

P.E.R.C. NO. 79-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FAIR LAWN BOARD
OF EDUCATION,

Petitioner,

Docket No. SN-79-16

-and-

FAIR LAWN EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by the Board, the Commission, reaffirming its prior decisions in this area, finds evaluation procedures to be mandatorily negotiable. Given the Commission's limited role in scope proceedings, the Commission declines to comment upon the propriety of a potential remedy which an arbitrator may order. Accordingly, the Commission denies the Board's request for a permanent restraint of arbitration and finds the controverted grievance to be arbitrable if otherwise arbitrable under the parties' agreement.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FAIR LAWN BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-79-16

FAIR LAWN EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Jeffer, Walter, Tierney,
Hopkinson & Vogel, Esqs.

(Mr. Reginald F. Hopkinson, of Counsel)

For the Respondent, Goldberg & Simon, Esqs.

(Mr. Theodore M. Simon, of Counsel)

DECISION AND ORDER

On October 8, 1978 a Petition for Scope of Negotiations Determination was filed by the Board of Education of the Borough of Fair Lawn (the "Board") with the Public Employment Relations Commission seeking a determination as to whether certain matters in dispute between the Board and the Fair Lawn Education Association (the "Association") were within the scope of collective negotiations.

The dispute before the Commission originally arose as a matter which the Association sought to process through the grievance/arbitration procedure contained in the parties' collective negotiations agreement. On June 23, 1978 a grievance was filed on behalf of Rochelle Wasserman alleging that the contractual procedures pertaining to evaluations had been violated. The essence of the grievance was the alleged improper interference

with the negotiated teacher evaluation procedures by Walter A. Pipp, the Assistant Superintendent of Schools.^{1/} When the Association sought to submit this grievance to arbitration, the Board filed the within Petition which included a request for

1/ Said procedures are set forth at Article XIII of the parties' contract as follows:

ARTICLE XIII
Teacher Evaluation

- A. 1. All monitoring or observation of the work performance of a teacher shall be conducted openly, and with full knowledge of the teacher.
2. A teacher shall be given a copy, on an appropriate form, of any evaluation report prepared by his evaluators. No such report shall be submitted to the central office, placed in the teacher's file or otherwise acted upon without prior conference with the teacher. The teacher shall be required to sign a completed evaluation form. Such signature shall solely indicate that the report has been read by the teacher. The teacher shall also have the right to submit a written statement concerning such evaluation, which shall be attached to the report and filed.
- B. 1. Those complaints regarding a teacher made to any member of the administration by any parent, student, or other person which are used in any manner in evaluating a teacher shall be promptly investigated. The teacher shall be given an opportunity to respond to and/or rebut those complaints, which, as a result of the investigation, shall become part of his file.
2. The teacher shall acknowledge that he has had the opportunity to review such material by affixing his signature to the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. The teacher shall also have the right to submit a written answer to such material, and his answer shall be reviewed by the Superintendent or his designee and attached to the file copy.
3. All documents shall be filed, signature notwithstanding, and shall be so indicated by the supervisor. The Association shall be informed in writing should a teacher refuse to sign said material.

a temporary and permanent restraint of arbitration. A conference relating to the Board's request for an order temporarily restraining arbitration was held on October 20, 1978 by Stephen B. Hunter, Special Assistant to the Chairman, at which time the petitioner's request for a temporary restraint of arbitration was denied. However, the Association voluntarily agreed to hold the arbitration request in abeyance during the pendency of this matter before us. The Commission heard oral argument by both parties in this matter on April 26, 1979. The delay between the initial filing and the oral argument was caused by scheduling conflicts between the parties.

In its brief, the Board presents three basic arguments. First, citing Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd of Ed, 78 N.J. 144 (1978) the Board maintains that the "whole issue of denying a tenure appointment to non-tenured personnel" has been removed from the sphere of collective negotiations.^{2/} Second, the Board contends that N.J.S.A. 18A:27-3.1 and 3.3,^{3/}

^{2/} Teaneck Bd of Ed v. Teaneck Ed Ass'n, 161 N.J. Super. 75 (App. Div. 1978) is also cited in support of this position.

