

P.E.R.C. NO. 2020-63

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2020-018

CITY ASSOCIATION OF SUPERVISORS  
AND ADMINISTRATORS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the Newark Board of Education's request to restrain arbitration of a grievance filed by the City Association of Supervisors and Administrators. The grievance alleges that a 2017-2018 written evaluation of a Vice-Principal was a disciplinary reprimand and that it was issued in derogation of required evaluation procedures and should be voided. The Commission restrains arbitration of the claim that the document is a disciplinary reprimand, but allows arbitration to proceed on the claimed procedural violation.

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, Riker Danzig Scherer Hyland & Perretti, LLP, attorneys (Teresa L. Moore, of counsel and on the brief; Stephanie D. Edelson, of counsel and on the brief)

For the Respondent, Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys (Dennis McKeever, of counsel and on the brief; Rachel E. Smith, on the brief)

DECISION

On October 29, 2019, the Newark Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the City Association of Supervisors and Administrators (CASA). The grievance alleges that the grievant's mid-year summative evaluation for the 2017-2018 school year was disciplinary in nature and should be removed from his personnel file. The Board contends that the issue is preempted by statute, the Teacher Effectiveness and

Accountability for the Children of New Jersey Act, N.J.S.A.  
18A:6-117 et seq. (TEACHNJ).

The Board filed briefs, exhibits and the certification of the Board's Executive Director of the Office of Labor and Employee Relations, JoAnne Y. Watson. CASA filed a brief, exhibits and the certification of its counsel, Dennis McKeever. These facts appear.

CASA represents principals, vice principals, department chairpersons, and instructional directors and supervisors. The Board and CASA are parties to a collective negotiations agreement (CNA) that is currently in four parts, consisting of an agreement in effect from July 1, 2006 through June 30, 2009 between the State-Operated School District, Newark, New Jersey and the City Association of Supervisors and Administrators, AFSA/AFL-CIO, Local 20; a nine-page Memorandum of Agreement dated December 15, 2017, plus two exhibits between the State-Operated School District of the City of Newark and CASA; and a two-page Memorandum of Agreement and a one-page Memorandum of Agreement, both dated December 15, 2017, between the State-Operated School District of the City of Newark and CASA. The grievance procedure ends in binding arbitration.

The grievant is a tenured administrative staff member presently employed by the Board and assigned to a high school, as a Vice Principal. The grievant has been an employee of the Board

for over twenty years. During the majority of the 2017-2018 school year, the grievant was assigned as an elementary school Vice Principal. On April 3, 2018, the grievant's request for a transfer was granted, and he began his assignment at a middle school as a Vice Principal.

Prior to the transfer, the grievant worked under the elementary school Principal, J.S. On February 10, 2018, J.S. performed a non-specific Administrator Observation of the grievant. The Observation Summary Form did not delineate a specific date of the observation, but states the range of "first and second quarters (September - January)." Thereafter, J.S. conducted a mid-year review dated February 27, 2018. The review rated the grievant as "partially effective."

After the encounter, the grievant requested and received a transfer to another school in which he also worked as a Vice Principal. On June 19, 2018, the grievant was issued a summative evaluation that stated his performance was "partially effective." The grievant submitted a rebuttal to his summative evaluation on June 28.

On June 28, 2018, CASA filed a grievance on behalf of the grievant regarding the performance evaluation for the 2017-2018 school year. Watson certifies that she met with the CASA representative on August 1 to review the grievance. She issued a written response to the grievance on August 16. The District's

Office of Educator Effectiveness issued a written response to the grievant's rebuttal. On August 27, CASA filed a request for submission of a panel of arbitrators.<sup>1/</sup> This petition, filed October 29, 2019, ensued.<sup>2/</sup>

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

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1/ The demand for arbitration contains this statement describing the grievance:

The process utilized to conduct observations and the Mid-Year Review of [the grievant] for the 2017-2018 school year were greatly flawed and resulted in [the grievant] receiving observations and a Mid-Year Review that contained inaccurate information regarding his attendance, included evaluation comments that did not correspond to [the grievant's] overall rating and violated the time line outlined in the Newark Public Schools Leadership Framework Guidebook. Additionally, [the grievant] requested an explanation of the evidence behind a specific observation made regarding his performance. [The grievant] never received the requested evidence and did not have the opportunity to discuss the observation with his superior prior to receiving his Mid-Year Evaluation.

Given the procedural deficits surrounding the Mid-Year Review and the baseless "observation," the grievant requests that both be removed from his personnel file and all other related District files.

