P.E.R.C. NO. 2019-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PLEASANTVILLE BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2019-021

PLEASANTVILLE ADMINISTRATORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Pleasantville Board of Education for a restraint of binding arbitration of grievances filed by the Pleasantville Administrators Association. The grievances alleges that letters issued to two administrators and made a part of their personnel files were reprimands issued without just cause. The Commission concludes that the letters were predominately disciplinary, rather than evaluative, because they contain statements that were not neutral in tone, did not contain a corrective action plan, and they were issued outside the regular evaluation process.

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, The Carroll Law Firm, PLC, attorneys (Benjamin B. Brenner, on the brief)

For the Respondent, New Jersey Principals and Supervisors Association (Wayne J. Oppito, on the brief)

DECISION

On September 14, 2018, the Pleasantville Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of grievances filed by the Pleasantville Administrators Association (Association). The grievances allege that certain letters, issued to two administrators and placed in their respective personnel files,[1/] were reprimands issued without just cause, in violation of Article IV, Section C of the parties' collective negotiations agreement (CNA). The grievances seek removal of the letters from

1/ The Association's request for arbitration asserts that three letters were issued, however the documentary record contains just two.

the administrators' files.[2/] The parties have filed briefs and exhibits.[3/] These facts appear.

The Association represents administrative staff members employed by the Board, including principals, assistant principals, the athletics director, and supervisors. The Board and the Association are parties to a CNA that expired on June 30, 2017, and are presently in negotiations for a successor agreement.

Article IV C, entitled "Just Cause Provision," states, "[n]o administrator shall be disciplined, reduced in rank or compensation or deprived of any commonly applied professional advantage without just cause. Any such action shall be subject to the grievance procedure herein set forth." With certain exceptions not at issue here, the grievance procedure ends in binding arbitration.

2/ A third grievance, filed on April 18, 2018, is mentioned in the briefs but not referenced in the Association's request for arbitration or the Board's scope petition. The third grievance contends that the Board's refusal to remove certain other documents (which are not in the record) from Principal 1's file violates the CNA and the employee handbook. We do not have a complete record on the third grievance and therefore do not consider it as part of this dispute.

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

The grievants, "Principal 1" and "Principal 2," respectively, are each employed at the same school as principals. On January 24, 2018, a secretary at the school complained to the Superintendent that Principal 2 had verbally bullied her and blocked her from entering her office while Principal 1, using the secretary's office telephone, completed a heated discussion with the secretary's immediate supervisor. The secretary also accused Principal 1 of verbally bullying her and speaking loudly to her about the use of office space and locked areas of the building.

On March 28, 2018, the Superintendent issued a letter to Principal 1 stating:

> Dear [Principal 1]:
>
> I am following up on the allegation reported by [the secretary]. She alleges that you came into her office demonstrating tone and behavior which was inappropriate and intimidating. She alleges that you entered her office on two occasions speaking loudly to her and reprimanding her about the office space, stating that you were in charge of the building and that no doors should be locked unless you possessed a key to the lock.
>
> [The secretary] indicated that on one occasion she was speaking to her supervisor on the phone when you entered her office. She says that because she felt any conflict about the equipment or material in the office should be discussed between you and her supervisor, she placed her phone on speaker so that the two of you could talk. At that point, [the secretary] says she left the office to go heat her lunch in the microwave. Upon returning she asserts that [Principal 2] prevented her from returning to the office until [the secretary's supervisor] and you

had finished what appeared to be a loud, heated conversation. At this point, [the secretary] says she went into the nurse's office to call . . . the Human Resources department.

My conclusion is that even though some of the details reported by [the secretary] may not be exact, some inappropriate communication and behavior did occur.

As you know, two of the [school's] staff members. . . wrote letters attesting that you never spoke inappropriately or harshly to [the secretary]. However, the following incidents have been confirmed:

1. [The secretary] was on the phone talking to [the secretary's supervisor].
2. At some point [the secretary] left you in her office and called [the Human Resources Department].
3. [The secretary] went into the nurse's office and called [the Human Resources Department].
4. At some point [the secretary] could not get back into her office where she planned to eat her lunch.
5. You and [the secretary's supervisor] were arguing on the telephone located in [the secretary]'s office on her desk.

It is critically important that those of us who possess a position of power in an organization remain ever cognizant of the responsibility to utilize that power wisely and with sensitivity when interacting with lower level employees. Otherwise, we can easily be accused of bullying or intimidation. Please conduct yourself accordingly in the future.

A copy of this letter will be placed in your personnel file.

[emphasis added.]

