

P.E.R.C. NO. 2003-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST MORRIS REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2002-37

WEST MORRIS REGIONAL EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the West Morris Regional High School Board of Education for a restraint of binding arbitration of a grievance filed by the West Morris Regional Education Association. The grievance contests the placement of a teacher into Pathway III of the District's Professional Supervision Evaluation System. The Commission finds that the Pathway III placement was an application of evaluative criteria, not a disciplinary action and restrains arbitration of the grievance to the extent it challenges that placement.

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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST MORRIS REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2002-37

WEST MORRIS REGIONAL EDUCATION
ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Parker, McCay & Criscuolo, P.A.,
attorneys (Paul C. Kalac, on the brief)

For the Respondent, Bucceri & Pincus, attorneys
(Louis P. Bucceri, on the brief)

DECISION

On February 25, 2002, the West Morris Regional High School District Board of Education petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by the West Morris Regional Education Association. The grievance contests the placement of a teacher into Pathway III of the District's Professional Supervision Evaluation System.

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

The Association represents certificated non-supervisory teaching personnel. 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.

In evaluating teaching staff, the district uses a Professional Supervision and Evaluations System (PSES) with three supervision methods or "pathways." Pathway I, the "directive supervision evaluation" mode, is for new teachers; Pathway II, the "self directed professional growth" pathway, is for tenured teachers who are demonstrating competence in the Descriptors of Effective Teaching; and Pathway III, the "professional assistance" pathway, is for tenured teachers in need of specific professional assistance in identified area(s) of the Descriptors of Effective Teaching. The PSES manual's description of Pathway III includes this statement:

Intensive supervision should be collaborative, but may also be directive. It is intended to provide the best likelihood for attainment of competency and professional growth. It should maintain the supportive climate inherent in the supportive process for as long as possible, yet it may also become a summative, directive process that leads to further administrative action which may ultimately result in withholding an increment and/or dismissal.

Pathway III teachers are formally and informally observed; have conferences with supervisory personnel; and work under a professional assistance plan. By contrast, Pathway II teachers have a "professional growth" plan and are not formally observed. For Pathway II teachers, the PSES focuses on discussion, ongoing informal observation and collaborative development of the

individual and team. Under the Board's PSES policy, an increment withholding or dismissal proceeding cannot be initiated, absent conduct which threatens the safety and welfare of students, unless the teacher has first been placed in Pathway III and the Board determines that the teacher is unable to meet the district's professional standards.

Joseph Karczewski is a tenured English teacher. On May 7, 2001, Karczewski met with his principal Angela DeMartino, assistant principal Julius Wargacki, and the parent of one of his students. They discussed the parent's concern about a remark that Karczewski made to his son during an April 20 class. The parent stated that Karczewski said to his son: "Are you being a smart ass? I apologize for using the word smart."

The father felt that Karczewski should apologize and commented that his son had told him of inappropriate remarks that Karczewski had made to other students. He also asked that his son be removed from Karczewski's class. Karczewski did not deny making the remark or apologize, but said that the comment was part of his classroom humor.

On May 15, 2001, DeMartino wrote to Karczewski about the April 20 incident and the May 7 meeting. She quoted the exchange between the student and Karczewski and described the other comments and gestures that the parent had attributed to Karczewski. DeMartino wrote that after the parent left the May 7 meeting, she told Karczewski that she could not defend the

comments or gestures, and certainly could not do so under the guise of humor. DeMartino continued that both the language and physical gestures "promote the wrong kind of class culture in my opinion, and they do not engender mutual respect." DeMartino added that the remarks were inappropriate and unprofessional and that some could be considered sexist and insensitive. The last paragraph states:

As a result of a pattern of incidents like this one, Mr. Karczewski will be placed in Pathway 3 of the district's supervision/evaluation system during the 2001-2002 school year. This is the professional assistance pathway "...and is used to provide a more structured and intensive mode of supervision for the tenured professional staff member who is not consistently demonstrating one or more of the fundamental competencies." P. 13 1999 Supervision/Evaluation Manual.

On May 22, 2001, Karczewski responded. He disputed many of the statements in the principal's May 15 memorandum and claimed that the tone and substance of the meeting were totally different from that described in the memorandum. Karczewski stated that since his first year in the district he has had overwhelmingly positive evaluations and one consistent feature has been his rapport with the students. Karczewski did not deny any of the comments, but explained that they were part of his effort to keep the classroom atmosphere funny, warm and familial. He emphasized that the student whose parent had requested the meeting was still in his class and had told the principal that he did not want to be removed.

On June 14, 2001, the Association filed a grievance concerning the placement of Karczewski on Pathway III. The grievance states:

The details of the incident as related and detailed in Dr. DeMartino's memo dated May 15, 2001 are in dispute by Mr. Karczewski. Mr. Karczewski states in his rebuttal dated May 22, that Dr. DeMartino's memo is full of misquotes, misrepresentations, and inaccuracies.

The information concerning the incident is based on hearsay and third hand knowledge. As stated in Dr. DeMartino's memo of May 15, the student's father acquired remarks made by the teacher "from his son and other students." Nothing concerning this matter was observed first hand by an administrator.

