

P.E.R.C. NO. 2017-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PATERSON STATE-OPERATED SCHOOL DISTRICT,

Petitioner,

-and-

Docket No. SN-2016-083

PATERSON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the District's request for a restraint of binding arbitration of a grievance contesting alleged procedural violations in the implementation and submission of observation and evaluation reports, which led to a lack of summative evaluation and no incremental salary increase for some unit members for the 2015-2016 school year. Finding that the District has not identified how the grievance is preempted by the TEACHNJ Act or AchieveNJ regulations or shown how its decision not to issue summative evaluations is a matter of educational policy or managerial prerogative, the Commission holds that an arbitrator may decide whether the District made procedural errors that resulted in a failure to issue summative evaluations, and if so, an appropriate remedy.

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, Robert E. Murray, LLC, attorneys
(Robert E. Murray, on the brief)

For the Respondent, New Jersey Education Association
(Sasha Wolf, Field Representative)

DECISION

On June 28, 2016, the Paterson State-Operated School District filed a scope of negotiations petition seeking to restrain arbitration of a grievance filed by the Paterson Education Association on behalf of teachers who did not receive a annual summative rating for the 2014-2015 school year. The grievance alleges that the District violated the parties' collective negotiations agreement (CNA) and "committed procedural violations in the implementation and submission of observation and evaluation reports," as a result of which the affected teachers did not receive a summative evaluation and, in turn, an incremental salary step increase for the 2015-2016 school year.

The District filed briefs, exhibits, and the certification of Luis M. Rojas, Jr., Executive Director of Labor Relations. The Association filed a brief, exhibits, and the certification of John McEntee, Jr., Association President.

The Association represents the District's teaching staff members and support staff. The Board and Association are parties to a CNA effective from July 1, 2014 through June 30, 2017. The grievance procedure, Article 3 of the CNA, ends in binding arbitration except as set forth at "3:3-4.8" of that article.

Article 12:5-4 of the CNA, "Granting of Increments," provides in pertinent part:

12:5-4.1 The granting of scheduled increments/steps to professional personnel shall not be automatic, but shall be dependent upon certificated staff earning an annual summative rating of effective or highly effective.

12:5-4.4 The Superintendent shall grant a step for any teacher who earns an effective or highly effective rating on his/her annual summative rating. Teachers who receive an ineffective or partially ineffective annual summative rating will remain on their current salary step, subject to the appeal process provided in this Article or Article 3.

Article 14:2-5 of the CNA, "Compliance with Statute and Regulations," provides:

All evaluations, observations, observation conferences, corrective action plans, etc., shall be conducted in accordance with N.J.A.C. 6A:10, and as may be amended.

Rojas certifies that the 30 grievants in this matter were not denied step movement for the 2015-2016 school year due to any discipline. He certifies that under the CNA, only teachers with summative evaluation ratings of "effective" or "highly effective" at the end of the 2014-15 school year earned an incremental step for 2015-16. Rojas certifies that some of the grievants had extended absences precluding them from being observed the number of times required in order to receive a summative evaluation.

McEntee certifies that none of the grievants received a summative evaluation at the end of the 2014-15 school year or had their increment withheld for disciplinary or other reasons. He further certifies that none of the grievants received notice that their increments were being withheld or why they did not advance on the salary guide. He certifies that the determination of the summative rating and summative evaluation is the exclusive province of the District pursuant to TEACHNJ. McEntee asserts that the grievance does not seek summative ratings or changes to ratings or the issuance of summative evaluations, but rather only that the arbitrator grant increments if the Association prevails.

Consistent with McEntee's certification, the grievance, which was filed on September 21, 2015, seeks the payment of the 2015-2016 step increase to the affected teachers or "other resolution deemed appropriate." On September 25, the District denied the grievance, stating the administration properly

conducted observations and evaluations and completed required reports. While the District stated that it disagreed with the Association that employees did not receive increments on account of procedural errors, the District offered to "fully investigate individual circumstances presented by the Association."^{1/}

The Association demanded arbitration on or about June 14, 2016. This petition ensued.

The Commission's inquiry on a scope of negotiations petition is limited:

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.

[Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978), quoting In re Hillside Bd. of Ed., PERC No. 76-11, 1 NJPER 55, 57 (1975).]

Under N.J.S.A. 34:13A-26, disputes involving the withholding of an employee's increment for predominately disciplinary reasons may be submitted to binding arbitration. Conversely, if the

^{1/} Rojas certifies that the Association did not advise him of any specific alleged procedural violations regarding any of the grievants.

reason for a withholding is related predominately to the evaluation of teaching performance, the teaching staff member may file an appeal with the Commissioner of Education. N.J.S.A. 34:13A-27(d).

