

P.E.R.C. NO. 2020-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2020-030

WILLINGBORO EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Willingboro Board of Education for a restraint of binding arbitration of grievances filed by the Willingboro Education Association. The grievances contest alleged violations of teacher evaluation procedures required by the collective negotiations agreement as well as Board policies and education law. The Commission finds that alleged violations of evaluation procedures that are not preempted and do not impair a school board's ability to evaluate staff performance are mandatorily negotiable. The Commission also finds that disputes regarding the application of state education statutes and regulations concerning evaluation procedures are arbitrable. Finding that the potential enforcement of the procedural requirements alleged by the Association would not significantly interfere with the Board's right and duty to evaluate, the Commission holds the grievances legally arbitrable.

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, Florio Perruci Steinhardt & Cappelli, LLC, attorneys (Lester E. Taylor, III, of counsel and on the brief)

For the Respondent, Zeller & Wieliczko, LLP, attorneys (Matthew B. Wieliczko, of counsel; Jeffrey P. Catalano, on the brief)

DECISION

On December 13, 2019, the Willingboro Board of Education (Board) filed a scope of negotiations petition seeking to restrain arbitration of three grievances filed by the Willingboro Education Association (Association).^{1/} The grievances contest alleged violations of teacher evaluation procedures required by the parties' collective negotiation agreement (CNA) and Board policies, as well as the TEACHNJ Act and its implementing ACHIEVENJ regulations, that led to invalid summative scores,

^{1/} A fourth grievance, Grievance T-7 concerning teacher C.A., is no longer included in this case after the Association represented in its brief that it will be withdrawing it.

improper placement in corrective action plans (CAPs), and, in one case, an increment withholding.^{2/}

The Board filed briefs, exhibits, and the certification of Dr. Charles Blachford, Interim Superintendent for the Board's school district. The Association filed a brief, exhibits, and the certifications of teacher and grievant S.B., teacher D.M., and teacher A.L.

The Association represents a broad-based negotiations unit including certificated professionals such as teachers, as well as clerical, maintenance, and custodial employees of the Board. The Board and Association are parties to a CNA with a term of July 1, 2015 through June 30, 2020. The grievance procedure ends in binding arbitration.

Article XVI of the CNA, entitled "Evaluation of Teachers and Support Staff," provides, in pertinent part:

^{2/} The Board did not file a scope of negotiations petition per N.J.A.C. 19:13-2.2(a)4(iii) requesting that the Commission determine whether the increment withholding is predominately related to teaching performance or disciplinary. Neither the Board nor the Association addressed the Commission's increment withholding jurisdiction pursuant to N.J.S.A. 34:13A-26 et seq., and the Board's reply brief states: "Here, the teachers' increments are not at issue . . ." Accordingly, we do not consider this scope petition to involve an increment withholding determination pursuant to N.J.S.A. 34:13A-26 et seq. and N.J.A.C. 19:13-2.2(a)4(iii).

A. Teacher

The teacher being evaluated must be a partner in the process with full knowledge of:

1. The procedure;
2. The evaluator's qualifications;
3. The findings;
4. The identity of all persons that are consulted by the evaluator in preparing his/her findings.

B. The teacher evaluated shall be given a copy of their ratings or any other written evaluations of their work. Before the material is submitted to the Central Administration or placed in their personnel file, the teacher shall have the right to discuss the ratings and evaluation and to append responsive comments.

C. Every evaluation shall be signed by both the evaluator and the teacher evaluated. The teacher's signature, however, shall not be interpreted as an assent to the contents signed. In no event shall anyone be asked to sign an incomplete evaluation. No public disclosure of the contents of the evaluation or of the responsive comments, if any, shall be made without the mutual consent of the teacher involved, the Association and the Board.

D. Procedure

Evaluative reports will be presented to the teacher by the principal periodically in accordance with the following procedures:

1. Such reports will be issued in the name of the building principal based upon a compilation of reports, of observations, and of discussions with any or all supervisory personnel who come into contact with the teacher in their supervisory capacity.

2. Such reports will be addressed to the teacher, with carbon copies being forwarded to the Superintendent of Schools and kept by the building principal.

3. Such reports will be written in narrative form and will include:

a. Strengths of the teacher as evidenced during the period since the previous report.

b. Weakness of the teacher as evidenced during the period since the previous report.

c. Specific suggestions as to measures which the teacher might take to improve their performance, particularly in each of the areas wherein weaknesses have been indicated.

