

P.E.R.C. NO. 2021-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLOUCESTER CITY EDUCATION ASSOCIATION,

Petitioner,

-and-

Docket No. SN-2020-045

GLOUCESTER CITY BOARD OF EDUCATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Gloucester City Education Association to allow binding arbitration of a grievance contesting the Gloucester City Board of Education's unilateral implementation of an attendance policy (Policy) to the extent the grievance challenges the as-applied impact of the Policy. The Commission restrains arbitration to the extent the grievance challenges the establishment of the Policy's attendance goals where no discipline has been issued, and to the extent the grievance challenges the calculation of the attendance rate based on the shortened 2019-2020 school year.

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, Selikoff & Cohen, P.A., attorneys
(Keith Waldman, of counsel and on the brief; Hop
Wechsler, of counsel and on the brief)

For the Respondent, Parker McCay, attorneys (Emily E.
Strawbridge, of counsel and on the brief)

DECISION

This scope of negotiations determination is before the
Commission by referral from the Appellate Division in Gloucester
City Bd. of Educ. v. Gloucester City Educ. Ass'n, No.

A-4464-18T4, 2020 N.J. Super. Unpub. LEXIS 280, at 17 (App. Div.
Feb. 7, 2020). The Gloucester City Board of Education (Board)
sought to restrain arbitration of the Gloucester City Education
Association's (Association) June 13, 2018 grievance by filing a
verified complaint in Superior Court, Chancery Division, alleging
lack of contractual arbitrability under the parties' collective
negotiations agreement. The Association's grievance alleged that
the Board violated the CNA when it unilaterally implemented

District Policy 3212 (Policy), an attendance policy applicable to teaching staff members that, among other things, requires all teaching staff members with an absence and/or tardiness rate greater than or equal to 3.5% in any school year (Attendance Goal) to be placed on a corrective action plan (CAP). The Chancery Division denied the Board's application, and the Board appealed. On February 7, 2020, the Appellate Division, in an unpublished written decision, referred the scope of negotiations issues to the Commission and dismissed the appeal without prejudice. Additionally, the Appellate Division stayed the Superior Court's March 25, 2019 order granting the Association's request for arbitration.

Following the Appellate Division's referral to the Commission, on February 26, 2020, the Gloucester City Education Association (Association) filed a scope of negotiations petition seeking a determination that its February 25, 2020 amended grievance is mandatorily negotiable and legally arbitrable. The Association's amended grievance asserts that Association members have been harmed by the Board's unilateral change to the Policy by being placed on Professional Development Plans (PDP) for the 2018-19 school year due to not meeting the Attendance Goal; Association members have had attendance used against them in preconference meetings prior to their second evaluation; and Association members were told by administrators that they will

receive lower ratings on their classroom observations due to not meeting the new stricter Attendance Goal. As with the original June 13, 2018 grievance, the amended grievance seeks that all attendance goals be eliminated from PDPs.

The Association filed briefs, exhibits and the certification of its Vice President, Loraine Marie Hennessey.^{1/} The Board filed a brief and an exhibit. On May 27, 2020, following completion of briefing in this matter, the Association sought leave to file additional certifications, which was granted.^{2/} On May 28, the Association filed the certifications of its President, Laila Gansert, and its Evaluations Chair, J.B. Leave was granted for the Board to file a response to the Association's additional certification, and on June 5, the Board filed the certification of its Assistant Superintendent, Dr. Elizabeth Curry. These facts appear.

1/ N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge. Hennessey's certification appears to simply authenticate the exhibits presented by the Association, but does not certify to the facts asserted in the Association's briefs. The Board did not file a certification(s) in support of its opposition brief.

2/ N.J.A.C. 19:10-3.1 allows for the Commission's rules to be construed liberally to prevent injustices and to effectuate the purposes of N.J.S.A. 34:13A-1 et seq. Specifically, N.J.A.C. 19:10-3.1(b) states, "When an act is required or allowed to be done at or within a specified time, the commission may at any time, in its discretion, order the period altered where it shall be manifest that strict adherence will work surprise or injustice or interfere with the proper effectuation of the act."

The Association represents all employees of the Board, which operates a K-12 public school district, including teachers, with certain exceptions. The Board and Association are parties' to a CNA in effect from July 1, 2016 through June 30, 2019.^{3/} The parties contractual grievance procedure ends with arbitration. CNA's Article 4, Section 6(b) provides for arbitration as follows:

Only matters relating to employees' terms and conditions of employment as set forth in this Agreement may be submitted to arbitration. The arbitrator shall be limited to the issue(s) submitted and shall consider nothing else. The arbitrator can add nothing to, subtract anything from, nor modify the express terms of this Agreement. The arbitrator's recommendations shall be submitted in writing to the Board and the Association, and shall be advisory except in those disciplinary matters covered by N.J.S.A. 34:13A-29^{4/} in which case arbitration shall be binding.

