

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WOODBURY BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2000-44

WOODBURY EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Woodbury Board of Education for a restraint of binding arbitration of a grievance filed by the Woodbury Education Association. The grievance alleges that the adoption and implementation of a "differentiated supervision" program for teaching staff members violated the parties' collective negotiations agreement. The Commission finds that arbitral review of the Board's adoption of a policy would significantly interfere with educational decision-making. The Commission also finds that the decisions to place the four teachers in the differentiated supervision program are not mandatorily negotiable. And, the Commission finds that the grievance is not legally arbitrable to the extent it alleges a violation of contract provisions pertaining to, or requiring negotiations over, "guidelines for applying the criteria" for placement in the program. The Commission finds that the grievance is legally arbitrable to the extent it alleges that the Board violated contractual notice provisions governing, or requiring negotiations over, notice of the adoption of the differentiated supervision program; notice of the criteria for placement; and a statement of the reasons a particular teacher was placed in the program. The Commission also finds that the grievance is legally arbitrable to the extent it alleges that the Board violated contract provisions concerning, or requiring negotiations over, advance notice of who will evaluate a staff member and the timing of formal observations. Finally, the Commission finds that claims that the Board has not complied with education regulations pertaining to evaluation procedures are 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, Cassetta, Taylor, Whalen & Hybbeneth,
consultants (William J. Yanonis, on the brief)

For the Respondent, Selikoff & Cohen, attorneys
(Steven R. Cohen and Keith Waldman, on the brief)

DECISION

On October 29, 1999, the Woodbury Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Woodbury Education Association. The grievance alleges that the adoption and implementation of a "differentiated supervision" program for teaching staff members violated the parties' collective negotiations agreement.

The parties have filed exhibits and briefs. These facts appear.

The Association represents teachers, guidance counselors, librarians, the learning disability teacher/consultant, the psychologist, the social worker and school nurses. The Board and the Association are parties to a collective negotiations agreement

effective from July 1, 1996 to June 30, 1999. The grievance procedure ends in binding arbitration.

Article XV is entitled Teacher Evaluation. It provides that all classroom evaluations of a teacher shall be made openly and with the teacher's knowledge; sets forth procedures for receiving and rebutting an evaluation report; provides that all non-tenured teachers must be evaluated at least three times per year, the first one not later than November 15 and the third one not later than April 25; sets forth the procedure for placement of materials and responses in personnel files; provides that all tenured teachers be observed and evaluated at least once before May 15; and provides that all professional improvement plans (PIPs) be completed at least seven days before the last teacher work day.

In June of 1999, four teachers received Annual Performance Reports for the 1998-1999 school year which noted either that their performance had been "less than satisfactory" or, in one case, prompted the same concerns that had been identified in previous years. The evaluations stated that the teachers would be placed in the district's new "differentiated supervision" program for the 1999-2000 school year. The teachers were also advised that their increments for the 2000-2001 academic year "would be" or "may be" denied if they did not make satisfactory progress in the program. The "1999-2000 Professional Improvement Plan" (PIP) section in all four evaluations indicated that a PIP would be developed by the teacher and his "mentor" under the differentiated supervision program.

The Association asserts that the Board unilaterally implemented the differentiated supervision program in May 1999. The Association has submitted a four-page document, apparently prepared by the Board, which describes the program. The document has four sections, the first of which, "philosophy and rationale," sets forth the view that evaluation and supervision are key elements in improving student learning. It is followed by a section titled "Guidelines for Identifying Marginally Effective Teachers." That section lists indicia of poor performance or marginal effectiveness in the areas of instruction, classroom environment, planning and preparation, and professional responsibilities. It provides:

INSTRUCTION

- Presentation/delivery of content is inappropriate and unclear; doesn't move students to high levels of thinking and complex problem solving.
- Instruction is not reflective of individual student and group needs.
- Instruction does not reflect current research methodology; is overly concrete, unvarying, and teacher-centered.

CLASSROOM ENVIRONMENT

- Environment is not one of respect and rapport, discipline is inappropriate, expectations for performance and behavior are not high, students are frequently off task.
- All students are not productively engaged in learning, time is not used efficiently and effectively.

PLANNING AND PREPARATION

- Goals are not clearly stated as student learning, are inappropriate in relation to student development, and lack meaning for students.
- Design of instruction is not coherent.
- Learning, activities, and assessment do not support state and local content standards.

PROFESSIONAL RESPONSIBILITIES

- Teacher profoundly misjudges the success of a lesson, i.e., what students really learned.
- Teacher is unable to articulate a comprehensive system of evaluation and assessment that mirrors state and local standards.
- Assessment is not used to adjust instruction and to provide useful feedback to the learner.

