

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JACKSON TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-82-10

JACKSON EDUCATION ASSOCIATION,

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Respondent.

SYNOPSIS

In a scope of negotiations determination, the Public Employment Relations Commission declines to restrain arbitration of a grievance which the Jackson Education Association ("Association") filed against the Jackson Township Board of Education ("Board"). The grievance alleged that the Board had failed to abide by a grievance settlement agreement with the Association which required the Board to remove material from a teacher's evaluation. The material was allegedly included in retaliation for the teacher's filing of grievances and speaking out at a Board meeting. The Association alleged that the refusal to honor the settlement agreement itself constituted anti-union retaliation and harassment prohibited by the parties' contract. So framed, the predominant issue in this case is harassment and reprisal for protected activity rather than a challenge to evaluation criteria.

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Appearances:

For the Petitioner, Cassetta, Brandon Associates
(Raymond A. Cassetta, Consultant)

For the Respondent, Bernie Gilbert, Field Representative
NJEA UniServ Regional Office

DECISION AND ORDER

On August 28, 1981, the Jackson Township Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board seeks to restrain the binding arbitration of a grievance which the Jackson Education Association (the "Association") has filed. This grievance alleged that the Board violated its collective agreement when, refusing to honor its disposition of a previous grievance, it included certain materials in the evaluation of Dr. Ira Sweet, School Psychologist.

The parties have filed letter statements in lieu of briefs and have submitted documents evidencing the background and course of this dispute. The following facts do not appear to be in dispute.

Dr. Sweet had filed grievances and criticized Board programs at public Board meetings prior to the completion of his evaluation for the period of September 1979 to April 1980. The evaluator, Gregory F. Riel, Director of Pupil Personnel Services, included certain materials pertaining to Dr. Sweet's grievances and public criticisms in the evaluation. On June 24, 1980, the Association filed a grievance in which it claimed that the inclusion of these materials violated the collective agreement's guarantees against harassment of and reprisal against employees invoking the grievance procedure.^{1/} On December 2, 1980, the Board, in a letter written by its president, agreed that the grievance material should not be included in the evaluation. The Board directed that the Director of Pupil Personnel Services complete a revised evaluation. The Association accepted this resolution.

On March 9, 1981, the Association filed the instant grievance. This grievance asserted that the Director had not followed the Board's directive to remove grievance materials from the revised evaluation and had thus violated the contract's guarantees against reprisal and harassment as well as the terms of the previous grievance award. The Board disagreed. On May 19, 1981, the Association filed a demand for binding arbitration.

1/ Article III, A-3 provides:

An employee represented by the Association having such a grievance is under obligation to follow proper procedures in an attempt to satisfy his grievance and in doing so he shall be assured freedom from prejudicial action, restraint, interference, coercion, discrimination, or reprisal in presenting his grievance.

In its letter statement, the Board argues that the instant dispute concerns the contents of an evaluation form and is therefore non-negotiable; challenges to evaluation contents must be pursued with the Commissioner of Education. The Association responds that the instant dispute predominantly concerns the Board's alleged violation of the contractual protection against harassment and reprisal and its alleged failure to honor its directive requiring removal of grievance related materials from Dr. Sweet's evaluation. We agree with the Association.

Ordinarily, grievances involving a board of education's evaluation criteria and the application of these criteria in an evaluation form may not be submitted to arbitration. In re Teaneck Bd. of Ed., 161 N.J. Super. 75 (App. Div. 1978); In re Hazlet Twp. Board of Education, ___ N.J. Super. ___, 6 NJPER 191 (¶11093 1980); In re Mahwah Bd. of Ed., P.E.R.C. No. 81-44, 6 NJPER 493 (¶11251 1980); In re Middlesex Bd. of Ed., P.E.R.C. No. 80-120, 6 NJPER 191 (¶11092 1980). This case is distinguishable because the Association does not seek to arbitrate the Board's right to determine criteria unilaterally or the substantive accuracy of the evaluation contents. Instead, its grievance asserts that the Board has failed to abide by its agreement to remove material which allegedly constitutes retaliation for filing grievances and speaking out at a Board meeting.^{2/} So framed, the predominant issue in this

^{2/} The New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-5.4(a)(1) and (3), prohibits harassment and reprisals against an employee who has invoked a grievance procedure.

case concerns the protection of an employee against harassment and reprisals for protected activity and the protection of an employee representative against failure to honor commitments made in resolving a grievance alleging harassment and reprisal.

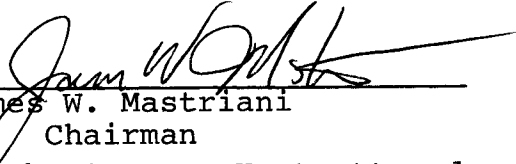
In In re Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission addressed a similar issue in the context of an unfair practice case. There, we held that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when it placed a letter criticizing an employee's comments made in the capacity of employee representative in his personnel file. We stressed that a board cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct which the board finds objectionable is protected activity.

In Jefferson Twp. Bd. of Ed., P.E.R.C. No. 82-43, 7 NJPER 614 (¶12224 1981), appeal pending App. Div. Docket No. A-600-80T1, we addressed a similar issue in the context of a scope of negotiations case. There, the Association sought to arbitrate a claim that the Board engaged in anti-union discrimination when it took certain adverse personnel actions. We held that the claim was arbitrable because freedom from discrimination in response to protected activity intimately and directly affects employees' work and welfare without interfering with legitimate managerial interests.^{3/}

^{3/} We distinguished State of New Jersey v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), pet. for certif. pending, and Jersey City v. Jersey City Police Officers Benevolent Ass'n, 179 N.J. Super. 137 (App. Div. 1981), pet. for certif. pending, cases finding that the power to discipline is an inherent management prerogative, on this basis.

As in In re Black Horse Pike Reg. Bd. of Ed., supra and In re Jefferson Twp. Bd. of Ed., supra, the balancing process favors arbitration. There is a significant employee interest in freedom from retaliation and harassment and a significant employee representative interest in the integrity of the grievance process. There is no countervailing managerial interest in using evaluations as a vehicle for reprisal or harassment.^{4/} Accordingly, under the particular facts of this case, we decline to restrain arbitration.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett and Suskin voted in favor of this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: January 12, 1982
Trenton, New Jersey
ISSUED: January 13, 1982

^{4/} Of course, we intimate no opinion on whether either evaluation contained retaliatory material or whether the revised evaluation complied with the parties' resolution of the past grievance by removing the offending comments; these are matters for the arbitrator. The Commission has only addressed the arbitrability of the Association's allegations of reprisal as contained in its grievance, not their merits. See, In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), quoted with approval in Ridgefield Park Ed Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).