

P.E.R.C. NO. 92-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BLOOMFIELD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-91-43

BLOOMFIELD EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Bloomfield Education Association against the Bloomfield Board of Education. The grievance alleges that a teacher was reprimanded without just cause. The Commission finds that the principal's criticism of the teacher's alleged misconduct was not predominantly an evaluation of her teaching performance.

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Appearances:

For the Petitioner, Schwartz, Pisano, Simon & Edelstein,
attorneys (Nathanya Simon, of counsel)

For the Respondent, Michael R. Mulkeen, NJEA UniServ Field
Representative

DECISION AND ORDER

On December 26, 1990, the Bloomfield Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Bloomfield Education Association and a teacher. The grievance alleges that the teacher was reprimanded without just cause.

The parties have filed briefs, exhibits, and an affidavit.^{1/} These facts appear.

The Association represents the Board's certificated professional personnel including classroom teachers. The Board and the Association entered into a collective negotiations agreement effective from July 1, 1988 until June 30, 1990. Its grievance

^{1/} The Association withdrew a request for a hearing.

procedure ends in binding arbitration. Article 7 is entitled Teachers' Rights. Section E provides, in part:

No teacher shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth....

Charlotte Clark is a tenured teacher. She teaches fourth grade at the Carteret School.

On April 11, 1990, Clark's principal met with her and then prepared a "Tenured Teacher Observation Report." The report, however, concerned an incident of alleged misconduct rather than an observation of Clark's classroom teaching. Thus all 13 categories on the form were marked inapplicable except for "performance of routine duties" which was marked unsatisfactory. Under "Written Comments: (Instructional process and total performance)," the principal criticized Clark's "handling of a teacher/student discussion involving two of your students." In particular, the principal asserted that the first student had confided in Clark that her mother's boyfriend was "guilty of sexual misconduct (touching, bothering)" towards the second student; that Clark had told the first student that she could talk to Clark and Clark would not tell anyone; that the second student's stepfather had been called by someone allegedly at Carteret School; and that the stepfather had called the police who in turn called the principal. The principal stated that by failing to report the incident to him immediately, despite knowing of the first student's family history, Clark had

shown poor discretion; had not complied with district procedures, and had possibly jeopardized the student's wellbeing. He also reminded Clark that she had a legal obligation to report suspicions of child abuse to the New Jersey Division of Youth and Family Services and that a failure to do so could result in a \$1,000 fine or six months in jail. The narrative ended with the principal's statement that "[i]t is my hope that this oversight in procedure and poor discretion on your part will not occur in the future. I will anticipate your total compliance with, and effective execution of, all building and District practices, procedures, and policies." The form then concluded with an "unsatisfactory" in the space for "General Summary" and blanks in the spaces for the signatures of the evaluator and evaluatee.^{2/}

A follow-up conference was scheduled for April 23, 1990. Clark's request for an Association representative was denied.

On May 3, 1990, Clark submitted an addendum. She asserted that the principal had not been fair-minded; disputed his factual assertions, and stated that his report did not accurately reflect what she told him at the April 11 meeting. For example, she stated that nothing in her conversation with the students gave her reasonable cause to believe that one of them might be a victim of sexual abuse -- the students had described only a light, innocuous

^{2/} In an affidavit, the principal asserts that observation forms are regularly used for non-classroom observations and that this report was for the purpose of improvement, not punishment.

"tapping" on the second student's back. Also, she denied that she told the first student that she would not tell anyone of their conversation and that she had been fully informed of the first student's family history. She also stated that the principal had told her that the second student's stepfather was called by someone who identified herself as Charlotte Clark, but she denied doing so.

On May 23, 1990, the principal submitted a rebuttal to Clark, with copies to the Board's Superintendent and attorney and Clark's personnel file. The rebuttal stated that Clark's addendum contained inaccurate accounts and interpretations, was emotional in nature, and was at times a vicious attack. The rebuttal noted that before writing the observation report, the principal had interviewed Clark, the stepfather, and the two students in the presence of a DYFS investigator and had determined that there were two distinctly different versions of what had happened and what was said. The principal stated, for example, that while Clark had described being told about a light tapping on the back, the first student told him that she had told Clark about her mother's boyfriend touching the second student's "butt" and kissing her. The rebuttal concluded: "After considering all the information available to me I was most certain, and still am, that no matter which version is the truth, failing to report this incident to me was a serious oversight in procedure/policy and an exercise of poor discretion on your part." The principal hoped that Clark would be able to put "this most unfortunate situation" behind her.

