P.E.R.C. NO. 2020-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2019-048

MIDDLESEX 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 two grievances filed by the Association. One grievance challenges a letter of reprimand issued to a teacher concerning alleged insubordination and failure to comply with administrative directives and school policies. The other grievance challenges the imposition of a doctor's note requirement for the teacher's future sick days that requires the doctor's note within three days of returning to work. Finding that the letter is predominately a disciplinary reprimand rather than a performance evaluation, the Commission declines to restrain arbitration of the letter of reprimand grievance. Finding that the Board has a managerial right to verify illness, but that a three day period to submit a doctor's note is a negotiable procedural issue, the Commission restrains arbitration of the challenge to requiring a doctor's note for future absences, but declines to restrain arbitration of the three day period for submission.

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, Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys (Dennis McKeever, on the brief)

For the Respondent, Detzky, Hunter & DeFillippo, LLC, attorneys (David J. DeFillippo, of counsel and on the brief)

DECISION

On February 15, 2019, the Middlesex Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of two grievances filed by the Middlesex Education Association (Association). The grievances allege that the Board violated the parties' collective negotiations agreement (CNA) when it placed a letter of reprimand in the grievant's personnel file and required the grievant to submit a doctor's note within three days of an absence when taking sick leave.

The Board filed briefs, exhibits, and the certification of attorney, Paul E. Griggs. The Association filed a brief,

exhibits, and the certification of its President, Robert Delude. These facts appear.

The Association represents all full-time and part-time certified personnel and all non-certified personnel (with certain exceptions enumerated in the CNA) employed by the Board. The Board and Association are parties to a CNA in effect from July 1, 2014 through June 30, 2017. The grievance procedure ends in binding arbitration.

Article 18.1.3 of the CNA provides:

> It shall be the obligation of the employee to certify that the absence resulted from personal illness. Upon request, the employee shall present a physician's statement of illness to the Superintendent.

The grievant is a tenured teacher assigned to the Von E. Mauger Middle School for the 2018-2019 school year. On October 12, 2018, Principal Sirna issued a "Letter of Reprimand" to the grievant which stated the following:

> The purpose of this Letter of Reprimand is to document your insubordination and failure to comply with the administrative directives and school policies.
>
> On October 5, 2018 you were directed, via email, to assign the same Interim comment (102 Satisfactory Progress) to all your 7th grade Science students. Due to your frequent absences (as of 10/5/18 you were only present 5 full instructional days in September) and because only two grades for students were entered into Genesis.
>
> At 10:48 on 10/5/18, Mr. Regan and I met with you to discuss the Interim comments. Mr.

Regan and I explained that 5 full instructional days is not enough time to appropriately assess the student's understanding of the 7th grade Science curriculum, nor reach a determination that a student is performing below grade level. In clear and direct language, you were told not to assign the following comments for Interim #1:

- "D" average at this time
- Failing at this time
- Unsatisfactory progress
- In danger of failing

Upon running a report in Genesis on 10/12/18, six of your students were assigned a comment that you were specifically directed not to assign.

Student Number	Comment Number	Comment
2430343	117	Failing at this time
2440047	137	In danger of failing
2450036	137	In danger of failing
2440080	137	In danger of failing
2440002	137	In danger of failing
2441152	137	In danger of failing

On 10/12/18 at 3:11, Mr. Regan and I met with you formally to discuss the Interim #1 comments that were published to parents. During our meeting you shared that you did assign comment 117 (Failing at this time) & 137 (In danger of failing) to students.

Further, you shared that you did not adhere to the school Failure Policy because you, "didn't know about it". Information pertaining to the school Failure Policy is included in the Staff Policy and Procedure Handbook. In addition, the school Failure Policy was prominently highlighted in an

> email sent from Mrs. Hartje on 10/3/18 to all staff members.
>
> To assist in correcting this conduct I have arranged for Mr. Hayes and Mrs. Vernaci of the VEM School Improvement Panel (ScIP) to meet with you to provide assistance. As members of the ScIP team, Mr. Hayes and Mrs. Vernaci are "resident experts" on policies and providing support for teachers.
>
> **A copy of this letter will be placed in your personnel file. You may prepare a response which will be attached to this document.**

On November 6, 2018, the Association filed a grievance challenging the October 12 letter as discipline without just cause in violation of Article 4 of the CNA ("Reprimand Grievance"). The same day, Principal Sirna denied the grievance, stating, in pertinent part:

> After we met to review the grievance, I am denying it on procedural and substantive grounds. There is a great amount of evidence to support that the letter of reprimand was warranted. [Grievant] was directed via email and in person not to use Interim Report comments (below) and she did so anyway for six students: . . . [Grievant] had the opportunity to respond to the letter of reprimand and have such a response attached to the letter in her file. To date she has not submitted a response.