On or about June 12, 2018, the Board implemented the Policy, which provides the following:

The regular and prompt attendance of teaching staff members is an essential element in the efficient operating of the school district

3/ The Board asserts that a successor CNA was ratified by the parties during the period of the instant matter. Only the 2016-2019 CNA has been included in the factual record.

4/ N.J.S.A. 34:13A-29 states that "[t]he grievance procedures that employers covered by this act are required to negotiate...shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act."

and the effective conduct of the educational program. Staff member absenteeism exacts a high cost in the depletion of district resources and in the disruption of the educational program, the Board of Education is vitally interested in the attendance of each employee and considers conscientious attendance an important criterion of satisfactory job performance.

The privilege of district employment imposes on each teaching staff member the responsibility to be on the job on time every scheduled working day. This responsibility requires that the employee maintain good health standards, take intelligent precautions against accidents, both on and off the job, and manage his/her personal affairs to avoid conflict with district responsibilities.

A teaching staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges.

In accordance with N.J.S.A. 18A:30-1, sick leave is defined to mean the absence from work because of a personal disability due to injury or illness or because the staff member has been excluded from school by the school medical authorities on account of contagious disease or of being quarantined for such a disease in the staff member's immediate household. No teaching staff member will be discouraged from the prudent, necessary use of sick leave and any other leave provided for in the collective bargaining agreement negotiated with the member's majority representative, in an individual employment contract, or provided in the policies of the

Board. In accordance with N.J.S.A. 19A:30-4, the Superintendent or Board of Education may require a physician's certificate to be filed with the Secretary of the Board in order to obtain sick leave.

The Superintendent or designee/s is directed to ascertain the rate of absence and tardiness among the professional staff, in accordance with rules of the State Board of Education. Whenever the rate of absence and or tardiness in any school year is equal to or higher than three and one-half percent, the Superintendent or designee/s shall develop and present to the Board a plan for the review and improvement of staff attendance. Whenever the rate of absence and or tardiness in any school year of an individual staff member is equal to or higher than three and one-half percent, the building principal or designee/s shall develop a corrective action plan for the staff member to review and improve his/her attendance. The corrective action plan may include but not be limited to a fitness for duty evaluation, scheduled meetings with administration to review attendance, and an examination performed by the district's physician or consultation between the district's physician and staff member's physician. Each staff member's annual evaluation will contain his/her absentee and tardiness rate for that school year. The review and improvement plan shall require the collection and analysis of attendance data, tardiness data, the training of teaching staff member in their attendance/tardiness responsibilities, and the counseling of teaching staff members for whom regular and prompt attendance/tardiness is a problem.

[Emphasis added].

The CNA's Article 9, among other leave benefits, provides teachers with ten sick days per school year, and unused sick leaves accumulates without limitation. The CNA's Article 10

provides for a school year of 186.5 days. Under the Policy, teachers will have not met the Attendance Goal, thereby triggering the CAP requirement, upon using approximately seven of their ten allotted sick days.

By letter dated June 13, 2018, the Association grieved the application of the Policy on behalf of teachers who had been placed on PDPs for the 2018-19 school year due to having not met the Attendance Goal. The Association's grievance stated, "In short, the mechanical application of this sick leave policy, without considering the reasons for absences, is improper...Any policy that does this violates our members' rights to take [leave]...and [Association members] should not be penalized for taking the time off guaranteed to them by the [CNA]." The Board denied the Association's grievance at each of the steps of the CNA's grievance procedure based on, among other reasons, the Board's non-negotiable managerial prerogative to establish evaluation criteria which includes attendance goals. On October 16, the Association submitted a demand for arbitration with the Commission. As discussed above, following the parties' litigation which culminated with the Appellate Division's February 7, 2020 decision, the Association amended its grievance on February 25, and this petition ensued.

In the Association's additional certifications filed after the conclusion of briefing in this matter, Gansert certifies that

on April 30, 2020, Curry informed her that teaching staff members' attendance rates for 2019-2020 would be calculated on a 148-day school year for purposes of determining whether individual staff members met the Attendance Goal, thereby triggering the CAP requirement in the policy. Gansert's certification asserts that due to the reduction in days in the calculation of the 3.5% absence rate, more teachers have been impacted by the unilateral Policy change than in prior years and it "has had a chilling effect on members' use of leave to which they are contractually entitled."