The Superintendent's letter to Principal 2, also issued on March 28, 2018, stated:

> Dear [Principal 2]:
>
> I am following up on the allegation reported by [the secretary]. She alleges that you came into her office using a tone and behaving in a manner which was inappropriate and intimidating. She also said that you deliberately stepped in front of her while she was walking back to her office so that [Principal 1] could complete an apparently heated discussion with [the secretary's supervisor]. [The secretary's supervisor] was on the phone. [Principal 1] was on [the secretary's] phone in her office. In addition, [the secretary] stated that you told her she could not go back into her office until [Principal 1] and [the secretary's supervisor] had finished talking. [The secretary] says that at that point, she went into the nurse's office and called . . . the Human Resources department.
>
> In my investigation I received two letters from two staff members at . . . [the] School. Both of these staff members assert that neither [Principal 1] nor [Principal 2] spoke loudly to [the secretary] at any time. The following events seem to be confirmed by your own description and others:
>
> 1. You were in [the secretary]'s office at the same time [Principal 1] was there. It __ [sic] to question why both of you were in her office at the same time. She is not secretary to either of you. She was speaking to her supervisor on the phone.
> 2. You confirmed that at some point you asked [the secretary] to allow [Principal 1]to complete her conversation on the phone in [the secretary]'s office with [the secretary's supervisor] before she could go back to her office.

> 3. The conversation between [Principal 1] and [the secretary's supervisor] was very loud and heated.
> 4. [The secretary] could not return to her office to eat her lunch after she had stepped out to use the microwave.
> 5. [The secretary] stepped into the nurse's office to call [the Human Resources Department].
> 6. [Human Resources] spoke to [the secretary] on the phone and she reported the alleged incident to the superintendent.
> 7. The nurse . . . confirmed that [the secretary] came into her office to use her phone because she could not get into her own office.
> 8. There is one more narrative from a district employee in the building at the time of the alleged incident. He reports that because of the loud voices and commotion he wondered what was going on.
>
> Based on the discrepancy of the versions of events I have concluded that some of the details of [the secretary's] account make unverifiable [sic]. Nonetheless, I do believe that at some point your behavior toward [the secretary] was inappropriate if not "bullying." As a principal, the expectations of your behavior are higher than that of a lower level employee. In the future I encourage you to be more sensitive in your verbal and nonverbal communications to your subordinates or employees under the management of other supervisors.
>
> A copy of this letter is being placed in your personnel file.
>
> [emphasis added.]

Principal 1 and Principal 2 each filed step-one grievances on April 10 and 18, 2018, respectively, challenging the March 28th letters. The Board denied both grievances at every step.

On June 22, the Association demanded binding arbitration. On September 14, the Board filed its scope petition.

The Board contends that the Superintendent's March 28, 2018 letters are nonarbitrable evaluations of administrative performance, not disciplinary reprimands. The Association contends the disputed letters are disciplinary reprimands issued in violation of the CNA's just cause provision. The Board, in reply, reiterates that the Association "cannot show that the letters . . . violate the Agreement or Board policies," because they do not impose or threaten disciplinary action.

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.

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).

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.]

We have also recognized that while school principals are teaching staff members, they usually do not teach classes. Instead, they have "broader responsibilities for overseeing the educational system and ensuring that students are educated properly." Middletown Tp. Bd. of Ed., P.E.R.C. No. 92-54, 18 NJPER 32 (¶23010 1991). Thus, we have formulated a performance standard for principals that is not limited to classroom

teaching, focusing on "whether the withholding relates predominately to an evaluation of the quality of the principal's performance as an educational leader and manager." Id. We restrained arbitration in Middletown, based upon our conclusion that the reasons given for the withholding (inappropriate leadership and judgment in responding to a student-staff altercation, failure to train the staff and oversee the building's budget, and ineffective leadership and training of assistant principals) predominately reflected an evaluation of the principal's performance as an educational leader and manager. Id.

We have since applied the Middletown test to restrain arbitration of increment withholdings of principals, assistant principals and vice principals, i.e., administrative teaching staff members who do not teach classes. In these cases, we found that the reasons given for the withholding predominately involved evaluation of the administrator's performance as an educational leader and manager. See, e.g. Paterson School Dist., P.E.R.C. No. 95-39, 21 NJPER 36 (¶26023 1994)(failure to show initiative, delegate authority, visit classrooms regularly, provide adequate instructional supervision); West Essex Reg. Bd. of Ed., P.E.R.C. No. 98-42, 23 NJPER 565 (¶28282 1997)(failure to evaluate professional staff and improve curriculum).

Although this is not an increment withholding case, Middletown has relevance for purposes of determining, on balance, whether the letters at issue here involved an evaluation of "teaching performance" as we have applied that phrase in Middletown and its progeny to principals and other administrative teaching staff members who do not regularly teach classes. That is, if the Superintendent's letters relate predominately to evaluations of the quality of the grievants' performance as educational leaders and managers, then restraint of arbitration is appropriate.

