

P.E.R.C. NO. 2017-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGENFIELD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2017-015

BERGENFIELD EDUCATION 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 challenging a memorandum placed in a teacher's personnel file. The Commission finds that the memorandum was predominately evaluative because it contained constructive criticism concerning the teacher's verbal interactions with students.

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

For the Respondent, Springstead & Maurice, Esqs., attorneys (Harold N. Springstead, Esq., on the brief, Alfred F. Maurice, of counsel)

DECISION

On September 29, 2016, the Bergenfield Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Bergenfield Education Association (Association). The grievance alleges that a letter issued to a teacher was a reprimand and that it was placed in her personnel file without just cause. The grievance seeks that the letter be removed from the teacher's file.

The Board filed briefs, exhibits, and the certifications of Principal Shane Biggins and Superintendent Christopher Tully.

The Association filed a brief and exhibits.^{1/} These facts appear.

The Association represents all of the Board's certified teaching personnel, as well as custodians, secretaries, bus drivers, and paraprofessionals. The Board and Association are parties to a collective negotiations agreement (CNA) effective from July 1, 2015 through June 30, 2018. With certain exceptions, the grievance procedure ends in binding arbitration.

The grievant is a tenured language arts teacher assigned to the District's Middle School. She has been employed by the Board since September 1, 2008. On November 11, 2015, an eighth grade student in the grievant's class glanced at a notation on his progress report in the grading task of "class work and productivity on research." (Biggins Cert., ¶8; Board Exhibit C). The comment read "wasting time all period." (Id.; and Board Exhibit D). The student asked the grievant about the notation.

According to the Principal's certification, which is undisputed and consistent with the exhibits provided by the Board, the teacher then had a verbal altercation with the student in class. The teacher became visibly irate. (Id.; and Board Exhibits E-I). She stated, "don't put words in my mouth," slammed the classroom door shut, and called the student a "piece

^{1/} N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

of shit.” (Biggins Cert., ¶9, Board Exhibits D-I). Several students witnessed the grievant’s behavior. (Id.)

After receiving reports of the altercation, Principal Biggins investigated the matter, which included obtaining witness statements. (Biggins Cert., ¶10; Board Exhibits D-I). On November 13, 2015, the Principal met with the grievant to discuss the incident and how to effectively resolve future conflicts in the classroom. (Biggins Cert., ¶11). Also on November 13, following the meeting, the Principal drafted and issued the following memorandum to the grievant:

Dear [Grievant],

As per our discussion this morning, I received a report that you slammed a classroom door and made a disrespectful, inappropriate comment toward a student following a verbal exchange you had with him. While I was not present during the incident, it is with due diligence to the situation that I reiterate the expectations of Roy W. Brown Middle School and provide you with this letter of advice and counsel. Please note that such conduct on a teacher’s part is not appropriate and will not be tolerated.

Middle school children often challenge authority and question boundaries. While this is an integral part of their development into young adulthood, students of this age often require redirection. Teachers play a vital role in setting the example for how to resolve conflict or clarify confusion. In this incident, a student misinterpreted information provided within your grade book and confronted you with questions about the comments. When the timing and/or delivery of student questioning is inappropriate, maintaining composure and professionalism is

paramount. In future situations like this, I recommend scheduling a time for the student to speak with you privately to discuss the concerns he/she may have.

Of course, it is expected that there will be no repercussions toward this student or any student following our meeting and this letter. Should you need assistance with a particular student or a class regarding any teaching responsibilities, please know there are individuals available to help. Tara Schneider, Dominick Rotante and I are here to support you and your students in achieving our district and building goals.

The memorandum was copied to Ms. Tara Schneider, Dr. Frank Auriemma, and to "File."

On November 17, 2015, the Association President met with Principal Biggins and Assistant Principal Rotante for an informal Step 1 grievance discussion. The Association sought removal from the grievant's personnel file and destruction of the November 13 memorandum. (Biggins Cert., ¶13). Principal Biggins denied the Association's request.

On November 23, 2015, the Association filed a written grievance contesting the November 13 memorandum as unwarranted, inaccurate, and unsubstantiated. By memorandum of January 27, 2016, Superintendent Tully denied the grievance. On February 5, 2016, the Association requested a Step 3 grievance meeting with the Board. Following a May 4 meeting involving the Association President, the Association Grievance Chair, the Board President, and a Board Trustee, the Board denied the grievance.

On July 6, 2016, the Association filed a request for submission of a panel of arbitrators. 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 the November 13 memorandum is a non-arbitrable evaluation of teaching performance, not a disciplinary reprimand. It argues that the memorandum reflects Principal Biggins' educational judgment about how students should be treated in class by their teachers, while also offering the grievant assistance with future student behavioral issues. The Board contends that Principal Biggins has a responsibility to

evaluate the grievant's unprofessional behavior toward her students, set forth the Board's future expectations for her interactions with students, and offer suggestions and assistance. It asserts that because the memorandum simply memorializes the grievant's inappropriate behavior, but focuses on appropriate instructional strategies for the future rather than punishment for the incident, it does not bear the indicia of a reprimand.