Clark submitted another response. The response did not contest the principal's account of what the first student may have told the DYFS investigator or that the principal may have had certain corroborating evidence that the second student might have been abused. Instead, the response contested the principal's alleged mischaracterization of what Clark told him at the April 11th meeting and his decision to credit the first student's account of her conversation with Clark rather than Clark's account of their conversation.

The principal then ended the exchange with a memorandum stating that the documentation in Clark's personnel file would stand on its own merits and that he would not dignify her last correspondence with a response.

The Association and Clark grieved the report as a reprimand without just cause. They asked that the reprimand be removed from Clark's personnel file. The Superintendent and the Board denied the grievance; the Association demanded binding arbitration; and this petition ensued.

The boundaries of our jurisdiction are 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. [Id. at 154]

Thus, we do not consider the merits of the principal's allegations or Clark's responses.

In Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87), we distinguished between evaluations of teaching performance and disciplinary reprimands. Only reprimands may be submitted to binding arbitration. We found that by enacting the discipline amendment, the Legislature had not meant to make an evaluation, as opposed to a reprimand, a form of discipline. We then stated:

We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore non-negotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions

which are not designed to enhance teaching performance are disciplinary. Id. at 826

We now examine whether the principal's criticism of Clark was an evaluation of her teaching performance. While this criticism was contained on an observation report form, this report was not based on a classroom observation and was not issued pursuant to the obligation under N.J.A.C. 6:3-1.21 to evaluate teachers periodically. Contrast, e.g., Neptune Tp. Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988). The observation form was obviously designed for classroom observations and is generally "not applicable" to instances of alleged misconduct unrelated to classroom teaching. Rather than observing Clark's teaching, the principal learned from the police of the sexual abuse accusations and conducted his own investigation of Clark's role and knowledge. The principal interviewed Clark, the stepfather, and the two students in the presence of a DYFS investigator. Rejecting Clark's explanation and concluding that Clark knew about, but did not report a suspected case of child abuse, he wrote a report criticizing her poor discretion and failure to comply with Board policies. The report is cast in terms of a rebuke rather than constructive criticism. While it does not expressly warn of disciplinary consequences for future infractions, it does demand "total compliance" with all practices, procedures, and policies. The documentation will be part of her permanent record and can be used to support future discipline if Clark repeats the alleged misconduct investigated and recorded. Under all these circumstances, we

conclude, on balance, that the principal's criticism of Clark's alleged misconduct was not predominantly an evaluation of her teaching performance. See Washington Tp. Bd. of Ed., P.E.R.C. No. 90-109, 16 NJPER 326 (¶21134 1990); Freehold Tp. Bd. of Ed., P.E.R.C. No. 89-80, 15 NJPER 97 (¶20044 1989); Union Beach Bd. of Ed., P.E.R.C. No. 87-44, 12 NJPER 828 (¶17137 1987), aff'd App. Div. Dkt. No. A-1714-86T7 (10/2/87).^{3/}

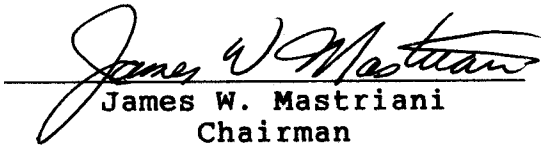
We stress that we have studied the facts of this case carefully and our holding is limited to them. We also stress that we do not and cannot decide whether the report was justified. The arbitrator must answer that question. In exercising that limited authority, the arbitrator may not reconsider the Board's policies on reporting suspected cases of child abuse, negate the principal's right to investigate alleged infractions, or prevent the principal from communicating his findings and concerns to an employee. See Union Beach Bd. of Ed. (arbitrator's authority does not extend to a review of the policy of requiring social workers to accept referrals).

^{3/} We note, furthermore, that N.J.S.A. 34:13A-5.3 requires public employers to negotiate grievance and disciplinary review procedures by means of which their employees may appeal violations of employer policies, including disciplinary determinations, affecting them. This dispute centers on alleged misconduct in violation of district policy and is within section 5.3's intendment.

ORDER

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Grandrimo and Smith voted in favor of this decision. Commissioners Goetting and Wenzler voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

DATED: Trenton, New Jersey
December 19, 1991
ISSUED: December 20, 1991