Given that both parties' representatives have certified that none of the affected teachers' increments were withheld for disciplinary reasons, we find that this dispute does not arise under N.J.S.A. 34:13A-26. Further, given that the Association does not allege that the District withheld increments based upon the grievants' attendance records, we have no basis to conclude that the District's action was taken to penalize a staff member due to his excessive absenteeism, a reason we have deemed to be disciplinary. See, Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991).^{2/} The crux of the Association's claim is not that increments were denied for disciplinary reasons, but rather that procedural errors in the evaluation process led to the District's failure to issue summative evaluations and this, in turn, resulted in the failure of the affected staff members to advance on the guide.

^{2/} Nor do we have a basis to instead conclude that the District's action was taken primarily due to concerns over the impact of the absences on the member's performance, a reason we have found to be predominately evaluative. Rockaway Twp. Bd. of Ed., P.E.R.C. NO. 97-88, 23 NJPER 129 (¶28062 1997).

Before addressing the crux of the Association's claim, we first consider the District's claim that the grievance is preempted by the Teacher Effectiveness and Accountability for the Children of New Jersey Act (TEACHNJ), 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., so-called "AchieveNJ." The District argues that since the evaluation process such as the number of evaluations, their format, the scoring of same, and so forth is prescribed by the Department of Education, any dispute over the procedures would be for the Commissioner of Education to decide. The District also asserts that teachers who have extended absences, regardless of the reason, and therefore do not meet the minimum evaluation requirements will not receive a summative evaluation. In support of this contention, the District relies upon and has provided us with a Department of Education publication entitled "Evaluating Teachers with Extended Leaves/Absences."^{3/}

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do

^{3/} The guidance material can be accessed at <http://www.state.nj.us/education/AchieveNJ/resources/033115Uupdate.pdf>. Although this links to a Department memorandum dated March 31, 2015, the guidance on "evaluating teachers with extended leaves," when that hyperlink is clicked on, is a document last updated "8-16." The District has provided us the extended absence guidance updated as of March 2015, which is the material relevant to the subject grievance.

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 preempted 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. 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 and internal quotes 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.

N.J.A.C. 6A:10-1.3 provides that "[n]o collective bargaining agreement entered into after July 1, 2013, shall conflict with the educator evaluation system established pursuant to these rules or any other specific statute or regulation, nor shall topics subject to bargaining involve matters of educational policy or managerial prerogatives." Pursuant to N.J.A.C. 6A:10-2.1, New Jersey teachers may earn one of four ratings: highly effective, effective, partially effective, or ineffective. N.J.A.C. 6A:10-4.1(c) provides that "[t]o earn a summative rating, a teacher shall have a student achievement score, including median student growth percentile and/or student growth objective(s) scores, and a teacher practice score pursuant to N.J.A.C. 6A:10-4.4." The teacher practice score is derived from the required minimum observations, which for the 2014-2015 school

year were three observations or, for teachers under a corrective action plan, four.^{4/}

At the time the grievance was filed, the Department's guidelines with regard to teachers with extended leaves or absences provided in relevant part:

- [T]eachers who are not present for a portion of student days may receive a summative evaluation as long as they have both a practice score and a student achievement score.
- Teachers without both component scores should not receive a summative rating for that school year.
- A teacher should not receive a final teacher practice score (and thus cannot receive a summative evaluation rating) unless the minimum observation requirements have been met.
- [T]eachers present less than 40% of the total school days in an academic year must receive at least 2 observations.^{5/}
- All teachers must set at least one SGO [student growth objective] and must calculate and record at least one SGO score by the end of the school year.
- For teachers on extended leave, observations and SGOs may have to occur in a narrower timeframe. For SGOs, it is best if teachers are present for a continuous 9-week period. In cases where this is not possible the teacher should set SGOs for as

^{4/} The regulation was amended in 2017. Among other changes, the amendment reduced the minimum number of observations for tenured teachers to two and added that if a non-tenured teacher is present for less than 40 percent of the total student school days in a school year, he or she shall receive at least two observations to earn a teacher practice score.

^{5/} Districts must provide at least 180 school days of instruction each academic year. N.J.S.A. 18A:7F-9.

much time as is available, provided the teacher has an opportunity to have a significant impact on students' learning during that abbreviated period of time.

- Teachers who do not set SGO(s) before the deadline due to an extended absence should set the SGO(s) as soon as possible after returning to the classroom.