The Association asserts that the November 13 memorandum is an arbitrable letter of reprimand because it states that the grievant's conduct "is not appropriate and will not be tolerated." It also argues that because Superintendent Tully's January 27, 2016 letter denying the grievance refers to the memorandum as a "letter of reprimand" several times, the Board should be bound by his characterization. The Association contends that the memorandum is not just a benign form of constructive criticism intended to enhance teaching performance. Rather, it asserts the memorandum is punitive in nature because it states that her conduct was inappropriate, disrespectful, and will not be tolerated, and it was placed in her personnel file.

The Board replies that Principal Biggins' memorandum never refers to itself as a reprimand. It notes that Superintendent Tully's later references to a letter of reprimand were in response to the Association's November 23, 2015 written grievance that referred to the memorandum as a letter of reprimand. The

Board also argues that the notation "File" on the memorandum is simply consistent with the procedure of maintaining all staff evaluation documents in their files, and that the memorandum does not contain any warnings of future disciplinary action.

First, we find the fact that Superintendent Tully, who did not author the November 13 memorandum, referred to it as a "letter of reprimand" in his January 27, 2016 grievance denial is inapposite. Not only did the memorandum's author (Principal Biggins) not refer to it as a reprimand, but labels such as "reprimand," "evaluation," "disciplinary notice," or "performance notice" are not determinative in the Commission's analysis of whether a memorandum is a reprimand or not. Holland Tp. Bd. of Ed., supra, at 826.

We find that, on balance, Principal Biggins' November 13 memorandum concerning the grievant's use of profane language and door slam during an altercation with a student was more of a benign form of constructive criticism intended to improve the grievant's teaching performance than it was a disciplinary reprimand. Although the first sentence briefly recounts the incident,^{2/} the balance of the document concerns Principal Biggins' desire to "reiterate the expectations" of the school and

^{2/} "As per our discussion this morning, I received a report that you slammed a classroom door and made a disrespectful, inappropriate comment toward a student following a verbal exchange you had with him."

provide "advice and counsel" on how to appropriately interact with middle school children who may challenge the grievant's authority in future situations. Rather than impose discipline or threaten or warn of future discipline as a result of the incident, the memorandum contains constructive criticism and appears to provide guidance by treating the incident as a learning opportunity.^{3/}

Our holding here is consistent with Commission precedent cited by the Board. In Somerdale Bd. of Ed., P.E.R.C. No. 98-40, 23 NJPER 562 (¶28280 1997), the Commission restrained binding arbitration of a memorandum critiquing a teacher for her lack of supervision while her class was outside, which allowed several students to damage a car by throwing clumps of dirt at it. The memorandum recounted the facts of the incident, offered some guidance and assistance regarding proper responsibility for students and supervision while outside, and concluded with: "This was an avoidable and unfortunate incident. I hope that it will not happen again." Id. The Commission held:

The memorandum addresses an incident occurring during a language arts class. It advises that the teacher should insure proper student supervision and offers assistance and suggestions for improving supervision. The

^{3/} "When the timing and/or delivery of student questioning is inappropriate, maintaining composure and professionalism is paramount. In future situations like this, I recommend scheduling a time for the student to speak with you privately to discuss the concerns he/she may have."

memorandum does not suggest that it was intended to be punitive or that any discipline will be forthcoming. . . . Applying Holland under these circumstances, we conclude that the memorandum is predominantly a benign form of constructive criticism intended to enhance teaching performance. Accordingly, we will restrain binding arbitration.

[Id. at 564.]

In Delran Bd. of Ed., P.E.R.C. No. 2001-43, 27 NJPER 101 (¶32039 2001), the Commission restrained binding arbitration of two memoranda critiquing a teacher's lesson plan on racial prejudice after parents complained to the Board about it. Despite describing the lesson as "totally inappropriate" and demanding that the teacher "cease and desist" from teaching it again, the Commission held that, on balance, the memoranda were not disciplinary reprimands because they focused on what instruction is appropriate for future classes, rather than punishing her for past behavior. Id.

By contrast, the cases cited by the Association are distinguishable from this case because they concerned memoranda containing more punitive language and in some cases threatening future discipline or concerned misconduct not considered teaching performance. See, e.g., Bloomfield Bd. of Ed., P.E.R.C. No. 92-68, 18 NJPER 56 (¶23024 1991) (declining to restrain arbitration where reprimand stemmed from teacher's misconduct in failing to properly report possible sexual abuse, demanded total compliance with all policies, and was "cast in terms of a rebuke rather than

constructive criticism."); Washington Tp. Bd. of Ed., P.E.R.C. No. 90-109, 16 NJPER 326 (¶21134 1990) (declining to restrain arbitration over portion of evaluation report that addressed teacher's letter to her colleagues described in report as demeaning, disturbing, inappropriate, finding that the incident was "more a matter of alleged misconduct than alleged poor teaching."). See also, Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) (declining to restrain arbitration where self-described "formal reprimand" concerning inappropriate verbal interactions with students in class criticized teacher for "inappropriate comments, lack of sensitivity, and poor judgment," and warned of additional investigation and possible discipline).

Accordingly, we hold that the November 13 memorandum is predominately evaluative and is not a reprimand that may be challenged through binding arbitration.

ORDER

The request of the Bergenfield Board of Education for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: January 26, 2017

Trenton, New Jersey