Following a December 14, 2018 step 3 grievance hearing, the Board denied the grievance on January 10, 2019.

On November 2, 2018, Superintendent Madison issued a letter to the grievant stating:

> It has been brought to my attention that you have exceeded your 2018-19 allotment of sick

> and personal days (see attached). At this point you do not have any remaining paid time off and in fact have 4 days without pay thus far this school year.
>
> On September 11, 2018 you were informed by Mr. Sirna that a doctor's note will be necessary each time you are absent. As per Article 18.1.3 in the negotiated agreement, "It shall be the obligation of the employee to certify that the absence resulted from personal illness. Upon request, the employee shall present a physician's statement of illness to the Superintendent." To date, 4 absences do not have an associated physician's statement: September 5, 20, 21, 25, 2018. You will have until November 12, 2018 to provide the necessary physician statement for each absence.
>
> The note dated October 30, 2018 from Dr. Srinivasa Potluri, is not adequate to excuse possible future absences. Please be advised that for any future absences, your pay will be deducted and you will need a specific physician's statement submitted to Mr. Sirna within 3 days of your return to work. Moving forward, I designate Mr. Sirna as my proxy to request and collect all documentation from your physicians.

On November 20, 2018, Superintendent Madison issued the following letter to the grievant:

> Due to your absence on November 16th and as per Article 18.1.3 in the negotiated agreement, "It shall be the obligation of the employee to certify that the absence resulted from personal illness. Upon request, the employee shall present a physician's statement of illness to the Superintendent"; please provide me with a physician's statement for your absence on November 16th within 3 school days of your return to work.

On November 29, 2018, the Association filed a second grievance ("Doctor's Note Grievance") alleging that the Board violated the CNA when it took the following actions:

> By email dated November 2nd, the Superintendent, Dr. Linda Madison, and by emails dated November 20th, and November 28th, the principal of Mauger School, Jason Sirna presented [Grievant] with memos from the Superintendent, requesting that [Grievant] provide physicians statements to excuse absences "within 3 days of [her] return to work." These memos were each placed in [Grievant's] personnel file.

Principal Sirna denied the grievance on December 20. The Board held a Step 3 hearing on January 7, 2019 and denied the grievance on January 10.

On January 15, the Association filed a Request for Submission of a Panel of Arbitrators alleging "Discipline without Just Cause" for both the Reprimand Grievance and the Doctor's Note Grievance. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [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.
>
> [Id. at 404-405.]

The Board asserts that the request for arbitration is procedurally defective because the CNA's grievance procedure does not allow for two unrelated grievances to be combined into one arbitration. It argues that the Reprimand Grievance is not arbitrable because the letter of reprimand it issued was based on an evaluation of the grievant's teaching performance. The Board contends the reprimand provided constructive criticism regarding

the grievant's error implementing the school's failure policy. It asserts that the Doctor's Note Grievance is not arbitrable because it has a managerial prerogative to verify employee illness by requesting a doctor's note at any time.

The Association asserts that the Reprimand Grievance is an arbitrable reprimand because the tone and language used reveals it is disciplinary, rather than evaluative in nature. It argues that the reprimand represented a clear rebuke to the grievant for her alleged "insubordination" rather than constructive criticism. The Association contends that the Doctor's Note grievance is arbitrable because it does not challenge the Board's authority to verify the grievant's illness, but challenges the manner in which the verification measures are being applied to the grievant. Specifically, it asserts that the requirements that the grievant submit a doctor's note for any future absences (rather than upon request per the CNA) and that she produce said doctor's note within three days of her return to work (despite no such time limit in the CNA) are arbitrable challenges to the Board's application of its sick leave verification policy. Finally, the Association argues that the Board's procedural claims are not appropriate for a scope of negotiations petition.

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-5.3. For school employees, grievance procedures "shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning the imposition of reprimands." N.J.S.A. 34:13A-29(a).