When a document is "challenged as constituting the imposition of discipline[,] . . . 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." Delaware Valley Reg. Bd. of Ed., P.E.R.C. No. 2017-39, 43 NJPER 295 (¶83 2017). In that respect, "comments regarding . . . non-teaching performance concerns . . . are not arbitrable if they are neutral and non-punitive." Id., citing, inter alia, N. Plainfield Bd. of Ed., P.E.R.C. No. 89-94, 15 NJPER 252 (¶20102 1989) (restraining arbitration of comments about attendance that were predominantly informational and "neutral in tone, not pejorative"). Other generally evaluative indicators include whether a corrective

action plan is imposed, Delaware Valley, supra, and whether the disputed statements are issued as part of the regular evaluation process. Bergenfield Bd. of Ed., P.E.R.C. No. 99-112, 25 NJPER 336 (¶30145 1999). See also, Mansfield Tp. Bd. of Ed., 23 NJPER 209 (¶28101 App. Div. 1997), rev'g and remanding, P.E.R.C. No. 96-65, 22 NJPER 134 (¶27065 1996)(withholding was predominately disciplinary where regular evaluation of teaching performance was satisfactory, and single incident outside parameter of evaluation process triggered withholding).

Statements that contain accusations of improper conduct are not "neutral in tone," and have been deemed to be disciplinary and subject to arbitration. In Bergenfield, P.E.R.C. No. 99-112, supra, we declined to restrain arbitration of a memorandum issued to a teacher following her refusal to comply with the board's expectation and directive that she submit a monthly article for the school newsletter. The memorandum neither imposed discipline nor threatened future discipline. Finding it to be predominately a disciplinary reprimand, we explained, in pertinent part:

> The Board had a right to reaffirm that expectation and a memorandum limited to that reaffirmation is not inherently disciplinary. But the other aspects of this memorandum are disciplinary and they predominate. The memorandum was issued outside the regular evaluation process and is focused more on Gunther's alleged insubordination . . . [and] makes that implicit accusation of insubordination part of her personnel record. . . . An arbitrator may consider . . . the justness of the Board's response to Gunther's

> alleged insubordination. . . . [but] may not second-guess the Board's right to have teachers contribute brief articles to the school newsletter or to express the expectation that they will do so.

Similarly, we declined to restrain arbitration of a grievance challenging a superintendent's letter which "pass[ed] judgment" on a teacher's conduct, specifically by concluding that the teacher violated a policy requiring her to follow a specific chain of command. Pequannock Tp. Bd. of Ed., P.E.R.C. No. 2008-28, 33 NJPER 280 (¶105 2007)(finding such a letter did not "address or evaluate the staff member's teaching performance"). See also, Orange Tp. Bd. of Ed., P.E.R.C. No. 2006-14, 31 NJPER 291 (¶114 2005) (restraining arbitration of grievance contesting withholding of school nurse's salary increment, where withholding was triggered by behavior the principal believed to be outside the nurse's area of responsibility, and therefore did not predominately involve her performance as a teaching staff member).

Here, no alleged facts suggest the conduct of the principals concerns their performance as educational leaders and managers. The incident occurred during the secretary's lunch break, in the secretary's office while she was on the phone with her direct supervisor. The Superintendent's letters address the principals' alleged misconduct in the context of their use of authority and verbal and non-verbal communications with a lower level employee.

While these concerns touch upon the principals' professional judgment and leadership, the alleged conduct and surrounding circumstances do not appear, on balance, to implicate their performance as educational leaders and managers. Middletown, supra.

Moreover, while neither letter imposed a disciplinary penalty or threatened or warned of future discipline, both contain statements that are not neutral in tone, namely those that accuse Principal 1 of engaging in "inappropriate communication and behavior," and Principal 2 of "inappropriate if not 'bullying'" behavior. The letter to Principal 2 also implicates improper conduct by questioning why both administrators were simultaneously in the secretary's office when she was not secretary to either principal. The letters pass judgment on the inappropriateness of the grievants' alleged statements and conduct toward a lower level employee. Orange Tp., supra.

Additionally, the letters were issued outside the regular evaluation process, as the result of an investigation into the secretary's allegations of improper conduct. No mention of a corrective action plan is made in the letters, nor is there any indication in the record that one was imposed. Bergenfield (1999), supra., Mansfield Tp., supra; Delaware Valley, supra.

The Board had a right to issue the statements in the letters which addressed the Superintendent's future expectations regarding the principals' responsibilities toward lower level employees, and their verbal and nonverbal interactions with such employees. Letters limited to such statements are not inherently disciplinary. But we find that the other aspects of the Superintendent's letters, discussed herein, are disciplinary and they predominate. Bergenfield, P.E.R.C. No. 99-112, supra.

ORDER

The request of the Pleasantville Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: February 28, 2019

Trenton, New Jersey