J.B. certifies that five teachers were placed on CAPs during the 2019-2020 school year based, in part, on having not met the Attendance Goal. She further certifies that in an April 23, 2020 email exchange, Curry informed her that moving forward Action Plans, which are informal internal documents, would be treated as CAPs, which are formal documents with disciplinary consequences. J.B. certifies that she was placed on a CAP that is based, in part, on her attendance rate despite having documented justifications for her absences that were not considered in determining her attendance rate. J.B. certifies that her CAP, which remains in effect through the beginning of the 2020-2021 school year, states that her goal is to "Attend work on a regular basis" and that she "will improve attendance rate by improving the present 26.69% absenteeism rate towards the required 3.5%."

In response to the Association's additional certifications, Curry certifies that as a result of the COVID-19 school building closures, and subsequent impact on staff evaluations, the Board calculated staff member absentee rates for 2019-2020 based on a 148-day school year, or through April 20, 2020. Curry certifies that any staff member who failed to meet the Attendance Goal in 2019-2020 would have still failed to do so in a regular school year; thus, the shortened school year did not impact their attendance rate. Curry further certifies that no staff member was placed on a CAP solely based on not meeting the Attendance Goal.

Curry further certifies that the CAP of each staff member who received a CAP goal related to attendance will be amended to remove the attendance goal, and those staff members will receive an informal action plan with the goal of improving their attendance in the 2020-2021 school year. Curry certifies that action plans given to staff members are intended to be distinct from the evaluation scoring and process, and to provide staff an opportunity to correct deficiencies prior to evaluations. Action plans do not carry any disciplinary consequences if the goals contained therein are not achieved. Curry further certifies a CAP is not developed based on the action plan.

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 seeks to restrain arbitration of the Association's

grievance because evaluation criteria, such as the Policy's Attendance Goal, is a non-negotiable managerial prerogative. The Board argues that the Policy's application to any individual employee does not affect any negotiable terms and conditions of employment. The Board asserts that the Policy only requires training and/or counseling that is not disciplinary and does not impact compensation, benefits, working hours, or performance ratings. Moreover, the Board argues that the Association has failed to bring forward any represented employee who has been deprived of any employment benefits, and instead, is simply making a blanket challenge to the implementation of the Policy.

The Association seeks a determination that its grievance is mandatorily negotiable and legally arbitrable. The Association claims it is not challenging the Board's establishment of the attendance criteria in the Policy. Rather, the Association asserts that it is challenging the mechanical application of the Attendance Goal that automatically requires teachers be placed on corrective action plans and subjects them to other potential disciplinary action if their absences equal or exceed 3.5% of workdays, without considering the reasons for their absences. Due to this mechanical application of the Policy, the Association submits that teachers, including J.B., have been placed on PDPs and CAPs and that these numbers have increased due to the shortened school year in 2019-2020. Additionally, teachers have

been informed they will receive lower observation scores as a result of not meeting the Policy's Attendance Goal. Moreover, the Association argues the Board's application of the Policy has had a chilling effect on members' use of contractual leave to which they are entitled by presumptively branding teachers as excessively absent in formal evaluation documents.

The Appellate Division has referred the following issue for the Commission's resolution: "whether negotiating the impact [of the Policy] would significantly or substantially encroach upon the [Board's] management prerogative." (Emphasis added.) We find that it would not, and accordingly, decline to restrain arbitration of the Association's grievance, with certain exceptions, for the following reasons.

We concur with the Appellate Division's assessment:

...it appears that certain teaching staff members have now been affected by the challenged policy through incorporation of its attendance goal into their professional development plans. This outcome is hardly surprising considering the mandatory nature of the Attendance Policy, which requires the principal to develop a corrective action plan whenever a teaching staff member's rate of absence or tardiness reaches or exceeds 3.5%. The Attendance Policy also requires each teaching staff member's annual evaluation to include his or her absentee and tardiness rate. This may lead to counseling and subject the member to disciplinary consequences, "which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges." Notably, the Attendance Policy does not consider the member's attendance during prior school

years, the member's accumulated sick leave, the legitimacy of the sick leave utilized, or whether the sick leave usage was patterned.

The Board's establishment of the Attendance Goal in the Policy or its use as an evaluation criteria is not at issue in this matter. The Association concedes that its grievance concerns not the adoption of the Policy, but rather its application. (Association's Brief at 1). The as-applied impact of the Policy on individual teachers, like J.B., who have been placed on PDPs and CAPs and who are subject to potential disciplinary consequences for violation of the Policy, is mandatorily negotiable and legally arbitrable. To the extent the Association's grievance is challenging this as-applied impact of the Policy on individual teachers, we do not restrain arbitration.

