

P.E.R.C. NO. 2018-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DUMONT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2017-051

DUMONT EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Board's request for a restraint of binding arbitration of a grievance contesting comments included in four teachers' observation reports. The Commission restrained arbitration with respect to the principal's initial comments expressing disappointment over the teachers' decision to leave a homework assistance club when the work day ended rather than remain 15 minutes more to its completion after having volunteered to do so. Conversely, the Commission declined to restrain arbitration with respect to the principal's statement that the teachers' decision "is unprofessional," finding that the district's evaluation instrument did not make professionalism an evaluative criterion and that the comment was 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.

P.E.R.C. NO. 2018-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DUMONT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2017-051

DUMONT EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Plosia Cohen LLC, attorneys (James J. Plosia, of counsel)

For the Respondent, Oxfeld Cohen, attorneys (Samuel Wenocur, of counsel)

DECISION

On June 19, 2017, the Dumont Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Dumont Education Association (Association). The grievance alleges that a principal's comments included in four teachers' observation reports were unrelated to the lesson being observed and seeks their removal.

The Board has filed a brief, exhibits, and the certifications of Dr. Karen Bennett, Principal of Lovell J. Honiss School (Honiss) and Dr. Maria Poidomani, Dumont School District (District) Director of Curriculum, Instruction and Supervision. The Association has filed a brief, exhibits and the

certifications of MA, CM, TK, and JC, the four teachers whose observation reports are the subject of this petition, and Donna Drake, a teacher and Association Representative at Honiss. The Board filed a reply brief with additional exhibits and supplemental certifications of Dr. Bennett and Dr. Poidomani.

The Association represents teachers and other employees of the Board. The Board and the Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2015 through June 30, 2018. The grievance procedure ends in binding arbitration "with respect to grievances involving the alleged violation, interpretation or inequitable application of the expressed provisions of the contract" and is "advisory with respect to all other matters."

Honiss serves students in grades kindergarten through eight. Elementary grades are kindergarten through five, and middle school grades are six through eight. TK teaches elementary students, and MA, CM, and JC teach middle school students. The school day ends at 3 p.m. Teachers are required to work until 3:30 p.m. Between 3 p.m. and 3:30 p.m., teachers prepare lessons, grade assignments, and meet with students or the administration.

For several years prior to the 2016-2017 school year, Honiss provided an after-school program for students needing help completing homework. Ten Honiss teachers volunteered for the

program during the 2015-2016 school year. Among these were TK, MA, CM, and JC. That year, the program ran from 3 p.m. to 3:45 p.m. and met Tuesdays, Wednesdays, and Thursdays, beginning November 11, 2015. Each teacher supervised participating students once a week. Teachers were not paid for the time they served beyond their work day (that is, from 3:30 p.m. to 3:45 p.m.).

Also during the 2015-2016 school year, the parties were involved in negotiations for a successor CNA. Negotiations became contentious, and in late January 2016, the Association directed its tenured teachers to strictly follow the terms of the expired CNA and to cease all contact with students outside of contractual hours.

Drake certifies that on January 28, 2016, she met with Dr. Bennett and informed her that starting the next week, tenured teachers would stop student contact at 3:30 p.m. Drake further certifies that on January 29, she sent Bennett a handwritten note confirming the topics of their meeting the prior day and asking how Bennett wanted to handle notifying parents. Conversely, Dr. Bennett certifies that Drake did not inform her that Honiss teachers would be leaving school at 3:30 p.m. and that she never received a note from Drake regarding the Association's plan.^{1/}

^{1/} The Association did not provide us a copy of a note from Drake to Bennett.

TK certifies that on February 2 or 9, 2016, she was supervising the homework program but left at 3:30 p.m., when Drake came into the room and told her that Drake would cover the rest of the program. TK further certifies that she did not talk to Bennett ahead of time about her leaving at 3:30 p.m. because Drake had told TK that she would speak to administration about the planned stoppage.