4. Teaching evaluation shall be done in accordance with the "NJ Teach Effectiveness and Accountability for the Children of New Jersey TEACHNJ Act," Chapters 6 and 28 of Title 18A of the New Jersey Statutes.

Board Policy 3221 provides, in pertinent part:

The Board shall meet the requirements as outlined in N.J.A.C. 6A:10-2.2(a) for the annual evaluation of teachers and shall ensure the training procedures as outlined in N.J.A.C. 6A:10-2.2(b) are followed when implementing the evaluation rubrics for all teachers. A District Evaluation Advisory Committee shall be established in accordance with the requirements of N.J.A.C. 6A:10-2.3. The minimum requirements for the evaluation procedures for teachers as outlined in N.J.A.C. 6A:10-2.4 shall be followed. For each teacher rated ineffective or partially effective on the annual summative evaluation rating, as measured by the evaluation rubrics, a corrective action plan shall be developed in accordance with the provisions of N.J.A.C. 6A:10-2.5. . . . The components

of the teacher evaluation rubric as described in N.J.A.C. 6A:10-4.1 shall apply to teachers. Measures of student achievement, as outlined in N.J.A.C. 6A:10-4.2, shall be used to determine impact on student learning. Teacher observations shall be conducted in accordance with the provisions of N.J.A.C. 6A:10-4.4. Observers shall conduct the observations pursuant to N.J.S.A. 18A:6-123.b.(8) and N.J.A.C. 6A:10-2.5 and 3.2, and they shall be trained pursuant to N.J.A.C. 6A:10-2.2(b).

N.J.A.C. 6A:10-2.2(b) (2-4) provides:

(b) Each district board of education shall ensure the following training procedures are followed when implementing the evaluation rubric for all teaching staff members and, when applicable, applying the Commissioner-approved educator practice instruments:

1. Annually provide training on and descriptions of each component of the evaluation rubric for all teaching staff members who are being evaluated in the school district and provide more thorough training for any teaching staff member who is being evaluated in the school district for the first time. Training shall include detailed descriptions of all evaluation rubric components, including, when applicable, detailed descriptions of student achievement measures and all aspects of the educator practice instruments;

2. Annually provide updates and refresher training for supervisors who are conducting evaluations in the school district and more thorough training for any supervisor who will evaluate teaching staff members for the first time. Training shall be provided on each component of the evaluated teaching staff member's evaluation rubric before the evaluation of a teaching staff member;

3. Annually require each supervisor who will conduct observations for the purpose of evaluation of a teacher to complete at least two co-observations during the school year.

i. Co-observers shall use the co-observation to promote accuracy and consistency in scoring.

ii. A co-observation may count as one required observation for the purpose of evaluation pursuant to N.J.A.C. 6A:10-4.4, as long as the observer meets the requirements set forth in N.J.A.C. 6A:10-4.3 and 4.4, but the co-observation shall not count as two or more required observations. If a co-observation counts as one required observation, the score shall be determined by the teacher's designated supervisor; and

4. Chief school administrators shall annually certify to the Department that all supervisors of teaching staff members in the school district who are utilizing evaluation rubrics have completed training on and demonstrated competency in applying the evaluation rubrics.

S.B. certifies that she is a tenured teacher who has been employed by the Board for 19 years. She certifies that during the 2018-19 school year, Sharon Williams performed two evaluations/observations of her classroom. She certifies that Williams had to redo one of her evaluations/observations for failure to return the evaluations within the contracted time frame. S.B. certifies that during one of her post-observation conferences with Williams in the spring of 2019, Williams told S.B. that she was new to the observation process and admitted

that she did not know that observations had to be returned to teachers within a certain time frame.^{3/}

Dr. Blanchard certifies that TEACHNJ and its ACHIEVENJ regulations set forth the requirements and procedures for teacher evaluations. Blanchard certifies that the Association filed Grievance T-5, pertaining to teacher V.C., on September 3, 2019. He certifies that in the interest of resolving Grievance T-5, he allowed V.C. to submit her Domain 4 documents for scoring. He certifies that, following his review, he determined that the additional documents for Domain 4 did not change the evaluation results. He certifies that he then denied Grievance T-5. Blanchard certifies that the Association filed Grievance T-6, concerning teacher S.B., on September 10, 2019. He certifies that he denied the grievance. Blanchard certifies that Grievance T-9, concerning teacher C.B., was never submitted to his office and that the Association's filing for arbitration was the first time he was notified of it. The Association submitted a copy of Grievance T-9, dated September 11, 2019, as well as a certified mail receipt indicating a date of delivery of September 12, 2019.

