

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PINELANDS REGIONAL BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2022-009

PINELANDS REGIONAL EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Pinelands Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Pinelands Regional Education Association asserting that the Board violated the parties' collective negotiations agreement when a supervisor took photographs (of student work) and used them as an integral part of the overall observation of a teaching staff member employed by the Board. The Commission finds that the Association does not challenge the Board's reliance on the use of photographs when conducting teacher observations, which is more in the nature of criteria selection and thus not arbitrable, and further that the Association may seek to enforce a negotiated contractual provision prohibiting the "monitoring or observation of the work performance of an employee" without the "full knowledge of the employee," as this is more in the nature of a procedural notice requirement, which is mandatorily negotiable and 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.

P.E.R.C. NO. 2022-28

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Appearances:

For the Petitioner, Cooper Levenson, P.A., attorneys
(Amy Houck Elco, of counsel and on the brief; Yolanda
N. Melville, on the brief)

For the Respondent, Mellk O'Neill, attorneys (Arnold M.
Mellk, of counsel and on the brief; Edward A. Cridge,
on the brief)

DECISION

On September 17, 2021, the Pinelands Regional Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Pinelands Regional Education Association (Association). The grievance asserts that the Board violated Article 7 of the parties' collective negotiations agreement (CNA) when the Shared Services Supervisor and Supervisor of Math and Science for the district took photographs (of student work) and used them as an integral part of the overall observation of the grievant, S.T., a teaching staff member employed by the Board.

The Board filed briefs, exhibits and the certifications of its Shared Services Supervisor and Supervisor of Math and Science, John Berenato. The Association filed a brief and the certification of its President, Mel Reid. These facts appear.

The Association represents regularly employed teaching staff members, special services staff, library/media specialists, school nurses, guidance counselors, secretaries, bookkeepers, accounting clerks, attendance officers, clerk typists, teacher aids, custodial staff, maintenance staff, sign-language interpreters and receiving personnel. The Board and Association are parties to a CNA in effect from July 1, 2018 through June 30, 2021. The grievance procedure ends in binding arbitration.

Article 7 of the parties' CNA, entitled "Evaluation of Employees," provides in pertinent part:

A. Open Evaluations

All monitoring or observation of the work performance of an employee shall be conducted with full knowledge of the employee. The use of eavesdropping, public address systems and similar surveillance devices shall be strictly prohibited.

On April 20, 2021, the Association filed a Level 1 grievance on behalf of S.T. asserting, in pertinent part:

The Association was made aware on March 23, 2021 that photos were taken during an observation. [Article 7 of the CNA] prohibits the practice[.]

. . .

The recordings in question were an integral part of the overall observation. The Board of Education has acknowledged, through bargaining, that this is an inappropriate practice. As such, the material in question, and the resulting impact on the observation, have violated this agreement.

The grievance seeks as relief, among other things: a new observation in compliance with Article 7 of the CNA to be substituted for the current observation; and for the District to refrain from using any recording devices as part of any and all staff observations or evaluations.

Berenato certifies that the Association circumvented the grievance process set forth in Article 3(E) of the CNA:

Supervisor Level: Step 1: An employee shall discuss his grievance with his immediate supervisor in an attempt to resolve the matter informally. The supervisor shall attempt to adjust the matter and shall respond orally to the grievant within five (5) working days.

Berenato further certifies that the District utilizes the teacher evaluation model developed by Dr. Robert Marzano based on his work in The Art and Science of Teaching, known as the Marzano's Causal Teaching Model (Marzano Model). The Marzano Model relies on teachers incorporating "elements" from Marzano's four domains of instruction, which are as follows:

- a) Domain 1: Classroom Strategies and Behaviors
- b) Domain 2: Preparing and Planning
- c) Domain 3: Reflecting on Teaching
- d) Domain 4: Collegiality and Professionalism

The four domains include 60 elements: 41 in Domain 1; eight elements in Domain 2; five elements in Domain 3; and six elements in Domain 4. Berenato certifies that his actions were consistent with the procedure of creating and maintaining staff evaluation documentation. Specifically, the District's administration routinely takes photographs as part of the District's evaluative process of personnel in furtherance of the Marzano Model and District policies.

Reid certifies that the basis of the Association's grievance is the allegation that the subject photographs were taken without notice to, or the knowledge of the grievant.