On February 3 or 4, 2016, JC and MA were supervising the homework program. At 3:30 p.m., they brought their sixth and seventh grade students to the main office and told a secretary that they were dropping off the students and leaving for the day. JC and MA then left school premises. Neither had informed Bennett before leaving their students in the main office that they would no longer remain in the program after 3:30 p.m. They claim that they thought Drake had told Bennett of the plan "to strictly comply with the terms of the CNA."

On February 5, 2016, Bennett received an email from CM in which the latter informed Bennett that CM would stay with students in the homework program only until 3:30 p.m. Thereafter, CM dropped off her students at the main office at 3:30 p.m. on days she supervised the homework program.

Dr. Bennett observed JC on February 8 and TK on February 17. Vice Principal Carla Perez observed CM on March 8 and MA on March

23. All four teachers received the following "below the line" comment attributable to Dr. Bennett:

I am disappointed that . . . you indicated that you would no longer be volunteering for the [homework club] from 3:30 onwards, despite previously agreeing to work with students from 3:00 - 3:45 pm. As you are aware, we communicated to parents that we would provide this homework service until 3:45 pm. Your decision to withhold your services after school jeopardizes the progress of our students and is unprofessional.^{2/}

Dr. Poidomani certifies that the "Teacher Effectiveness and Accountability for the Children of New Jersey Act," (TEACHNJ), N.J.S.A. 18A:6-117 et seq., and its implementing regulations require every public school to adopt an evidence-based evaluation system and instrument. She also certifies that she reviewed numerous evaluation instruments approved by the New Jersey Department of Education (DOE) and that all of them, including the DOE-approved instrument ultimately adopted by the District, include consideration of a teacher's non-classroom activities as a component of evaluating overall teacher job performance. Poidomani cites as examples of these "non-classroom" activities professional development, supervision of students outside of the classroom, and demonstrated teacher leadership. Dr. Poidomani

^{2/} The observation report initially issued to CM did not contain Dr. Bennett's comment. The report was later amended to include Dr. Bennett's comment.

further certifies that teacher-provided evidence is often used to score the non-observable elements.

Dr. Poidomani also certifies that the District's evaluation instrument, the McRel, factors in "non-observed" elements, or what the District refers to as "below the line" comments. When an "eye" is included on the form, it means that the evaluation criteria is an "observable element" by a supervisor. When there is no "eye," it means that the criteria is not a directly observable element.^{3/}

The McRel instrument uses five standards to evaluate teachers. Each standard is broken down into several elements with descriptions of the employee attribute or conduct demonstrating the element. Some of the standards do elicit information about activities or conduct that would not necessarily be observable in the classroom. The one that does so the most is the first, "Teachers Demonstrate Leadership." While the first element is "Teachers lead in the classroom," the others are "Teachers demonstrate leadership in the school," "Teachers lead the teaching profession," "Teachers advocate for schools and

3/ Dr. Poidomani also certifies that there has been a consistent and unchallenged past practice for almost 30 years for supervisors to include in written teacher observation reports comments about a teacher's work performance outside the classroom, so called "below the line" comments. We made no determination of whether such a practice exists and if so, whether the challenged conduct here was consistent with that practice.

students," and "Teachers demonstrate high ethical standards."

Among the descriptive examples of non-observable elements are the following:

Teachers work collaboratively with school personnel to create a professional learning community. They analyze and use local, state, and national data to develop goals and strategies in the school improvement plan that enhance student learning and teacher working conditions. Teachers provide input in determining the school budget and in the selection of professional development that meets the needs of students and their own professional growth. They participate in the hiring process and collaborate with their colleagues to mentor and support teachers to improve the effectiveness of their departments or grade levels.

Teachers strive to improve the teaching profession. They contribute to the establishment of positive working conditions in their school. They actively participate in and advocate for decision-making structures in education and government that take advantage of the expertise of teachers. Teachers promote professional growth for all educators and collaborate with their colleagues to improve the profession.

Teachers demonstrate ethical principles including honesty, integrity, fair treatment, and respect for others.