^{3/} S.B., D.M., and A.L. also certified to alleged comments made by Williams about experienced teachers needing to retire, but that is not relevant to the issues in this scope of negotiations petition.

Grievance T-5 alleges that V.C. was denied the submission of Domain 4 documents to be attached to her evaluation record, which negatively affected her summative score and caused her to be placed on a CAP. It alleged violations of Article XVI of the CNA, Board Policies 3221 and 3222, TEACHNJ statutes, and ACHIEVENJ regulations. Grievance T-5 seeks the following relief: allow grievant to submit her Domain 4 documents for scoring; adjust her final summative score accordingly; remove her from the CAP; require administrators to follow the ACHIEVENJ regulations as to annual staff notification and training; require administrators to undergo rigorous training regarding ACHIEVENJ regulations and the Danielson model; and any other remedy deemed appropriate.

Grievance T-6 alleges that S.B. was incorrectly placed on a CAP for the 2019-20 school year due to a final summative review process that failed to follow required procedures. Grievance T-6 alleges violations of Article XVI of the CNA, Board Policies 3221 and 3222, TEACHNJ statutes, and ACHIEVENJ regulations. Grievance T-6 seeks the following relief: adjust S.B.'s final summative score to reflect an effective rating; remove her from the CAP; require administrators to follow the ACHIEVENJ regulations as to annual staff notification and training; require administrators to undergo rigorous training regarding ACHIEVENJ regulations and the Danielson model; and any other remedy deemed appropriate.

Grievance T-9 alleges that C.B. incorrectly had her increment withheld because the Board did not follow Board Policy or regulations regarding her evaluations and summative score, including being denied the right to submit Domain 4 documents. Grievance T-9 alleges violations of Article XVI of the CNA, Board Policies 3221, 3222, and 3152, TEACHNJ statutes, and ACHIEVENJ regulations. Grievance T-9 seeks the following relief: rescind C.B.'s increment withholding and make her whole; allow her to submit her Domain 4 documents for scoring; adjust her final summative score accordingly; remove her from the CAP; require administrators to follow the ACHIEVENJ regulations as to annual staff notification and training; require administrators to undergo rigorous training regarding ACHIEVENJ regulations and the Danielson model; and any other remedy deemed appropriate.

On November 18, 2019, the Association filed a demand for binding arbitration of all three grievances with the American Arbitration Association. 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, 404-405 (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.

The Board asserts that arbitration should be restrained because the Association's grievances relate to evaluation procedures that are preempted by TEACHNJ, N.J.S.A. 18A:6-117 et seq., and ACHIEVENJ, N.J.A.C. 6A:10 et seq. It argues that the only appropriate remedy would be for the grievants to file

appeals with the Commissioner of Education per N.J.S.A. 18A:6-9 and N.J.A.C. 6A:3-1.1. The Board also contends that the Association's grievances fall within its managerial prerogative because they relate to the substance and content of the summative evaluations and performance-related CAPs.

The Association asserts that it seeks to arbitrate the Board's failure to adhere to its own policies and the CNA, both of which adopt the TEACHNJ and ACHIEVENJ statutes and regulations. It argues that such contractual evaluation procedures that are consistent with statutes and regulations and do not impair the Board's ability to evaluate staff performance are mandatorily negotiable. The Association contends that it cannot be an employer's prerogative to misapply and ignore procedural requirements in evaluating a teacher's performance, without arbitral review. The Association asserts that it does not seek to arbitrate the evaluation procedures set by statutes and regulations, but seeks to hold the Board accountable to follow and properly apply those procedures as adopted in the CNA and in the Board's policies. Finally, the Association argues that the CAPs at issue were directly caused by the Board's procedurally deficient observations and failures to comply with TEACHNJ and ACHIEVENJ evaluation requirements, which led to diminished scores for the grievants.

An otherwise negotiable term and condition of employment is only preempted when a statute or administrative regulation does so "expressly, specifically and comprehensively." Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982).