2/ Despite the 14-month delay between the Board's receipt of the demand for arbitration and its filing of the scope of negotiations petition, we will decide the issues raised as an arbitration award has not been issued. See discussion in Ocean Tp. Bd. of Ed. and Ocean Tp. Ed. Ass'n, P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983).

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, including its argument that CASA's demand for arbitration was filed four days beyond the deadline set by the parties' CNA or the Board's assertion that a challenge to a "partially effective rating may not be challenged through grievance arbitration."<sup>3/</sup>

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). However procedures pertaining to evaluations are mandatorily negotiable and enforceable through grievance arbitration. Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed.

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<sup>3/</sup> In addition N.J.S.A. 34:13A-5.3 provides in pertinent part:

In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a court or agency shall be bound by a presumption in favor of arbitration. Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration.

Ass'n, 130 N.J. 312 (1992), aff'g, Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div. 1991).<sup>4/</sup>

In addition, disciplinary reprimands 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 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

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<sup>4/</sup> Some evaluation procedures may be fully or partially set by statutes or regulations, but adherence to them can also be mandated through grievance arbitration.

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.]

The Board argues that both before and after the enactment of TEACHNJ, N.J.S.A. 18A:6-117 et seq., a Board of Education's evaluation of the performance of teaching staff, including administrators was and is not reviewable through binding grievance arbitration. It contends that the content of the evaluation documents in this case contains a review of the Vice-Principal's professional performance and responsibilities and is not disciplinary.

The Board argues that all issues pertaining to the accuracy, correctness, validity, or legitimacy of the Vice Principal's performance evaluation rating are controlled exclusively by TEACHNJ providing that a school principal, in conjunction with the superintendent or his designee, shall conduct evaluations of each assistant principal and vice-principal employed in his school, including an annual summative evaluation." N.J.S.A. 18A:6-121(b). The Act further provides that a school district's evaluation rubric . . . shall not be subject to collective negotiations." N.J.S.A. 18A:6-125, thus precluding arbitration seeking to review the application of those criteria to administrator performance ratings.



CASA argues that the Board has violated both statutorily mandated and internal evaluation procedures that require setting aside the Vice-Principal's 2017 to 2018 evaluations.<sup>5/</sup> It also asserts that several portions of those documents contain disciplinary reprimands that an arbitrator can review and order excised from the evaluations.

The alleged procedural deficiencies in the evaluation process are reviewable through binding arbitration. See Lacey Tp., supra.

However, we find that the content of the documents reviewing the Vice Principal's 2017-2018 performance are predominately evaluative.<sup>6/</sup> This is best evidenced by numerous references to performance issues, such as: a lack of follow up and support for parent involvement; problems relating to student leadership programs; an absence of a student council; and resistance to change management. While there are aspects of the evaluation that appear related to disciplinary type matters, on balance the evaluation is predominately performance related. Under these

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<sup>5/</sup> CASA cites N.J.A.C. 6:10-2.2(3) requiring that administrators be notified of their evaluation criteria by October 1; N.J.A.C. 6:10-5.4(e) requiring two observations per year of school administrators; and N.J.A.C. 6:10-5.4(d)(1) mandating a post-observation conference within 15 days.

<sup>6/</sup> The observation summary, mid-year review and annual evaluation are set forth in Exhibits E, F and G to the Watson certification. Exhibit H is the Grievant's response to the annual evaluation.

circumstances our precedent does not allow a grievance to go to arbitration and parse out disciplinary terms to see if the Board had just cause to level those criticisms. The cases cited by CASA involved evaluations which incorporated reprimands that had already been the subject of previously written reprimands. See Washington Tp. Bd. of Ed., P.E.R.C. No. 90-126, 16 NJPER 326 (¶ 1990) and Burlington Tp. Bd. of Ed., P.E.R.C. No. 94-77, 20 NJPER 71 (¶25031 1994).

The central focus of CASA's grievance is procedural. Accordingly, that element of the grievance seeking to have the performance evaluation set aside based on procedural deficiencies is, in the abstract, arbitrable and we deny that aspect of the request to restrain it. We make no determination on whether the Board-CASA agreement supports or excludes such claims from arbitration, leaving that determination to the arbitrator. However, based on the finding that the evaluation is predominately related to performance, we grant restraint to the extent that the grievance seeks to excise allegedly disciplinary comments from the evaluation.

#### ORDER

The Newark Board of Education's request for a restraint of arbitration is granted to the extent CASA's grievance seeks to excise alleged disciplinary comments from the Vice-Principal's 2017-2018 written evaluation. The request is denied to the

extent CASA's grievance asserts that the procedural violations warrant voiding the evaluation.

BY ORDER OF THE COMMISSION

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

ISSUED: June 25, 2020

Trenton, New Jersey