The four teachers placed in the program in May 1999 were identified through evaluations conducted during the 1998-1999 school year -- before the Association alleges that the Board adopted the differentiated supervision program.

The document submitted by the Association also includes a section titled "Components of Differentiated Supervision." That section describes three types of supervision -- intensive, self-directed/cooperative development, and traditional. It then compares traditional and intensive supervision as follows.

DIFFERENCES

Traditional

Intensive

- | | |
|---|---|
| <ul style="list-style-type: none"> . Concerned with teacher methods . Superficial impact . 1-3 observations per year . One type of observation followed by analysis & conference . One size fits all . Evaluative | <ul style="list-style-type: none"> . Concerned with learning outcomes . Promotes improvement . 5 or more intensive development cycles . More varied set of tools . Individualized . Supervisory |
|---|---|

INTENSIVE DEVELOPMENT IS:

- . Concerned with teacher growth
- . Divorced from teacher evaluation; person responsible for evaluation should not provide intensive development.
- . Not shared with principal unless authorized by teacher
- . Collaborative inquiry and reflection with supervisor, who, rather than behaving like an expert, fosters reflection on the part of the teacher

COMPONENTS OF CYCLE

1. Taking Stock Conference - Always at beginning or end of year, also can occur to assess progress or to make plans; establish the primary purpose and process of the relationship
2. Pre-observation Conference - Review plans for lesson - discuss intended outcomes, student tasks, means of assessment, overall nature of the lesson; determine purpose of observation
3. Diagnostic Observation - Observation to collect data and to assess strengths and diagnose needs; recorded in writing or on forms, on computer or video
4. Analysis of Diagnostic Observation - Analyze data and determine focus for developmental work; can be done working alone and/or collaboratively with teacher

5. Diagnostic Debriefing Conference - Collaborative lesson analysis based on objective data.
6. Coaching Session - Coaching for specific skills by developing a knowledge base, demonstration, guided practice, independent practice.
7. Focused Observation - Follows coaching session within a few days, focuses on one skill or one facet of teaching/learning process, using a collaboratively developed form to collect information about teacher's use of that skill.
8. Focused Debriefing Conference - Reviews and analyzes the results of focused observation, looking for patterns of behavior; decide on next step - another coaching session on same skill, another focused observation on the same skill, or another diagnostic observation.

The next section sets forth "Procedures for Marginally Effective Teachers" and provides:

1. Marginal Teachers are identified by Administrators and the Superintendent.
2. Principal notifies Teachers of marginal status during Annual Review Conference.
3. Principal explains the need for Intensive Development: why they were identified, why Intensive Development is needed.
4. Principal assists Intensive Development Supervisor with program design.
5. Intensive Development by Supervisor is ongoing.
6. Principal conducts three formal observations by October 1st, January 15th, March 1st for the purpose of making personnel decisions.
7. Annual Summary Conference with Intensive Development Supervisor, Principal, and Teacher is held to review progress by March 31st.

8. Summary report is submitted to the Superintendent on or before April 1st.

On July 7, 1999, the Association filed a grievance alleging that the implementation of the differentiated supervision program violated contract provisions establishing evaluation and negotiations procedures and incorporating N.J.S.A. 34:13A-5.3's requirement that changes in terms and conditions of employment be made through negotiations. It also alleged that the four teachers had been disciplined without just cause, in violation of the agreement.

On September 15, 1999, the Board denied the grievance, contending that the content of evaluations is a managerial prerogative and that the differentiated supervision model was intended to improve teacher performance. On October 4, the Association demanded arbitration. It seeks an order directing the Board to cease and desist in unilaterally changing evaluation procedures. It also requests the removal of all documents created as a result of the allegedly illegal changes. This petition ensued.

The Board asserts that it has a managerial prerogative to evaluate teaching staff members and to provide the remedial assistance it deems necessary. It states that it has not adopted new evaluation procedures or criteria but instead has decided, consistent with Ridgefield Park Bd. of Ed., P.E.R.C. No. 90-70, 16 NJPER 139 (¶21054 1990), to provide enhanced supervision to some

teachers who were identified through pre-existing evaluation criteria and procedures. It further asserts that substantive issues regarding the evaluation process are not mandatorily negotiable. 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).

The Association counters that, under Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982), some evaluation procedures are mandatorily negotiable. It maintains that the Board implemented the program without advance notice to the Association; violated its obligation to negotiate over procedural aspects of the program; and deprived the Association of the opportunity to demand negotiations over procedural safeguards. The Association also contends that the adoption of the program violated education regulations and Article XV's requirements that evaluations be made openly and with the teacher's knowledge; that at least three formal observations be conducted; and that a summary report be submitted by April 1. Citing 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), it contends that an arbitrator may order the removal of the teachers' evaluations and related material.