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.]

In Delaware Valley Reg. Bd. of Ed., P.E.R.C. No. 2017-39, 43 NJPER 295, 298 (¶83 2017), the Commission explained that "[when] documents are challenged as constituting the imposition of discipline, then the subjects of the documents are not determinative," but "rather, 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." See also Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) (finding that "the subject of the memorandum is only one factor among many that must be considered in determining whether the memorandum is disciplinary.")

Accordingly, the Commission has found that memoranda concerning teaching performance issues may nonetheless be arbitrable disciplinary reprimands. Delaware Valley (finding that one of two memoranda concerning nurse's alleged deficiencies in student examinations was performance-related but was an arbitrable reprimand due to the accusatory tone, strong admonishment, and threat of future consequences); Red Bank (holding that self-described "formal reprimand" that warned of additional investigation and possible discipline for alleged

inappropriate verbal interactions with students in class was arbitrable); and Union Beach Bd. of Ed. and Union Beach Ed. Ass'n, P.E.R.C. No. 87-44, 12 NJPER 828 (¶17317 1986), aff'd, NJPER Supp.2d 183 (¶160 App. Div. 1987) (finding that memo concerning social worker's refusal to accept a referral in a child abuse case and unprofessional demeanor with superintendent was arbitrable because it was more of a reprimand for insubordination than an evaluation, and was placed in the personnel file with a warning of future disciplinary action). Therefore, in the instant case, even though the subject of the October 12, 2018 letter is the grievant's alleged failure to follow administrative directives about what grades to assign to her students due to her absences, which may relate predominately to teaching performance, that is not solely determinative of whether the letter is an arbitrable reprimand.

On balance, we find that the letter contains more indicia of a disciplinary reprimand rather than of a more benign form of constructive criticism intended to improve the grievant's teaching performance. The letter's stated purpose - "to document your insubordination and failure to comply with administrative directives and school policies" - strikes a disciplinary tone that indicates it is meant to maintain a record of her alleged failure to comply with directions. It accuses the grievant of not following what she was "directed" to do "in clear and direct

language" as far as entering the same Interim grade comment for all her students due to her "frequent absences." The letter of reprimand was directed towards the grievant's alleged "insubordination" stemming from grading directives imposed on her due to her absences.[1/] Thus, the letter intertwines concerns regarding the grievant's absences with the ensuing directives that differed from the regular grade reporting process. Furthermore, the Commission has previously found that a reprimand concerning a failure to submit grades was predominately disciplinary and arbitrable where the focus of the grade-related allegations was insubordination. Watchung Hills Reg. Bd. of Ed., P.E.R.C. No. 97-122, 23 NJPER 294 (¶28134 1997) (memorandum issued to teachers who failed to submit grades on time noted that "insubordination cannot and will not be tolerated" and included in teachers' personnel files was arbitrable as discipline); Cf. Moonachie Bd. of Ed., P.E.R.C. No. 2018-17, 44 NJPER 217 (¶63 2017) (increment withholding was arbitrable where teacher allegedly improperly changed a student's grades). Other hallmarks of discipline are that the letter was issued outside of the regular evaluative process and stated that a copy "will be placed in your personnel file." Finally, though not solely

1/ Teacher attendance issues are generally disciplinary. See, e.g., Bergenfield Bd. of Ed. and Bergenfield Ed. Ass'n, P.E.R.C. No. 2006-69, 32 NJPER 82 (¶42 2006), aff'd, 33 NJPER 186 (¶65 App. Div. 2007).

determinative, the letter is entitled "Letter of Reprimand," refers to itself as a "Letter of Reprimand," and Principal Sirna twice refers to it as a "letter of reprimand" in his November 6 response to the grievance. Based on the foregoing, we hold that the October 12, 2018 letter is predominately a disciplinary reprimand and therefore arbitrable.

We next turn to the Doctor's Note Grievance. N.J.S.A. 18A:30-4 establishes a school board's ability to require a physician's certificate to verify sick leave. Moreover, a public employer has a managerial prerogative to verify that sick leave is not being abused, which includes the prerogative to verify sick leave at any time. City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985);[2/] Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). The employer's right to verify illness includes the right to determine the number of absences and the situations that trigger a doctor's note requirement, regardless of whether the employees have exhausted their earned sick leave. State of New Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); State of New Jersey, P.E.R.C. No.

