P.E.R.C. NO. 2019-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SECAUCUS BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2018-042

SECAUCUS 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 over a memorandum issued to a teacher. Finding that the majority of the memorandum is predominantly evaluative because it concerns the teacher's alleged failure to comply with a specialized health plan concerning a student's allergies and details the teacher's responsibilities regarding such student health and safety issues, the Commission restrains arbitration of those portions of the memorandum. Finding that a portion of the fifth paragraph of the memorandum is predominantly a disciplinary reprimand, the Commission declines to restrain arbitration of that portion.

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, of counsel and on the brief; Christopher J. Geddis, on the brief)

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

DECISION

On April 30, 2018, the Secaucus Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Secaucus Education Association (Association). The grievance asserts that the Board violated the collective negotiations agreement (CNA) when it disciplined the grievant with an October 17, 2017 evaluative memorandum.

The Board filed a brief, reply brief and Exhibits, and the certification of its Superintendent. The Association filed a brief.[1/] These facts appear.

The Board and the Association are parties to a collective negotiations agreement with a term of July 1, 2017 through June 30, 2020. Article XXVII, Just Cause Provision, states as follows:

ARTICLE XXVII JUST CAUSE PROVISION

> No EMPLOYEE may be discharged, disciplined or reduced in compensation except for just case. Any such action asserted by the BOARD or any agent or representative thereof, shall be subject to the grievance procedure herein set forth.

Article XVII, section B, "Personnel Files and Complaints," states as follows:

> B. Any complaints regarding a teacher or employee made to any member of the administration by any parent, student or other person, shall be promptly investigated. The teacher or employee involved shall be immediately informed of the complaint and the identity of the complainant, and shall have the right to be represented by the SEA at any meetings, or conferences, regarding such complaints.

The grievance procedure ends in binding arbitration.

The grievant is a second grade teacher at Clarendon Elementary School. On October 17, 2017, the grievant received an "Evaluative Memorandum" from the Interim Superintendent of

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1/ N.J.A.C. 19:13-3.6(f)1 requires that all briefs filed with the Commission in scope of negotiations matters "recite all pertinent facts supported by certification(s) based upon personal knowledge."

Schools which stated as follows:

> Dear [Grievant]:
>
> The purpose of this Evaluative Memorandum is to memorialize my serious concerns regarding your recent behavior and conduct as a teaching staff member of the Secaucus Board of Education ("the Board"). More specifically, your failure to implement a student's Individual Health Care Plan that provided for Allergy Emergency Treatment and to review a student's Section 504 Plan (hereinafter referred as "504 Plan") that clearly identified an allergy to nuts, and worse, your decision to bring nuts into the classroom and to consume them in the classroom, is a serious dereliction in your duties and responsibilities to provide for the care and supervision of your students. The health and safety of students entrusted to your care is your highest priority as a professional staff member. This conduct is contrary to the high professional expectancies of our staff members and will not, under any circumstances, be tolerated.
>
> On or about September 27, 2017, a student in your class with a nut allergy reported to his mother that "someone" in her classroom was eating nuts. Apparently, this young student was concerned about implicating you and did not disclose to her mother that it was, in fact, her teacher that was eating nuts. As a result, the student's mother contacted you to remind you that her daughter has a 504 Plan with an identified nut allergy. This should not have been necessary since you attended a faculty meeting at the beginning of the school year, at which all teachers were reminded that they need to access the 504 Plans for any students in their classes to determine any action plans or accommodations required by those plans. You were informed of the student's Individual Health Care Plan that provided orders for Allergy Emergency Treatment. I have verified that you did not access this student's 504 Plan at any time

prior to September 27, 2017. What I find completely inexplicable is that on the day following the mother's notification of you of her child's allergy, you again brought nuts into the classroom and acknowledge eating them during your preparation time. You defended your conduct on the basis that the nuts were no longer in plain view. My investigation reveals further, that the student herself told you that she is allergic to nuts. Finally, your awareness of the student's Individual Health Care Plan that provided orders for Allergy Emergency Treatment if the student had a reaction to nuts makes your actions particularly egregious.

Board Policy No. 3280, "Liability for Pupil Welfare," provides that teaching staff members are responsible for supervision of pupils and must discharge that responsibility with the highest levels of care and prudent conduct. Thus, failing to review and implement a child's Section 504 Plan, and ignoring notification by a parent and the student herself that she has a nut allergy contravenes your responsibilities as a teacher, and undoubtedly jeopardized the student's health and safety.

Board Policy No. 2418, "Section 504 of the Rehabilitation Act of 1973," outlines with specificity your responsibility to provide accommodations for students with disabilities, as well as imposing upon you the obligation to be fully familiar with a student's disability and its impact on the regular educational environment. Your failure to review this child's 504 Plan constitutes a reckless disregard of this student's rights and your responsibility to protect those rights. Once you became aware that this student had a food allergy that could have subjected the child to a serious reaction, including anaphylaxis, your continued consumption of nuts in the classroom went from a serious transgression to reckless indifference.

> In sum, your recent conduct and behavior has failed to live up to the high professional standards placed on staff members in this District, as set forth in Board Policies 3281, "Inappropriate Staff Conduct," 3211, "Code of Ethics," 3280, "Liability for Pupil Welfare," 2418, "Section 504 of the Rehabilitation Act of 1973," and New Jersey's Professional Standards for Teachers, N.J.A.C. 6A:9-3.3. Together, these Policies and Standards emphasize the expectations of educators and the responsibility to protect the health, safety, and welfare of students, all of which you have disregarded.
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> To address these deficiencies, I will be imposing a corrective action plan. In addition, please know that this Evaluation Memorandum will be placed in your personnel file and that pursuant to Board Policy No. 3152, "Withholding an Increment," this shall serve as a reasonable effort to inform you that your professional conduct and disregard of your professional responsibilities as a teacher, which resulted in this Evaluative Memorandum, will result in the withholding of an increment for the 2018-2019 school year.
>
> If you have any questions regarding the District's professional expectancies of your performance, please contact me.

