

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HAZLET TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-79-32

HAZLET TOWNSHIP TEACHERS'
ASSOCIATION,

Respondent.

SYNOPSIS

The Commission in a scope of negotiations proceeding initiated by the Board of Education holds that the application of evaluation criteria, i.e. teacher absence, in a situation where potentially adverse notations were made in year-end evaluation forms, is a term and condition of employment which is mandatorily negotiable. The Commission, therefore, denies the request of the Board of Education for a permanent restraint of arbitration.

The Commission does reaffirm the distinction between two concepts: the adoption of evaluation criteria and the application of those criteria to the terms and conditions of employment of unit members. The former is a non-negotiable matter of educational or, more broadly, governmental policy. The latter, however, affects terms and conditions of employment in that criteria are or may be used as a basis for the imposition of some form of disciplinary action or in some other way which effects terms and conditions of employment. The Commission finds that the reasonableness of the application of such criteria may be subject to review by an arbitrator in the event of a dispute, consistent with the New Jersey Supreme Court's decision in Township of West Windsor v. PERC, 78 N.J. 98 (1978).

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Appearances

For the Petitioner, Crowell and Otten
(Mr. Robert H. Otten, of Counsel)

For the Respondent, Hayden L. Messner, Jr., NJEA
UniServ Field Representative

DECISION AND ORDER

On November 30, 1978, the Hazlet Township Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission seeking a determination as to whether certain matters in dispute between the Board and the Hazlet Teachers 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 within the parties' collective negotiations agreement. On March 22, 1978, a group grievance was filed on behalf of a number of teachers who had received year-end evaluations for the 1977-78 school year upon which notations had been made concerning the teachers' attendance records. The controverted remarks generally read, "Work attendance has been somewhat

adversely affected by scattered short term illness." When the Association sought to submit this dispute to arbitration, the Board filed the within petition which included a request for a temporary and permanent restraint of arbitration. A conference relating to the Board's request for an order temporarily restraining arbitration was conducted on December 18, 1978 by Stephen B. Hunter, Special Assistant to the Chairman. At the meeting the Association agreed to a voluntary stay of arbitration pending the Commission's decision in this matter.

In its brief filed on January 2, 1979, the Board argues that references to work attendance made on a teacher's evaluation report concern non-negotiable evaluation criteria as opposed to evaluation procedures. To support this position, the Petitioner cites the Appellate Division's recent decision in In re Teaneck Board of Education, 161 N.J. Super. 75 (App. Div. 1978). Therein the Court reversed PERC's finding^{1/} that evaluation criteria are permissively negotiable and held that they are subject solely to the unilateral determination of boards of education.^{2/} In Teaneck, supra, negative comments concerning nonparticipation in allegedly voluntary after-school activities had been placed in certain teachers' evaluation files. The Association argued that evaluations were contractually restricted to school-related activities. Thus, that dispute involved the right of the Board to agree to a particular criterion. In the instant matter, however, it is not the criteria which is at issue.

^{1/} P.E.R.C. No. 78-3, 3 NJPER 224 (1977).

^{2/} This in no way precludes informal consultation between teachers and the administration.

The Association herein does not contest the right of the Board to establish evaluation criteria or to warn an employee that his or her attendance record could be a factor in management's decision to renew a teacher's employment contract. Rather, the Respondent maintains that the controverted matter does not involve evaluation criteria but relates to a form of disciplinary action taken by the Board which is alleged to be covered by a contractual "just cause" provision.^{3/}

The parameters of a contractual grievance procedure in the public sector have most recently been defined by the Supreme Court in Township of West Windsor v. PERC, 78 N.J. 98 (1978) wherein the court declared that:

"The terms of all negotiated grievance procedures must 'cover' grievances concerning the 'interpretation, application or violation of policies, agreements and administrative decisions' affecting the terms and conditions of public employment." 78 N.J. at 117 (emphasis supplied).

The operative definition of the phrase "terms and conditions of employment", which was first formulated by the Supreme Court in Dunellen Education Ass'n v. Dunellen Bd. of Ed., 64 N.J. 17, 25 (1975), was once again endorsed by the Court in Ridgefield Park Ed. Ass'n v Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). As set forth in the aforementioned decisions, mandatorily negotiable terms and conditions of employment are those which "intimately and directly affect the work and welfare of public employees and on

^{3/} Article IV, paragraph C states: "No teacher shall be disciplined, reprimanded, reduced in rank or compensation or deprived of professional opportunity, or deprived of the privilege of attending professional conference without just cause."

which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy."^{4/}

One prior Commission decision is particularly pertinent to our consideration of the issue herein and will be briefly reviewed. In re Glassboro Bd. of Ed., P.E.R.C. No. 77-12, 2 NJPER 355 (1976) the Board unilaterally adopted an absence and tardiness policy. Therein the Association, while not directly questioning the Board's decision to utilize absence and tardiness as evaluative criteria, argued that the policy in question went further by establishing various disciplinary sanctions. The Association contended that subjects of remuneration and disciplinary procedures - as opposed to the Board's decision to avoid excessive absence or tardiness - directly affect the financial and personal welfare of teachers and should therefore be considered mandatorily negotiable. We concluded that monetary penalties as well as notations in an employee's personnel file clearly affect terms and conditions of employment.^{5/} The Commission went on to note that, in both the public and private sectors, the reasonableness of the application of such rules typically was subject to the review of an independent third party in the event of a dispute, i.e., such disputes were arbitrable. Thus, an employer could take reasonable disciplinary action subject to subsequent impartial scrutiny by an arbitrator. This is consistent with the Supreme Court's holding

^{4/} 78 N.J. at 156.