Here, failing to meet the Attendance Goal automatically places the violating teacher on a CAP with no discretion (e.g., "the building principal or designee/s shall develop a corrective action plan for the staff member to review and improve his/her attendance.") (Emphasis added). While Curry certifies that no teacher has been placed on a CAP solely due to attendance, the express language of the Policy allows for this possibility. As supported by the certification of both J.B. and Curry, a CAP is a formal document with disciplinary consequences. As the Policy states, "the review and improvement plan shall require the

collection and analysis of attendance data, tardiness data, the training of teaching staff member in their attendance/tardiness responsibilities, and the counseling of teaching staff members for whom regular and prompt attendance/tardiness is a problem," which can amount to a disciplinary reprimand for excessive absenteeism.

Disciplinary sanctions for absenteeism could include counseling, letters of reprimand, docking of pay, withholding of increments, tenure charges, and nonrenewal or termination of nontenured staff members. See Mainland Reg. H.S. Dist., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991). Consistent with Mainland, in Morris Cty., P.E.R.C. No. 2002-33, 28 NJPER 58 (¶33020 2001), we held that once an employer determines that an employee has "chronic or excessive absenteeism" and decides that the employee must be "put on notice through a documented verbal discussion, to be confirmed in writing, in an effort to correct the problem," the employer has in essence issued a verbal reprimand. Employees may then invoke a contractual right to contest that notice through binding arbitration.

The language in J.B.'s CAP presumptively identifies her as a teacher for whom regular and prompt attendance is a problem, and the CAP provides her no opportunity to challenge that designation. Moreover, J.B.'s CAP provides no remedial guidance for achieving the stated goal of "Attend[ing] work on a regular

basis.” Curry’s certification that attendance goals included in CAPs, such as in J.B.’s CAP, are being removed and added to informal “Action Plans” with no disciplinary consequences, further supports that attendance-based CAPs approach disciplinary reprimands that can be challenged through arbitration.

Moreover, the Association claims other individual teachers have been impacted by the Policy by being told they will receive lower observation scores as a result of their absence rates under the Policy, being placed on attendance-based PDPs, and in general, being discouraged from taking contractual leave to which they are entitled. We find such impacts of the Policy to be mandatorily negotiable and legally arbitrable. Employees have a substantial interest in maintaining full use of their negotiated leave benefits without concern for financial and professional consequences. See Cty. of Cumberland (Division of Social Services), P.E.R.C. No. 2019-5, 45 NJPER 84 (¶22 2018); see also Montville Tp. Ed. Ass’n v. Montville Tp. Bd. of Ed., NJPER Supp.2d 159 (¶140 App. Div. 1985).

While the Association has narrowed the scope of its grievance throughout these proceedings to focus on the as-applied impact of the Policy on individual teachers, its amended grievance still seeks the blanket remedy of eliminating all attendance goals from PDPs. To the extent that the Association is challenging the establishment of the Policy’s Attendance Goals

where no discipline has been issued, the grievance is not subject to binding arbitration. See Piscataway Tp. Bd. of Ed. and Piscataway Tp. Ed. Ass'n, P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). We make no findings with regard to the Association's ability to bring such claims to advisory arbitration since ordinarily we will only consider a petition for advisory arbitration based on statutory preemption claims. South Hackensack Bd. of Ed., P.E.R.C. No 81-118, 7 NJPER 234 (¶12104 1981, aff'd. NJPER Supp.2d 136 (¶118 App. Div 1983). Additionally, to the extent that the grievance is challenging the calculation of the attendance rate based on the shortened 2019-2020 school year, the grievance is not subject to binding arbitration. See Bd. of Educ. v. Woodstown-Pilesgrrove Reg'l Educ. Ass'n, 81 N.J. 582, 592 (1980) ("Establishing the school calendar in terms of when school commences and terminates is a non-negotiable managerial decision.")

Therefore, we find that the grievance is subject to binding arbitration to the extent it challenges the as-applied impact of the Policy on individual teachers. However, the grievance is not subject to binding arbitration to the extent it challenges the establishment of the Policy's Attendance Goals where no discipline has been issued, or calculation of the attendance rate based on the shortened 2019-2020 school year. Whether the attendance language in J.B.'s CAP is in fact discipline subject

to advisory or binding arbitration under the CNA; whether the Board had just cause to include the attendance goal in the CAP; whether J.B., or any other individual teacher impacted by the Policy, is included in the Association's grievance (i.e. issues of standing); or whether the Association's amended grievance was properly processed through the CNA's grievance procedure, are all issues to be resolved by an arbitrator.

ORDER

The request of the Gloucester City Education Association to allow binding arbitration is granted to the extent the grievance is challenging the as-applied impact of the Policy on individual teachers. However, binding arbitration is restrained to the extent that the grievance challenges the establishment of the Policy's Attendance Goals where no discipline has been issued. Additionally, binding arbitration is also restrained to the extent that the grievance is challenging the calculation of the attendance rate based on the shortened 2019-2020 school year.

BY ORDER OF THE COMMISSION

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

ISSUED: August 13, 2020

Trenton, New Jersey