"[T]he mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." Ibid. The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." Local 195, 88 N.J. at 403-04, quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). Here, the Board has referenced TEACHNJ and ACHIEVENJ generally as covering the topic of teacher evaluations and procedures, but has not cited any provisions that expressly, specifically, and comprehensively preempt the evaluation procedures the Association alleges were violated.

While a school board has a managerial prerogative to observe and evaluate employees, evaluation procedures that are consistent with statutes and regulations and do not impair a board's ability to evaluate staff performance are mandatorily negotiable.

Bethlehem Tp. Bd. of Ed.; Ocean Tp. Bd. of Ed. and Ocean Tp. Ed. Ass'n, P.E.R.C. No. 85-123, 11 NJPER 378 (¶16137 1985), aff'd NJPER Supp.2d 164 (¶144 App. Div. 1986), certif. den. 105 N.J. 547 (1986); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed. and Matawan-Aberdeen Reg. Teach. Ass'n, P.E.R.C. No. 90-98, 16 NJPER

300 (¶21123 1990) recon. den. P.E.R.C. No. 91-4, 16 NJPER 434 (¶21185 1990), aff'd NJPER Supp.2d 257 (¶213 App. Div. 1991).

Alleged violations of such negotiable evaluation procedures are enforceable through binding arbitration. E. Brunswick Bd. of Ed. and E. Brunswick Ed. Ass'n, P.E.R.C. No. 98-150, 24 NJPER 319 (¶29152 1998), aff'd 25 NJPER 306 (¶30128 App. Div. 1999) (requirement that evaluator confine his/her written comments to the lesson chosen for observation does not significantly interfere with the right to evaluate other lessons); Lacey Tp. Bd. of Ed. v. Lacey Tp Ed. Ass'n, 259 N.J. Super. 397 (App Div. 1991), aff'd 130 N.J. 312 (1992) (Court upheld arbitration award vacating evaluation because the teacher had not been provided with copy of document prior to conference); Paterson State Op. Sch. Dist., P.E.R.C. No. 2011-57, 37 NJPER 9 (¶4 2011); Woodbury Bd. of Ed., P.E.R.C. No. 2006-81, 32 NJPER 128 (¶59 2006); Newark State Op. Sch. Dist., P.E.R.C. No. 97-118, 23 NJPER 240 (¶28115 1997); W. Orange Bd. of Ed., P.E.R.C. No. 92-128, 18 NJPER 365 (¶23159 1992); and Upper Pittsgrove Bd. of Ed., P.E.R.C. No. 90-78, 16 NJPER 174 (¶21073 1990).

Moreover, disputes concerning the interpretation and application of statutes setting terms and conditions of employment may be subject to binding arbitration so long as the grievance resolution does not contravene statutory mandates. See West Windsor Twp. v. PERC, 78 N.J. 98, 116 (1978); and Old Bridge

Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985). Accordingly, the Commission has specifically held that contractual disputes regarding the application of state education statutes and regulations may be resolved through binding grievance arbitration and are not within the sole jurisdiction of the Commissioner of Education. Paterson State Op. Sch. Dist., P.E.R.C. No. 2017-63, 43 NJPER 433 (¶121 2017) (arbitrator may decide if District made procedural errors in violation of CNA and/or ACHIEVENJ that led to failure to issue final summative evaluations and increment withholdings); North Hunterdon-Voorhees Reg. H.S. Bd. of Ed., P.E.R.C. No. 2012-36, 38 NJPER 281 (¶96 2012) (arbitrator may determine if Board deducted health insurance contributions in excess of those required by N.J.S.A. 18A:16-17b); Quinton Tp. Bd. of Ed., P.E.R.C. No. 2008-18, 33 NJPER 241 (¶92 2007) (arbitrator may determine if Board violated N.J.S.A. 18A:30-2); and Woodbury Bd. of Ed., P.E.R.C. No. 2000-108, 26 NJPER 313 (¶31127 2000) ("claims that the Board has not complied with education regulations pertaining to evaluation procedures may be arbitrated").