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 contractual merits of the grievance or any contractual defenses the Board may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable and thus whether agreements over such subjects can be enforced through binding arbitration:

[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]

See also Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980).

Under this balancing test, negotiated agreements cannot significantly interfere with an employer's right to establish evaluation criteria and to evaluate employee performance.

Bethlehem; Hazlet Tp. Bd. of Ed., P.E.R.C. No. 79-57, 5 NJPER 113 (¶10066 1979), rev'd 6 NJPER 191 (¶11093 App. Div. 1980).

However, 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. They are also enforceable through binding arbitration. Newark State-Operated School Dist., P.E.R.C. No. 97-118, 23 NJPER 240 (¶28115 1997). Whether or not a proposal or contract provision is labeled "procedural" is not controlling; the balancing test must be applied in each instance. See City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998); Rutgers v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 120 (App. Div. 1992), aff'd 131 N.J. 118 (1993).

Applying these principles, we have held that a board has a prerogative to evaluate all aspects of a teacher's performance; to record all pertinent information; and to issue a summary evaluation report based upon a teacher's complete performance in all teaching assignments and other duties. East Brunswick Bd. of Ed., P.E.R.C. No. 98-150, 24 NJPER 319 (¶29152 1998), aff'd 25 NJPER 306 (¶30128 App. Div. 1999); Manalapan-Englishtown Bd. of Ed., P.E.R.C. No. 97-15, 22 NJPER 326 (¶27166 1996); Ridgefield Park Bd. of Ed., P.E.R.C. No. 90-70; Neptune Tp. Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988). Encompassed within the prerogative to evaluate performance are the rights to select evaluators and change evaluative criteria or an evaluative rating scale. See, e.g., Rutgers; State v. State Troopers NCO

Ass'n, 179 N.J. Super. 80, 91 (App. Div. 1981); High Bridge Bd. of Ed., P.E.R.C. No. 94-26, 19 NJPER 537 (¶24252 1993).

In addition, a board has a prerogative to prepare supervisory plans designed to correct deficiencies detailed in evaluations. See Cherry Hill Bd. of Ed., P.E.R.C. No. 92-119, 18 NJPER 308 (¶23131 1992); see also Manville Bd. of Ed., P.E.R.C. No. 94-58, 19 NJPER 605 (¶24288 1993) (arbitrator could not review superintendent's educational decision that teacher be reevaluated to assess computer proficiency); Ridgefield Park, P.E.R.C. No. 90-70 (finding to be evaluative, not disciplinary, comments in annual performance report calling for meetings between teacher and her supervisor to discuss "new instructional techniques, lessons, materials and whatever else may be necessary" to rectify performance problems); Burlington Cty. Comm. College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989) (contract provision was mandatorily negotiable to the extent it required a faculty member's supervisor to notify a faculty member of any professional deficiencies or goals, but not mandatorily negotiable to the extent it required mutual agreement on goals); compare N.J.A.C. 6:3-4.3 (professional improvement plan developed by teaching staff member and supervisor).

In applying the principle that evaluation procedures may be mandatorily negotiable, we have held that the most basic employee interests sought to be protected by evaluation procedures are having some form of notice of when the evaluation has taken

place, being able to receive suggestions for improvement and know specific criticisms, and having the opportunity to respond if appropriate. Ocean Tp. Bd. of Ed., 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). Commission and judicial case law have held to be mandatorily negotiable provisions concerning the number and timing of formal observations; providing that employees be notified in advance of the identity of their evaluator; requiring notice of evaluative criteria and changes in such criteria; and providing that an employee be given a statement of reasons for a personnel decision. State v. State Troopers NCO Ass'n; Rumson-Fair Haven Bd. of Ed., P.E.R.C. No. 99-55, 25 NJPER 41 (¶30017 1998); Matawan-Aberdeen Reg. School Dist., 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).

Within this framework, we turn to the Board's contention that the Association may not legally arbitrate a grievance contesting its decision to adopt a differentiated supervision program. For purposes of analysis, we stress that the program includes the Board's decision to apply different supervision methods to "marginally effective" teachers; its decision to place four teachers in the program and have the PIPs for these teachers developed by the teacher and his or her "mentor"; and its direction that, once a teacher is placed in the program, his or

her mentor will help the teacher improve performance by conducting five or more "intensive development cycles." The program also includes "procedures" which set forth how and when a teacher is placed in the program and timelines for subsequent conferences and evaluations.

Applying the negotiability balancing test to this matter, we conclude that certain aspects of the differentiated supervision program are not mandatorily negotiable. The Board's adoption of a policy to the effect that some teachers need intensive, non-traditional supervision reflects an educational policy determination that the availability of different supervision options will improve student achievement. Arbitral review of that judgment would significantly interfere with educational decision-making.