2/ In Elizabeth, the Appellate Division's published decision affirmed our analysis of the issue, stating: "By holding that the city had a managerial prerogative to require sick leave verification at any time, the commission protected the governing body's interest in identifying and dealing with sick leave abuse." Id. at 386.

2000-32, 25 NJPER 448 (¶30198 1999); and Montclair Tp., P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000). This prerogative encompasses requiring employees suspected of abusing sick leave to bring in a doctor's note for any future absence. See, e.g., New Jersey State Judiciary (Ocean Vicinage), P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004); Burlington Cty., P.E.R.C. No. 97-3, 22 NJPER 274 (¶27147 1996); UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995); Spring Lake Bor., P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988); and Rahway Valley Sewerage Auth., P.E.R.C. No. 96-69, 22 NJPER 138 (¶27069 1996).

Here, requiring the grievant to submit a doctor's note for future absences is part and parcel of the Board's managerial prerogative to prevent abuse of sick leave by verifying illness at any time. Thus, the Doctor's Note Grievance is not arbitrable to the extent it contests the Board's decision to require a doctor's note from the grievant before paying her sick leave for future absences.

However, "the application of a policy, the denial of sick leave pay, sick leave procedures, penalties for violating a policy, and the cost of a required doctor's note are all mandatorily negotiable" and may be challenged through contractual grievance procedures. Monmouth Cty. Sheriff's Office, P.E.R.C. No. 2016-50, 42 NJPER 354 (¶100 2016), quoting City of Paterson, P.E.R.C. No. 92-89, 18 NJPER 131 (¶23061 1992). Specifically,

the Commission has held that the deadline by which an employee is required to submit a doctor's note to verify sick leave may be a negotiable and arbitrable procedural issue. County of Passaic, P.E.R.C. No. 2002-63, 28 NJPER 234 (¶33085 2002). In Passaic, the union contested a sick leave policy requiring employees to submit doctors' notes for weekend call outs and docking their pay if they did not. The Commission restrained arbitration over the challenge to the employer's prerogative to verify weekend sick leave call outs via doctor's note, but declined to restrain arbitration over the policy's directive that "employees who do not substantiate their illness will be docked accordingly and may be subject to disciplinary action." The Commission held:

> We do not believe that the employer's interest in seeking to reduce sick leave abuse compels an automatic docking of pay in all cases, potentially including some cases where workers were truly ill but could not see a doctor on a weekend. Visiting a doctor on a Saturday or Sunday may not be possible if emergency care is not needed and a doctor's office is closed; an inability to obtain a doctor's note may be excusable in some instances.
>
> [Passaic, 28 NJPER 235.]

Here, the Board has instituted a 3-day period in which the grievant is required to submit a doctor's note or be docked pay. Consistent with Passaic, we find that the issue of how many days Association members have to submit a doctor's note following use of sick leave is a negotiable procedural issue that is severable

from the Board's prerogative to verify illness. Therefore, that aspect of the Doctor's Note Grievance challenging the 3-day period to submit a doctor's note is arbitrable.

Finally, the Board's argument that the grievances are procedurally defective because they should not be considered as part of a single arbitration is a contractual defense concerning procedural arbitrability that is outside of our scope of negotiations jurisdiction and for the arbitrator to determine. See, e.g., Cape May M.U.A., P.E.R.C. No. 2019-3, 45 NJPER 80 (¶20 2018); Middlesex Bor. Bd. of Ed., P.E.R.C. 2017-67, 43 NJPER 448 (¶126 2017) (declining to restrain arbitration where the board asserted that the grievance was untimely and filed at the wrong step); and Middlesex Bor. Bd. of Ed., P.E.R.C. No. 2017-61, 43 NJPER 423 (¶118 2017) (arguments that grievances were untimely and violated grievance procedure are outside our scope jurisdiction).

ORDER

The request of the Middlesex Board of Education for a restraint of binding arbitration of the Reprimand Grievance is denied. The Board's request for a restraint of binding arbitration of the Doctor's Note Grievance is granted to the extent it contests the Board's decision to require a doctor's note from the grievant for future absences, but denied to the

extent it contests the Board's imposition of a 3-day period to submit the doctor's note.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: August 15, 2019

Trenton, New Jersey