Here, the Association seeks to arbitrate over alleged procedural requirements set forth by Board policy and state regulations concerning staff training for teacher observers and evaluators and annual notifications to teachers of evaluation policies, as well as alleged CNA and Board policy procedures

concerning submission of documents during the evaluation process and the signing of incomplete evaluations on behalf of teachers without their prior knowledge or permission. We do not find that potential enforcement of these procedures by an arbitrator would significantly interfere with the Board's right and duty to evaluate. Nor do we speculate on potential remedies or preemptively prohibit the consequences that might result from proper application of alleged evaluation procedures.

In Sterling H.S. Dist. Bd. of Ed., P.E.R.C. No. 2007-58, 33 NJPER 112 (¶39 2007), the Commission allowed arbitration over grievances alleging violations of evaluation procedures that required observation reports to be issued within five days of the observations. The board objected to the association's suggested remedy to have the observation reports removed, but the Commission declined to restrain arbitration, stating:

As a rule, we decline to speculate about what remedies may be awarded and may be appropriate. See, e.g., Deptford Tp. Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 86 (¶12034 1981). . . . We add that in Lacey Tp. Bd. of Ed., P.E.R.C. No. 89-81, 15 NJPER 99 (¶20045 1989), we declined to restrain arbitration of a grievance alleging that an evaluation report had not been timely provided; the arbitrator ordered expungement of the report; and the Appellate Division and the Supreme Court upheld that order. Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div 1991), aff'd o.b. 130 N.J. 312 (1992). Given our policy against ruling on remedies in advance of awards, we do not

consider whether Lacey's rationale would apply if expungement were ordered. That question can be considered, if necessary, in post-award proceedings pursuant to N.J.S.A. 2A:24-8. We therefore decline to restrain arbitration of these grievances.

[Sterling, 33 NJPER at 113.]

In Paterson State Op. Sch. Dist., P.E.R.C. No. 2011-57, supra, the Commission held that the association could arbitrate over alleged violations of contractual evaluation procedures concerning teachers receiving copies of evaluation reports at least one day prior to any conference to discuss it, and did not restrain the requested remedy of removal and destruction of the evaluation that resulted from the alleged procedural violations. It held:

In Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397, 398 (App. Div 1991), aff'd 130 N.J. 312 (1992), the Court upheld an arbitration award vacating an evaluation because the teacher had not been provided with a copy of the document prior to a conference to discuss it. . . . [We] recogniz[e] that the procedural challenges to the evaluation could, as in Lacey, affect the evaluation's viability.

[Paterson, 37 NJPER at 11-12; emphasis added.]

In North Hunterdon-Voorhees Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 2015-81, 42 NJPER 48 (¶14 2015), the Commission allowed for the possibility that an arbitral remedy on evaluation procedures could result in a re-evaluation of the teacher and a

higher rating that could change her evaluation to "Effective."

It held:

The Association's arguments regarding the administrator's alleged violation of the contractual requirement to disclose any documents to a teacher that are used in evaluating professional performance is an issue that may be resolved through binding arbitration. If the grievance is sustained and the Board is directed to re-evaluate the teacher, the rating could be raised. Doing so could resolve the remainder of the dispute.

[North Hunterdon-Voorhees, 42 NJPER at 50; internal footnotes omitted; emphasis added.]

In Paterson, P.E.R.C. No. 2017-63, supra, the Commission declined to restrain arbitration over evaluation procedures just because a remedy could include ordering the board to issue summative evaluation ratings that it had not previously issued.

It held:

[W]e conclude that an arbitrator may decide whether the District made procedural errors that resulted in its failure to issue summative evaluations and if so, an appropriate remedy. If the arbitrator finds a contractual violation and issues a remedy that the District believes would significantly interfere with its educational policy determinations or misinterprets or misapplies education laws or regulations, the District may seek relief at that time. See Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 217 (1979); Woodbury Bd. of Ed., P.E.R.C. No. 2000-108, 26 NJPER 313 (¶31127 2000).

[Paterson, 43 NJPER at 436; internal footnote omitted.]

In all of these cases, the Commission declined to speculate on arbitral remedies that might result from enforcement of alleged negotiable evaluation procedures and - consistent with the Appellate Division and Supreme Court decisions in Lacey - recognized that an arbitrator may be empowered to vacate or remove evaluative documents or ratings that were part of an evaluation process which included violations of contractual or statutory/regulatory procedures. Applying that precedent to the evaluation procedures sought to be arbitrated here, we decline to restrain arbitration.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: March 26, 2020

Trenton, New Jersey