Dr. Poidomani certifies that there has been a consistent and unchallenged past practice for almost 30 years of supervisors including in teacher observation reports comments about a teacher's work performance outside the classroom. Dr. Poidomani further certifies that if supervisors were prevented from including information about "non-observed" teacher performance in evaluations, the District would be in violation of TEACHNJ.

Three of the observation reports at issue here included the following comments regarding non-observable elements:

[TK] continues to demonstrate leadership. She recently coordinated the elementary spelling bee for grades 3-5. She continues to serve as the advisor for elementary and middle school chess club.

[JC] is the advisor of the Student Council and has led the student government in several student projects: Breakfast with Santa, Food Drive, and Valentine Fundraiser Carnation sale (Make A Wish Foundation). She meets with students regularly and supervises their progress towards meeting their goals.

[CM] actively contributes to the school community. This year she volunteered to be trained as a Glucagon designee for medical emergencies for our diabetic students. Additionally, she will be one of our staff members chaperoning the 6th graders on the overnight trip to Camp Linwood. Her eagerness to be active in the school community is evident as she seeks other opportunities to engage in professional development, such as becoming a member of a school-based committee.

The teachers whose reports are at issue deny receiving observation reports containing "below the line" comments not related to in-class teaching performance prior to the 2015-2016 school year.^{4/} The District provided several observation reports of other District teachers for years prior to the 2015-2016 school year that included comments, some positive, some negative,

^{4/} JC acknowledged receiving an observation report prior to the 2015-2016 school year that included critical comments about conduct not occurring during the observation but denied that the comments were unrelated to teaching performance.

about conduct that did not occur in the classroom or during the observation.

The District's observation and evaluation policy was revised in August 2015 and includes standards relating to a teacher's performance outside of the classroom. Under Professional Responsibilities, it includes "Carries out such responsibilities as may be assigned: e.g. morning duty, schedule reports, forms, lesson plans, hall duty, playground, cafeteria and homeroom supervision." Under the job description for teacher it includes "Participates in co-curricular activities."

The Association filed grievances about the inclusion of Dr. Bennett's comment in the evaluations of the four teachers, and the grievances proceeded to binding arbitration. At the outset of the hearing, the Board contended that the grievances were not arbitrable and requested bifurcation of the arbitration. Its application for bifurcation was granted over the Association's objection. On May 18, 2017, the arbitrator issued a decision finding that the grievances were arbitrable under the arbitration clause of the CNA. This petition ensued.

Our jurisdiction in a scope of negotiations proceeding is narrow:

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 Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.^{5/}

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in *Local 195, IFPTE v. State*, 88 N.J. 393, 404-405 (1982):

[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.

^{5/} Accordingly, we do not decide whether the District has a past practice of including comments in observation reports about a teacher's work performance outside the classroom.

We must balance the parties' interests in light of the particular facts and arguments presented. *City of Jersey City v. Jersey City POBA*, 154 N.J. 555, 574-575 (1998).

The Board argues that although Dr. Bennett's comments addressed a non-observable event, they constitute evaluation criteria pursuant to the McRel instrument that are not mandatorily negotiable. It further argues that Dr. Bennett's comments were evaluative in nature and not disciplinary and therefore are not mandatorily negotiable.

The Association responds that the Superintendent's comments were disciplinary and not evaluative in nature.^{6/ 7/}

^{6/} The Association also responds that because the arbitrator already determined that the grievances are arbitrable, the Board should not get a "second bite at the apple" by arguing to the Commission that the grievances are non-arbitrable. To the extent that the Association is arguing that the arbitrator's decision addressing "contractual arbitrability" divests the Commission of its jurisdiction to determine "legal arbitrability," the Association is mistaken. The arbitrator's determination of "contractual arbitrability" addressed whether the grievances were arbitrable under the arbitration clause of the CNA. The Commission's instant determination of "legal arbitrability" addresses whether or not Dr. Bennett's comments were mandatorily negotiable under the test set forth in Local 195.

^{7/} The Association also argues that "the Board's waiver argument cannot serve as a basis to restrain arbitration." The Board did not make a waiver argument in its brief. To the extent that the Association is arguing that no past practice existed with regard to the inclusion of "below the line" comments in an evaluation, we decline to consider such arguments in a scope of negotiations proceeding. Ridgefield Park, supra.

