶23024 1991), we considered a dispute that we

said "center[ed] on alleged misconduct in violation of district policy." There, a teacher had failed to report suspected child abuse to the principal, a violation of law. The principal used an observation form to communicate to the teacher her "poor discretion" in the matter and demanded her "total compliance with" all district practices, procedures, and policies. We concluded that the criticism of the teacher's "alleged misconduct was not predominantly an evaluation of her teaching performance" and declined to restrain arbitration. In doing so, we stated that the arbitrator had the limited authority to decide whether the report was justified but could not reconsider the Board's policies, negate the principal's right to investigate alleged infractions, or prevent the principal from communicating his findings and concerns to an employee.

We find that, on balance, the superintendent's memorandum concerning the student examination was a disciplinary reprimand more than a benign form of constructive criticism intended to improve nursing performance. More than a mere warning to enable the employee to correct deficient performance, the memorandum accuses the grievant of engaging in inappropriate conduct, strongly admonishes her, and threatens that "[s]uch conduct shall not be tolerated in the future and will be met with appropriate consequences."

We view the principal's memorandum differently though it, too, contains multiple alleged violations of policies and professional standards that the Board discovered and investigated and was placed in the grievant's personnel file. However, in contrast to the superintendent's memorandum, the principal's does not overtly threaten future discipline or consequences. The memorandum also culminates in the imposition of a corrective action plan, compliance with which will also form a basis for her annual performance report. Corrective action plans or performance improvement plans are generally evaluative in nature because, like a non-punitive warning, they are intended to enhance teaching performance by giving employees guidance and notice of professional expectations with the opportunity to improve and avoid future negative evaluations, discipline, or increment withholdings. See Plainsboro Tp., P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008) (arbitration restrained where grievance challenged issuance of performance improvement plan). Furthermore, the memorandum is not cast in punitive language but can be fairly classified as a subjective evaluation of the grievant's performance, particularly regarding her ability to accept instruction, respond to criticism, and maintain a professional attitude and interactions with supervisors and coworkers. See, e.g., Holland, supra; Branchburg Tp. Bd. of Ed., P.E.R.C. No. 2014-5, 40 NJPER 153 (¶58 2013) (arbitration

restrained where grievance sought removal of comments regarding teacher's disruptive behavior and attitude during meeting with supervisor regarding lesson plans expectations); and Manalapan-Englishtown Bd. of Ed., P.E.R.C. No. 97-15, 22 NJPER 326 (¶27166 1996) (arbitration restrained where grievance sought removal of comments in a teacher's evaluation that criticized her attitude as preventing collegial dialogue). Accordingly, the principal's memorandum is predominately evaluative and is not a reprimand that may be challenged through binding arbitration.

Finally, we address the Association's alleged violations of the contractual grievance procedures. N.J.S.A. 34:13A-5.3 requires negotiations over grievance procedures. See also West Windsor Tp. v. Public Employment Relations Comm'n, 78 N.J. 98, 106 (1978) (procedural details of the grievance mechanism are mandatorily negotiable). We have declined to restrain arbitration over claims that an employer violated the parties' negotiated grievance procedures. See Lakehurst Bd. of Ed., P.E.R.C. No. 2002-66, 28 NJPER 238 (¶33088 2002)(refusal to hear from union at initial steps of grievance procedure); Essex County College, P.E.R.C. No. 98-115, 24 NJPER 175 (¶29087 1998)(alleged untimely response to grievance). Accordingly, we decline to restrain binding arbitration over the claim that the Board violated the negotiated grievance procedures. However, in the event that a violation is found, the arbitrator may not impose

any remedy that would prevent the principal or superintendent from communicating their findings and concerns to the school nurse. Bloomfield, supra.

ORDER

The request of the Delaware Valley Regional Board of Education for a restraint of binding arbitration is granted as to the January 19, 2016 memorandum from the principal but is denied with regard to the November 23, 2015 memorandum from the superintendent and the alleged violation of the negotiated grievance procedures.

BY ORDER OF THE COMMISSION

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

ISSUED: January 26, 2017

Trenton, New Jersey