The Superintendent certifies that although the memorandum notified the grievant that her 2018-2019 increment would be withheld, neither she nor the Board acted to withhold the increment. On November 2, 2017, a grievance was filed asserting that the October 17, 2017 memorandum was discipline without just cause and seeking to have it removed from the grievant's file.

On November 22, 2017, the Superintendent denied the grievance, responding in pertinent part as follows:

> Third, the evaluative memorandum placed in your personnel file is evaluative, not disciplinary. The memorandum explains the results of the administration's investigation into your violations of numerous Board Policies. In addition to Mr. Knopps' evaluative memorandum, Mr. Viggiani instituted a Corrective Action Plan to assist you in complying with those Board Policies in the future. Mr. Knopps sought to help you improve your performance as a teaching staff member and his recommendation that the Board withhold your salary increments for the 2018-2019 school year is also based on his evaluation of your teaching performance. Notably, the Board has not, to the present time, taken any action to withhold your salary increments for the 2018-2019 school year. Your grievance is, therefore, denied. The October 17, 2017 evaluative memorandum will remain in your personnel file.

On November 28, 2017, a Corrective Action Plan was put in place for the grievant listing the following as goals:

> I. Demonstrate an understanding and consistent adherence to the policies regarding Liability for Pupil Welfare (No. 3280) and Section 504 of the Rehabilitation Act; and
>
> II. Demonstrate your review and understanding of the Section 504 Plans for each student in your classroom.

On November, 30, 2017 another grievance was filed, with no substantive difference from the November 1 grievance.

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.
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> [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.

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.

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 since the memorandum was based on the grievant's failure to read a student's 504 plan and her violation of that plan, it relates to teaching performance and is not arbitrable. The Association responds that the memorandum is disciplinary and arbitrable because it was based on third party accusations, accused the grievant of violating Board policies and of unprofessional conduct and reckless indifference, was placed in her personnel file, and stated that her increment would be withheld.

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.
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> [Id. at 826.]

With the exception of the last portion of the October 17, 2017 memorandum, we find that the memorandum's focus is predominately evaluative of teaching performance and that it was drafted with the intention of raising the grievant's awareness of her student's 504 plan as well as the importance of 504 plans generally. Section 504 refers to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq. A 504 plan is developed to ensure that a child with a disability identified under the law receives accommodations in the educational setting

that will ensure the child's academic needs are meet. 34 C.F.R. §104.33. 504 plans are different from Individualized Educational Plans (IEPs), however we draw a parallel between 504 Plans and IEPs for the purpose of our analysis.[2/]

In Willingboro Bd. of Ed., P.E.R.C. No. 96-28, 21 NJPER 388 (¶26239 1995) we found that excluding students from classes required by their IEPs and not cooperating with child study teams in implementing IEPs relate to teaching performance; see also Moonachie Bd. of Ed., P.E.R.C. No. 2018-17, 44 NJPER 217 (deviating from an IEP relates to an evaluation of teaching performance). Similarly, the memorandum in this case addresses the grievant's alleged failure to comply with a specialized plan, put in place pursuant to the law, to provide accommodations in the school setting that would ensure a student's health and safety. Compliance with such a plan is an essential part of the grievant's teaching responsibilities, as detailed in the first through fourth paragraphs of the memorandum.

The beginning of the memorandum's fifth paragraph continues in the same vein as the rest of the memorandum in being predominately related to teaching performance. It states that a corrective action plan will be imposed to address the grievant's

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2/ Students who have IEPs require specialized instruction, and the procedural requirements for IEPs are controlled by the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq.

deficiencies. Corrective action plans are generally evaluative in nature and intended to enhance teacher performance. Plainsboro Tp., P.E.R.C. No 2009-26, 34 NJPER 380 (¶123 2008). This paragraph also notes that the memorandum will be placed in the grievant's personnel file. We find that the memorandum's first four paragraphs and fifth paragraph up to this point are predominately evaluative of teaching performance. However, we view the remainder of the fifth paragraph as being predominately disciplinary, specifically the statement that "pursuant to Board Policy 3152, 'Withholding an Increment,' this shall serve as a reasonable effort to inform you that your unprofessional conduct and disregard of your professional responsibilities as a teacher, which resulted in this Evaluative Memorandum, will result in the withholding of an increment for the 2018-2019 school year." This portion of the fifth paragraph imposes discipline. While the Superintendent certified that the grievant's increment was never actually withheld, the inclusion of the language in the memorandum stating that the withholding would be implemented is still disciplinary. Accordingly, we restrain arbitration except over the section of the fifth paragraph identified above.

ORDER

The request of the Secaucus Board of Education for a restraint of binding arbitration is granted except with regard to the following section of the fifth paragraph of the October 17, 2017 memorandum:

> [P]ursuant to Board Policy 3152, "Withholding an Increment," this shall serve as a reasonable effort to inform you that your unprofessional conduct and disregard of your professional responsibilities as a teacher, which resulted in this Evaluative Memorandum, will result in the withholding of an increment for the 2018-2019 school year.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau and Papero voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Bonanni was not present.

ISSUED: October 25, 2018

Trenton, New Jersey