^{3/} N.J.S.A. 18A:27-3.1: "Every board of education in this State shall cause each nontenured teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester. Said evaluations are to take place before April 30 each year. The evaluations may cover that period between April 30 of one year and April 30 of the succeeding year excepting in the case of the first year of employment where the three evaluations must have been completed prior to April 30. The number of required observations and evaluations may be reduced proportionately when an individual teaching staff member's term of service is less than one academic year. Each evaluation shall be followed by a conference between that teaching staff member and his or
(continued)

negotiations over evaluation procedures, the Association contends that said statutory provisions merely establish minimum procedural safeguards. Therefore, the Board and the Association may agree to additional procedures as long as they do not contravene those mandated by statute or regulation. In reviewing the applicable regulations set forth at N.J.A.C. 6:3-1.19, the Association points out that the provisions of Article XIII in the contract either coincide with or supplement those procedures contained in the aforementioned regulation. Furthermore, the Association maintains, albeit indirectly, that the subject of the grievance, even if non-negotiable due to preemption, is nevertheless presentable through the contractual grievance procedure. Reliance is placed upon Township of West Windsor v. PERC, 78 N.J. 98 (1978) for this proposition, wherein the Supreme Court declared that all statutes which affect terms and conditions of employment are by reference incorporated into the parties' collectively negotiated agreement.

In addition, the Association asserts that upon finding a violation of the contract, the arbitrator would be well within his power to order the Board to reconsider the grievant's teaching performance.

As the Association correctly points out, there now exists a long line of Commission decisions which has held evaluation procedures to be mandatorily negotiable.^{4/}

^{4/} In re Plainfield Bd of Ed, P.E.R.C. No. 76-45, 2 NJPER 216 (1976) (appeal dismissed by stipulation) Docket No. A-4378-74; In re County College of Morris, P.E.R.C. No. 77-64, 3 NJPER 165 (1977); In re Wyckoff Bd of Ed, P.E.R.C. No. 77-41, 3 NJPER 79 (1977); In re West Orange Bd of Ed, P.E.R.C. No. 78-19, 3 NJPER 328 (1977); and In re Township of Maplewood, P.E.R.C. No. 78-89, 4 NJPER 258 (14132 1978).

Moreover, the applicable statutory and administrative provisions cited by Petitioner in support of its preemptive argument were in effect at the time those decisions were handed down.

It should also be noted that Ridgefield Park, supra, left in tact the mandatory realm of negotiations as defined by the Supreme Court in Englewood Board of Education v. Englewood Teachers Ass'n, 64 N.J. 1 (1975). It was based upon the definition of the phrase "terms and conditions of employment" articulated in the latter decision that the Commission declared evaluation procedures a required subject of negotiations.^{5/}

Petitioner has made no effort to distinguish the evaluation procedures at issue herein from similar procedures which we have previously found to be terms and conditions of employment.^{6/} Accordingly, the Commission finds that the subject matter of the grievance filed by the Association on behalf of Ms. Wasserman relates to evaluation procedures rather than criteria and is therefore mandatorily negotiable.

With regard to the Board's objection that the requested remedy would require the arbitrator to exceed the bounds of his authority, the Commission points out that its role in scope of negotiations decisions is limited to determining whether the particular matters in dispute are within the scope of collective

^{5/} The Court's finding that the legislation had not intended to create a permissive area of negotiations when it enacted Chapter 123 has no bearing upon those subjects which have been classified as mandatory by the Commission.

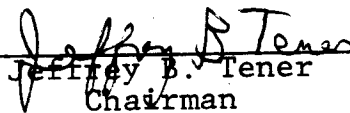
^{6/} See footnote 4.

negotiations.^{7/} Clearly, prior to the issuance of an arbitrator's decision and award it would be inappropriate for the Commission to pass judgment upon the propriety of a potential remedial order. It should be noted that N.J.S.A. 2A:24-8(d) specifically provides that the courts may vacate an award where the arbitrator has exceeded his authority. Therefore, the Commission declines to rule on that aspect of the Board's scope petition that requests that the arbitrator's potential remedy be restrained.^{8/}

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) and the foregoing discussion, the Public Employment Relations Commission hereby determines that the matter in dispute is a required subject for collective negotiations and that the grievance relating thereto is arbitrable if otherwise arbitrable under the parties' agreement. The Board of Education's request for a permanent restraint of arbitration is hereby denied.

BY ORDER OF THE COMMISSION



 Jeffrey B. Tener
 Chairman

Chairman Tener, Commissioners Graves and Hartnett voted for this decision. Commissioner Parcels voted against this decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
 May 22, 1979
 ISSUED: May 23, 1979

^{7/} See In re Wyckoff Bd. of Ed., supra, and In re Morris School District Bd of Ed., P.E.R.C. No. 79-61, 4 NJPER 120 (110070 1979).

^{8/} The Board's contention that the real issue is whether PERC can award tenure is not correct and its concerns in this area are premature.