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). The substantive aspects of teacher evaluation involve sensitive educational policy decisions, which cannot be the subject of mandatory negotiations. Id. at 46. Accordingly, the subject of criteria for evaluating teaching staff is not negotiable. Id. at 47. 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.]

Lastly, regulations implementing TEACHNJ provide 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.” N.J.A.C. 6A:10-1.3.

We agree with the Board that the McRel instrument includes consideration of non-observable factors outside of a teacher’s performance in the classroom. In particular, the first standard weighs various factors pertaining to whether teachers demonstrate leadership, both in the school and in the teaching profession. To the extent a provision of the parties’ CNA precludes the inclusion of comments in an observation report that pertain to non-observable elements set forth in the McRel instrument, the provision would be preempted by the TEACHNJ regulations.

However, we are not persuaded that Dr. Bennett’s comments about the teachers’ participation in the homework activity is

tied to evaluative criteria set forth in the McRel instrument. In that regard, we contrast this case with the facts in Elizabeth Bd. of Ed., P.E.R.C. No. 2016-74, 42 NJPER 542 (¶149 2016) where we restrained, in part, binding arbitration of a grievance contesting a school principal's written comments about a teaching staff member's professionalism. The comments, though not contained in an observation report, were expressly tied to that district's evaluation instrument and its evaluative component of professionalism. With regard to that component, the instrument required consideration of the elements of integrity and ethical code, decision making, and compliance with all school and district regulations. The document in dispute conveyed the school principal's opinion that certain conduct of a teaching staff member showed "lack of discretion" as to those elements, and we restrained binding arbitration of the grievance to the extent it sought to have those comments excised from the document. Here, all the "below the line" comments appearing in the Honiss teachers' evaluations, except for Dr. Bennett's comments, were placed under the evaluative component of leadership. Dr. Bennett's comments about the teachers' failure to remain for the duration of the homework club, after having volunteered to provide the service, appear at the end of the report and mention none of the McRel evaluative components or the elements comprising same. Therefore, we disagree with the Board

that the comments are shielded from arbitration based on the McRel instrument alone.

The District's observation and evaluation policy also makes reference to a teacher's responsibilities outside of the classroom such as participation in co-curricular activities. Consistent with that policy, the observation reports at issue here include positive comments about teacher activities outside of the classroom, including activities for which the staff member volunteered. Therefore, the fact that Dr. Bennett's comments regarding the homework club are not tied to the McRel component of leadership does not necessarily make the comments non-evaluative in nature. Under the District's policy, a teacher's participation in and performance of professional activities outside of the classroom, such as the homework club, may be considered in evaluating the staff member. However, we have declined to restrain binding arbitration of a reprimand issued to a teacher that was included in a formal observation report. See, e.g., North Haledon Bd. of Educ., P.E.R.C. No. 2015-56, 41 NJPER 403 (¶126 2015).

Applying the approach set forth in Holland Tp. Bd. of Ed., supra, we do not consider Dr. Bennett's initial comments to be disciplinary in nature. Expressing disappointment with a teacher for not keeping her commitment to provide homework assistance until its announced end time does not amount to discipline in and

of itself. The initial comments do not threaten disciplinary action or accuse the teacher of misconduct.

Conversely, Dr. Bennett's statement that the teacher's "decision to withhold [her] services after school . . . is unprofessional" crosses the line between benign constructive criticism designed to enhance teacher performance and a disciplinary reprimand. Allowing an arbitrator to review that comment against any standard set forth in the CNA for the imposition of discipline would not interfere with the Board's managerial prerogative to evaluate teaching staff. Therefore, we decline to restrain binding arbitration as to that comment.

ORDER

The request of the Dumont Board of Education for a restraint of binding arbitration is denied as to the allegation of unprofessional conduct set forth in the observation reports of the Association members.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. Commissioner Jones did not vote.

ISSUED: January 25, 2018

Trenton, New Jersey