^{5/} A similar approach has been adopted in the private sector and by New York's Public Employment Relations Board. See Murphy Diesel Co. v. NLRB, 454 F.2d 303, 78 LRRM 2993 (7th Cir. 1971) In re City of Albany, 9 PERB 3015 (1976).

in the West Windsor decision, supra. There the specific issue was the PBA's demand to expand the definition of grievance in the parties' contract to include disputes arising from the disciplining of police officers. See 78 N.J. 98 at 116, at footnote 4, and Judge Conford's opinion concurring in part and dissenting in part, 78 N.J. at 118.

In deciding this matter, we believe it to be essential to recognize the distinction between two things: the adoption of evaluative criteria and the application of those criteria to the terms and conditions of employment of unit members. The former is a non-negotiable matter of educational or, more broadly, governmental policy. Our Supreme Court recently has determined that in public sector in New Jersey there is no permissive category of negotiations. Items are either mandatorily negotiable or they cannot be negotiated at all, even voluntarily by the parties.^{6/} We are satisfied that the adoption or the establishment of criteria to be utilized in evaluating employees is not mandatorily negotiable as that term has been defined. See Teaneck, supra.

On the other hand, we are confident that the Legislature intended to allow negotiations and, when so agreed by the parties, arbitration^{7/} regarding the application of those criteria when this application affects employees' terms and conditions of employment. Thus, we hold that the application of the evaluative criteria is a term and condition of employment which is mandatorily

^{6/} Ridgefield Park, supra. An exception to this is police and fire department negotiations.

^{7/} See N.J.S.A. 34:13A-5.3.

negotiable within the intendment of Ridgefield Park, supra and that the insertion of the "shall be utilized" sentence to N.J.S.A. 34:13A-5.3^{8/} renders disputes regarding the application of the criteria to be arbitrable if within the scope of the parties' contractual grievance/arbitration procedure.^{9/}

Utilization of this framework takes cognizance of the Board's nonnegotiable right to establish the criteria by which it chooses to measure or evaluate its employees while at the same time permitting negotiations over the application of the criteria to the terms and conditions of employment of particular teachers. Thus, the parties may agree to submit disputes over the application of the criteria to arbitration pursuant to a "just cause" or similar test to be invoked by the arbitrator.

In summary, a board's ability to establish evaluation criteria is unaffected by our conclusion. That is neither negotiable nor arbitrable. Teaneck, supra. However, as we indicated in Glassboro, supra, the application of the criteria affects terms and conditions of employment in that the criteria are or may be used as a basis for the imposition of some form of disciplinary action or in some other way which affects terms and conditions of employment, and the reasonableness of the application of such criteria is subject to review by an arbitrator in the event of

^{8/} N.J.S.A. 34:13A-5.3 provides, in relevant part, "Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement."

^{9/} See In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975).

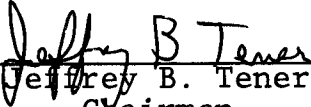
a dispute.^{10/}

Accordingly, the Commission, distinguishing between the Board's adoption of evaluation criteria which is nonnegotiable and the application of that criteria, will deny the Board's request for a permanent restraint of arbitration.

ORDER

Based upon the above discussion, IT IS HEREBY ORDERED that the request of the Hazlet Township Board of Education for a permanent restraint of arbitration is denied. The instant group grievance regarding the Board's application of one of its (non-negotiable) evaluation criteria, i.e., teacher absence, in its evaluation of teachers affects teachers' terms and conditions of employment and is negotiable and, if the parties have so agreed, arbitrable.

BY ORDER OF THE COMMISSION



 Jeffrey B. Tener
 Chairman

Chairman Tener, Commissioners Graves, Hartnett and Parcells voted for this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
 March 8, 1979
 ISSUED: March 9, 1979

^{10/} We have previously held that a "just cause" provision such as the article at issue in this matter is a required subject of negotiations. In re East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976). But, as noted above, the scope of the grievance procedure is confined to terms and conditions of employment. We further note that we are not ruling upon the question as to whether the particular notations in the evaluation forms in this case constitute "just cause" within the meaning of the pertinent contractual provision. This is for the arbitrator to determine. In re Hillside Board of Education, supra, and Twp. of West Windsor 78 N.J. 98 (1978).