P.E.R.C. NO. 2002-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GREATER EGG HARBOR REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2001-46

OAKCREST-ABSEGAMI TEACHERS
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants a restraint of binding arbitration to the extent, if any, a grievance filed by the Oakcrest-Absegami Teachers Association against the Greater Egg Harbor Regional Board of Education challenges the Board's selection of an evaluator and contends that a summer evaluation of a certificated Media Specialist was unjust discipline. Three procedural requirements for observations and evaluations established by the parties' contract and allegedly violated were not addressed by the Board and the Commission declined to restrain binding arbitration over them.

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 (Bruce Taylor, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys (Keith Waldman, on the brief)

DECISION

On March 8, 2001, the Greater Egg Harbor Regional High School Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Oakcrest-Absegami Teachers Association. The grievance alleges that the Board inappropriately evaluated a teacher.

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

The Association represents teaching staff members. The Board and the Association are parties to a collective negotiations

agreement effective from July 1, 2000 through June 30, 2003. The grievance procedure ends in binding arbitration.

Article 8 is entitled Teacher Evaluation. It provides:

> A. The procedures set forth in Board policies relating to evaluation of teaching staff members shall be the procedures used in evaluating all teachers.
>
> B. 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 of any class visit or evaluation report prepared by his evaluators at least one (1) day before any conference to discuss it. No such report shall be submitted to the central office, placed in the teacher's file or otherwise acted upon without the teacher having an opportunity for a conference with the evaluator.

Board Policy 3221 is entitled Evaluation of Tenured and Nontenured Teaching Staff Members. It specifies the rationale and methods for teaching staff evaluation. It states that each tenured and nontenured teaching staff member shall be evaluated annually by appropriately certified and trained administrators and/or supervisors using criteria taken from the instructional priorities and program objectives of each member's position as specified in the job description. These criteria shall be developed in consultation with the teaching staff member and based on job descriptions. The policy also sets forth the State Board of Education's definition of an observation as "a visitation to an assigned work station by a certified supervisor for the purpose of

formally collecting data on the performance of a teaching staff member's assigned duties and responsibilities and of a duration appropriate to same." It describes an evaluation as "a written report (of the observation) prepared by the administrator or supervisor who did the observation." Finally, the policy states that the superintendent shall, in implementing the policy, develop procedures in consultation with the tenured teaching staff members for:

> 1. The collection and reporting of data which is appropriate to the job description and minimally includes the observation of classroom instruction and the evaluation of classroom instruction. A minimum of one observation and associated evaluation conference for tenured teaching staff and three for nontenured teaching staff members.
>
> 2. The preparation of the Individual Professional Improvement Plan.
>
> 3. The procedural conduct of the annual performance summary evaluation conferences.

Richard Uecker is an eleven-month certificated Media Specialist. During the summer of 2000, Uecker's job performance was observed by Jeri-Lynn Gatto, a ten-month supervisory employee. On September 14, 2000, Gatto issued a written evaluation report for Uecker for the summer of 2000.

The report consists of eight Job Tasks followed by a list of criteria for performing each job task. An employee receives a rating for each job task from a choice of: Exceeds Expectations; Meets Expectations; Needs Improvement. Uecker received three Needs Improvement and five Meets Expectations ratings. Ueckers

was commended for a number of items and recommendations for improvement were made. Finally, the supervisor noted that the overall assessment of the summer AVA program is that "there is tremendous room for improvement" and the appearance of "wasted time, misuse of time and a general lack of organization." She states that "if there is a consistent pattern of Job Tasks that continue to need improvement either in the summer setting or school year setting, a contract without increment could be issued in the future."

On November 7, 2000, the Association filed a grievance over the summer evaluation. The grievance states:

> Mr. Richard Uecker stands aggrieved by which Mrs. Jeri-Lynn Gatto, an agent of the GEHRHSD Board of Education, has done the following:
>
> 1. Mr. Uecker received a "Summer Evaluation." Mr. Uecker was not told that he was being observed during the months of June, July, and August, 2000. This is in violation of Article 8, Section B-1 of the negotiated agreement between the Board and the OATA.
>
> 2. The "Summer Evaluation" in question violates the past practice of the summer supervisory procedure of GEHRHSD, that is, specifically, having a twelve-month administrator responsible for any observation and/or evaluation.
>
> 3. Mrs. Gatto informed Mr. Uecker and his representative on 9/21/00 and his representative again on 10/5/00 that ten-month supervisory employees are instructed to observe and evaluate eleven- and twelve-month employees of the district during the months of June, July, and August. The OATA was never informed, in writing nor verbally, of this negotiated item between the GEHRHSD and the OATA.