Other guidance material from the Department indicates that if a teacher who was required to have a median student growth percentile score did not receive one due to an extended absence (of more than forty percent of the school year) and that teacher set only one SGO, the educator cannot receive a summative evaluation for the school year.^{6/}

It is apparent from the Department's regulations and interpretative guidance that extended absences may result in a teacher not receiving a summative rating and, in turn, an increment under the District's merit system of guide advancement. It is less clear, however, that the regulations and guidance material establish the number of absences during the school year that preclude the issuance of a summative evaluation. Rather, the Department's guidance appears to leave that decision to the

^{6/} See "Procedures for Addressing 2013-14 mSGP Data Issues" and "Procedures for Addressing 2015-16 mSGP Data Issues," both available on the Department's website. This guidance material also addresses how a district may correct errors with student achievement scores to ensure that no educator's evaluation rating is impacted by incorrect information. This guidance indicates that a district may correct a rating from a prior year under certain circumstances.

discretion of the school district within the limits of N.J.A.C. 6A:10-4.1(c), the regulation requiring a teacher to have both a student achievement score and a student practice score in order to earn a summative rating.

Since the District has not identified any provision of the parties' CNA that it contends conflicts "with the educator evaluation system established pursuant" to the AchieveNJ regulations or "any other specific statute or regulation," and since it has not asserted that its decision not to issue summative evaluations to the grievants constituted "matters of educational policy or managerial prerogatives," we do not find on the record before us that the grievance is preempted by TEACHNJ, N.J.A.C. 6A:10-1.3, or other regulations embodying AchieveNJ, or that the District acted pursuant to a managerial prerogative in determining not to issue a summative evaluation to any grievant.

Nor do we agree with the District that any dispute over the evaluation procedure must be resolved by the Commissioner of Education, where as here, we have no basis to find that the grievants did not earn increments based upon an evaluation of performance or due to an educational policy determination on the District's part.^{7/} Citing the Court's decision in Bethlehem Twp.

^{7/} However, given the complexity of the TEACHNJ evaluation process and the dearth of Commissioner decisions on the topic, we encourage the parties to invoke the Commissioner's jurisdiction to resolve similar disputes, if any, in the
(continued...)

Bd. of Educ., supra, we have held that contractual evaluation procedures that are consistent with statutes and regulations and that do not impair a board's ability to evaluate staff performance are mandatorily negotiable. Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed. and Matawan-Aberdeen Reg. Teach. Ass'n, P.E.R.C. No. 90-98, 16 NJPER 300 (¶21123 1990) recon. den. P.E.R.C. No. 91-4, 16 NJPER 434 (¶21185 1990), aff'd NJPER Supp.2d 257 (¶213 App. Div. 1991); Ocean Tp. Bd. of Ed. and Ocean Tp. Ed. Ass'n, P.E.R.C. No. 85-123, 11 NJPER 378 (¶16137 1985), aff'd NJPER Supp.2d 164 (¶144 App. Div. 1986), certif. den. 105 N.J. 547 (1986). See also Lacey Twp. Bd. of Educ. v. Lacey Twp. Educ. Ass'n, 259 N.J. Super. 312 (1992), aff'd, 130 N.J. 312 (1992) (arbitration permitted on procedural issue; remedy did not substantially interfere with managerial prerogative or violate any statutory policy inasmuch as board was not prohibited from conducting subsequent evaluation).

Therefore, and turning to the crux of the Association's claim, we conclude that an arbitrator may decide whether the District made procedural errors that resulted in its failure to

7/ (...continued)
future relating to the evaluation process under AchieveNJ. Whether a teacher's extended absences prevented the District from issuing a summative evaluation is a determination better resolved in the first instance by the agency with particular expertise in matters of educational policy.

issue summative evaluations and if so, an appropriate remedy.^{8/} If the arbitrator finds a contractual violation and issues a remedy that the District believes would significantly interfere with its educational policy determinations or misinterprets or misapplies education laws or regulations, the District may seek relief at that time. See Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 217 (1979); Woodbury Bd. of Ed., P.E.R.C. No. 2000-108, 26 NJPER 313 (¶31127 2000).

ORDER

The request of the Paterson State-Operated School District for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: April 27, 2017

Trenton, New Jersey

^{8/} We note that notwithstanding the Association's representation that the grievance does not seek the issuance of summative ratings, the arbitrator may determine that a grievant should have received a summative rating that would preclude guide advancement under the CNA or the Department of Education's regulations. Nor does our decision preclude the arbitrator from determining whether the CNA required the District to notify teachers who were not entitled to receive a summative evaluation that an evaluation would not be forthcoming and if so, whether the District provided the requisite notice.