We also hold that the substantive decisions to place the four teachers in the differentiated supervision program are not mandatorily negotiable. Those decisions are tied to the content of the teachers' evaluations and the Board's regulatory obligation to issue an annual performance report that includes recommendations for improvement. See Cherry Hill; Ridgefield Park, P.E.R.C. No. 90-70; N.J.A.C. 6:3-4.3. Each placement reflects an educational judgment that the teacher's performance requires significant improvement and warrants intensive supervision. The fact that the Board has adopted a policy that stresses the importance of intensive supervision for some teachers

does not render legally arbitrable an evaluative determination that a particular individual needs such supervision. Ridgefield Park, P.E.R.C. 90-70; Cherry Hill. Nor is the evaluative nature of the placement decisions changed by the fact that an improvement program is not set forth in the annual performance reports, which instead direct that a PIP be developed by the teachers and their mentors.^{1/}

Further, we hold that the grievance is not legally arbitrable to the extent it alleges a violation of contract provisions pertaining to, or requiring negotiations over, "guidelines for applying the criteria" for placement in the program. Application of evaluative criteria for purposes of triggering intensive supervision is a managerial prerogative, State Troopers, and "guidelines" concerning the exercise of that prerogative would significantly interfere with it. Contrast Essex Cty., P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), aff'd NJPER

^{1/} The Association stresses that all four teachers were warned that their increments could be withheld. It is not clear whether a teacher placed in the differentiated supervision program will always be warned that an increment may or will be withheld absent satisfactory progress in the program. However, the warnings here do not alter our conclusion that the Association may not legally arbitrate the substantive decisions to place the teachers in the program. The statements reflect the seriousness of the Board's concerns and its desire to see performance improve. They are not in the nature of a reprimand for past actions and are focused on the Board's educational concerns for the future. See Greater Egg Harbor Bd. of Ed., P.E.R.C. No. 97-100, 23 NJPER 170 (¶28085 1997) (statement that increment might be withheld if performance did not improve was predominately evaluative).

Supp.2d 182 (¶158 App. Div. 1987) (application of evaluative criteria for purposes of triggering merit pay was legally arbitrable).

However, the grievance is legally arbitrable to the extent it alleges that the Board violated contractual notice provisions governing, or requiring negotiations over, notice of the adoption of the differentiated supervision program; notice of the criteria for placement; and a statement of the reasons a particular teacher was placed in the program. Rutgers; State v. State Troopers NCO Ass'n.^{2/} We find, consistent with Commission and judicial case law, that employees have a strong interest in being informed of the existence and purpose of, and the procedures for placement in, an intensive supervision program. That program is part of the Board's overall system for evaluating all teachers, which in turn affects retention, tenure, promotion and compensation decisions. Rumson-Fair Haven. Negotiations over such notice provisions would not significantly interfere with the Board's right to evaluate employees or determine that a particular employee needs intensive supervision. Indeed, such notice would better enable teaching staff members to participate in the program; is consistent with the program's emphasis on

^{2/} We need not resolve the parties' dispute over whether the Board in fact adopted new evaluative criteria. The arbitrator may consider that question in deciding whether the Board violated any contractual notice provisions.

collaboration between teacher and mentor; and would promote the parties' shared interest in improving teaching performance and educational quality.

Similarly, consistent with the case law noted earlier, we find that the grievance is legally arbitrable to the extent it alleges that the Board violated contract provisions concerning, or requiring negotiations over, advance notice of who will evaluate a staff member and the timing of formal observations. In that vein, we note that the Association cites contract provisions concerning the timing of evaluations and of the annual summary report, and that the Board has not made any particularized arguments that these provisions would significantly interfere with its ability to implement the differentiated supervision program. Cf. Rumson-Fair Haven (finding mandatorily negotiable provision limiting number of formal observations but stating that should an occasion arise where the Board has a specific need to conduct an additional evaluation, it may raise its educational policy concerns in seeking a restraint of arbitration of any grievance challenging its decision).

Finally, claims that the Board has not complied with education regulations pertaining to evaluation procedures may be arbitrated. Township of West Windsor v. PERC, 78 N.J. 98, 107 (1978).

We will not speculate on what remedy might be appropriate should an arbitrator find any procedural violations. Should an arbitrator find a contractual violation and issue a remedy that

the Board believes would significantly interfere with its educational policy determinations, it may seek relief at that time.

ORDER

The request of the Woodbury Board of Education for a restraint of binding arbitration is granted to the extent, if any, the grievance challenges the adoption of a policy concerning differentiated supervision; the content of evaluations; the substantive decisions to place four teachers in a differentiated supervision program; and the failure to negotiate over guidelines concerning the application of evaluative criteria. The request is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: June 29, 2000
Trenton, New Jersey
ISSUED: June 30, 2000