Berenato supplementally certifies that the grievant possessed full knowledge about the photographs during his actual observation - and not on March 23, 2021. Specifically, the grievant was aware that he took the photographs during the March 12 observation. He met with the grievant several days later on March 18. At the March 18 meeting, he referenced a photograph to the grievant in order to provide specific feedback on one (1) of the Marzano components. The grievant admitted to him that he and his students witnessed on March 12 that he took the photograph. At no time during their March 18 meeting did the grievant indicate or inform him that he was upset by the photo being taken or that the photograph violated his contractual rights. At the

March 23 meeting, the grievant expressed personal concern with the photographs to him.

The Board denied the grievance at all levels. On September 1, 2021, the Association submitted a Request for Submission of a Panel of Arbitrators. 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 (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.]

We must balance the parties' interests in light of the particular facts and arguments presented. *City of Jersey City v. Jersey City POBA*, 154 N.J. 555, 574-575 (1998).

A school board has a managerial prerogative to observe and evaluate employees. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982). Evaluation criteria are not mandatorily negotiable. But procedural aspects of evaluations, like notice of the criteria to be applied or of the identity of evaluators, are mandatorily negotiable unless preempted. Ibid., see also S. Hunterdon Reg. Bd. of Ed., P.E.R.C. NO. 2013-67, 39 NJPER 460 (¶146 2013), Burlington Cty College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989), citing Hoboken Bd. of Ed., P.E.R.C. No. 84-139, 10 NJPER 353 (¶15164 1984). In Fairview Bd. of Ed., P.E.R.C. NO. 80-18, 5 NJPER 378 (¶10193 1979), we found existing and/or proposed CNA provisions "calling for open evaluation observations" and prohibiting "eaves-dropping and surveillance devices" during evaluations to be "basically"

procedural, not otherwise controlled by regulations, and thus negotiable.

The Board argues that the District's administration routinely takes photographs as part of the evaluative processes, in furtherance of the Marzano Model and District policies. Accordingly, it maintains that the photographs taken by Mr. Berenato as part of S.K.'s evaluation further the District's personnel practices and were evaluative in nature. The Board asserts that these actions are not subject to a challenge through arbitration before the Commission.

The Association, citing Fairview, supra, argues that in the context of teacher evaluations the prohibition of eavesdropping and surveillance devices is mandatorily negotiable, because these are matters of evaluation procedure, not criteria. The grievance alleges the Board breached its agreement upon that mandatorily negotiable subject. Whether or not S.K. was observed/evaluated in a surreptitious manner, in violation of CBA Article 7(A), is the sole issue to be determined in arbitration. The Association argues that the grievance neither contends, nor depends upon, a determination that the Board is prohibited from using photography or other multimedia when it conducts teacher evaluations.

In reply, the Board argues that this matter is distinct from Fairview, supra, because no language in the parties' CNA is "analogous" to the "open evaluation" provision discussed in

Fairview. The Board also cites step one of the parties' grievance procedure, which requires an employee to "discuss his grievance with his immediate supervisor in an attempt to resolve the matter informally." The Board also contends that the factual basis of the grievance is in dispute, that is, whether or not S.K. was aware that Berenato took photographs during the observation; and reiterates that the District's actions were consistent with its standard procedures of creating and maintaining staff evaluative documentation.

We decline to restrain arbitration. Article 7(A) of the parties' CNA, which is entitled "Open Evaluations" and which prohibits the "use of eavesdropping . . . and . . . surveillance devices" during observations, is substantively identical to the contractual provisions discussed in Fairview, supra, requiring "open observations" and prohibiting "eaves-dropping and surveillance devices" during evaluations, which we found to be procedural and negotiable. We find the Board's argument to the contrary to be unpersuasive.

The Board's practice of relying on the use of photographs when conducting teacher observations may be more in the nature of criteria selection, which is not arbitrable. But the Association does not challenge that practice, per se. It only seeks to enforce a negotiated contractual provision prohibiting the "monitoring or observation of the work performance of an

employee" without the "full knowledge of the employee." We find this to be more in the nature of a procedural notice requirement, which is mandatorily negotiable and arbitrable. The Board does not argue that arbitration is preempted by statute or regulation, nor are we aware of any such statutory policy. As such, we find that arbitration of this dispute will not substantially interfere with the Board's management prerogatives. See Lacey Tp. Bd. of Educ. v. Lacey Tp. Educ. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), aff'd, 130 N.J. 312 (1992).

The Board's arguments regarding whether the grievance procedure was properly followed and whether S.T. knew that Berenato took photographs during his observation go to the merits of the grievance, and may be presented to the arbitrator.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: January 27, 2022

Trenton, New Jersey