> 4. Mr. Uecker received an Annual Evaluation Report for 1999-2000 written by Mrs. Gatto, in June 2000. He was not told that Mrs. Gatto would be his supervisor for the summer; he was not told on those occasions when she observed him that she was doing so; nor was he told when he communicated with her on various occasions during the months of June, July, and August that his actions and communications delivered in the spirit of cooperation would be used against him in the **second Annual Evaluation of 1999-2000.** This is in violation of Article 8, B-1 of the negotiated agreement, Board Policy, and the moral and ethical standards that we aspire to instill in our students.
>
> 5. Mr. Uecker has <u>never</u> in the history of his employment at GEHRHSD received an evaluation for his summer activities. The "Summer Evaluation" in question violates Mr. Uecker's right not to be harassed and threatened by his ten-month supervisor. Mrs. Gatto has recently changed procedures that have worked well for many years; when these procedures were not successful, Mr. Uecker was reprimanded via the evaluation in question. This is clearly punitive in nature.

As a remedy, the grievance seeks that the summer evaluation be withdrawn; that ten-month supervisory personnel be instructed of their negotiated, paid duties regarding the months of June, July, and August; that the Association president be informed in writing of changes in procedure regarding observations and evaluations during the months of June, July and August; and that Gatto's harassing, threatening, and punitive tactics toward Uecker cease.

On November 15, 2000, the Board denied the grievance. It states that an employee's supervisor is always responsible for that employee's evaluation.

On January 22, 2001, the Association demanded arbitration. The demand asserts that the Board violated the agreement by inappropriately evaluating Uecker. By way of remedy, the demand seeks removal of the summer evaluation from Uecker's personnel file and any other remedies that may apply.

This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 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 cannot consider the merits of the grievance or any of the parties' contractual defenses.

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]

The Board asserts that the selection of a supervisor for evaluation purposes is a non-arbitrable managerial prerogative. The Board further asserts that the evaluation is not disciplinary and that, while it is critical of performance, it attempts to correct Uecker's professional approach to organization and delivery of educational services, and does not touch on traditional disciplinary topics.

The Association asserts that the Board did not follow the procedures in the contract and the evaluation policy. It states that Uecker was observed in secret and those observations were used to prepare a second evaluation contrary to the agreement and policy. It asserts that Uecker was not told that Gatto would be his supervisor for the summer or that she would be observing him, and was not informed of when those observations were taking place. The Association agrees that a board has a prerogative to evaluate an employee, but argues that procedures to be used for the observation and evaluation process are negotiable. The Association points out that the agreement states that observations shall be conducted openly and with full knowledge of the teacher and that there is to be one annual evaluation.

Under the negotiability balancing test, negotiated agreements cannot significantly interfere with an employer's right to establish evaluation criteria and to evaluate employee performance. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Woodbury Bd. of Ed., P.E.R.C. No. 2000-108, 26 NJPER 313 (¶31127 2000); 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).

The Association has identified three procedural requirements for observations and evaluations established by the parties' contract and allegedly violated: all observations are to be conducted openly; all monitoring of work performance must be conducted with a teacher's full knowledge; and there is to be one annual evaluation per teaching staff member. Each of these requirements is mandatorily negotiable and enforceable through

binding arbitration. Woodbury. Employees have a basic interest in knowing when an evaluation is taking place. The employer has not identified any governmental policy interest that would be compromised by providing that notice. Similarly, employees have an interest in having some finality to each year's evaluation cycle. Thus, we have held limits on the number of annual formal evaluations to be mandatorily negotiable. Rumson-Fair Haven Reg. H.S. Bd. of Ed., P.E.R.C. No. 99-55, 25 NJPER 41 (¶30017 1998). This holding does not preclude informal observations and discussion about teaching performance or restrict the contents of the required annual written performance report. Id. at 43.

The employer's brief does not address these procedural issues and it has not filed a reply brief. We decline to restrain binding arbitration over them.

The employer's brief does, however, seek a restraint of arbitration over certain other issues raised in the initial grievance. We address these issues now.

The grievance appears to challenge the Board's right to have a ten-month supervisor evaluate an eleven-month employee. We will restrain arbitration over the identity of the evaluator. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 50 (1982). While employees may have an interest in determining who will evaluate them, the employer's interest in selecting the evaluator it believes most qualified predominates.

The grievance also suggests that the evaluation is punitive and the Board seeks a restraint of arbitration over any claim that the evaluation is disciplinary. In 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), 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 to N.J.S.A. 34:13A-5.3, 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]

This evaluation was designed to enhance teaching performance and is not a reprimand. To the extent, if any, the Association seeks

to contest the evaluation as unjust discipline, we will restrain binding arbitration.

ORDER

The request of the Egg Harbor Regional High School Board of Education for a restraint of binding arbitration is granted to the extent, if any, the grievance challenges the Board's selection of an evaluator and contends that the September 2000 evaluation of Richard Uecker was unjust discipline. 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: July 26, 2001
Trenton, New Jersey
ISSUED: July 27, 2001