This action does not follow prescribed district policy. Page thirteen of the Professional Supervision Evaluation System for the West Morris Regional High School District states "This pathway provides a more structured and intensive mode of supervision for the tenured professional staff member who is not consistently demonstrating one or more of the fundamental competencies stated on page 16." This action by Dr. DeMartino was prompted by a single incident. Mr. Karczewski has never been warned, reprimanded, or even spoken with concerning deficiencies in his professional performance or "fundamental competencies." Mr. Karczewski has never received anything but glowing evaluations. In fact, state guidelines concerning teacher discipline requires [sic] a verbal warning or reprimand to precede a formal disciplinary action.,

Finally, Dr. DeMartino violated Article IV Section B of the current contract which states "Whenever a teacher is required to appear before any member of the Administrative or Supervisory staff or the Board or a Board committee concerning any matter which involves discipline, the teacher shall receive prior written notice of the reasons for such a meeting and his/her right to representation...."

A meeting was held on May 7 with Mr. Wargacki, vice-principal of the West Morris Regional High School, Dr. DeMartino, the student's father . . . , and Mr. Karczewski. Information and testimony was gathered at this meeting which was cited in Dr. DeMartino's memo of May 15 and apparently affected her decision to place Mr. Karczewski on Phase 3 of the evaluation system. Mr. Karczewski was not given previous written notice of the nature and intent of this meeting, nor was he permitted to obtain association representation in the meeting. Therefore Mr. Karczewski was denied his right to fair representation at a meeting which has had major impact on the condition of his employment.

Dr. DeMartino's action and decision also violates Article V Section I of the current contract which states "All monitoring or observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher by certified supervisors employed by the district." Mr. Karczewski is being evaluated based on a student's version of an incident and a parental complaint, not by anything which the administration has observed. This is illustrated by Mr. Karczewski's record of eighteen years of service in the district without any evidence of negative feedback by any administrator on a single evaluation.

As a remedy, the Association asked that Karczewski be taken off Pathway III and placed on the "mainstream" evaluation process.

On June 20, 2001, DeMartino wrote Karczewski confirming the 2001-2002 supervision and evaluation arrangements that had been discussed at a meeting that day with Karczewski and his representatives. DeMartino indicated that Karczewski would be observed by the principal or an assistant principal once during

each of the four marking periods. She stated that the focus of the observations would be to note the absence, during class periods, of words or gestures "previously labeled objectionable" that could be misinterpreted by students or parents. The memorandum concluded with DeMartino noting that Karczewski had expressed a desire to "continue your work on your PGP with Doug Kirk for the 2001-2002 school year."

On June 28, 2001, DeMartino wrote a memorandum entitled "Grievance Report." It was not addressed to anyone, but the first sentence stated: "[t]he grievance (attached) of June 14, 2001 regarding Joseph Karczewski is denied." The memorandum also stated that DeMartino's May 15 memorandum represented her recollection of the May 7 meeting; Karczewski did not deny the information from the parent; and Karczewski had a similar incident with a student in September of 2000 in which interventions were carried out. The memorandum added that the May 7 meeting was not disciplinary and that data for teacher evaluation may come from sources other than direct classroom observation. The memorandum reiterated that "as a remedy" Karczewski would be observed four times during the 2001-2002 school year.

On September 18, 2001, the superintendent also denied the grievance. He stated that Karczewski's placement in Pathway III was justified as it was based on more than one incident during the 2000-2001 school year and that both incidents demonstrated the need for reinforcement of the District's "Descriptors in Effective

Teaching" in the category of classroom environment. He also stated that the placement was not a disciplinary action, but a professional assistance pathway designed to support the tenured teacher.

On December 3, 2001, the Board denied the grievance. Its response stated that the placement was not disciplinary, but designed to assist a teacher "who is not consistently demonstrating one or more of the fundamental competencies" specified in the manual.

On January 29, 2002, the Association demanded arbitration. 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 contractual merits of this grievance.

The Board maintains that Karczewski was placed in Pathway III for evaluative, not disciplinary, reasons and that the placement is designed to help him improve in an area that the Board has identified as a "fundamental competency" -- "fostering a code of mutual respect and modeling respectful behavior." It

stresses that Karczewski was not penalized and was not threatened with any sanction if he did not improve.^{1/}

The Association asserts that Pathway III is "a clear precedential step intended to lead to more draconian punishments" and that such a placement reflects a Board judgment that the teacher is incompetent. It therefore asserts that placement on Pathway III is a form of discipline requiring just cause. It also maintains that evaluation procedures are mandatorily negotiable and that a grievance protesting a change in evaluation procedures from Pathway II to III is therefore legally arbitrable.

The Board denies that placement in Pathway III means that a teacher is incompetent, contending that it indicates only that a teacher needs improvement in one or more areas. It stresses that any adverse evaluation could eventually lead to discipline if a teacher does not improve, but that that does not make all such evaluations disciplinary.

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

^{1/} We do not discuss the Board's position that the May 15, 2001 memorandum was evaluative, given the Association's statement that the sole issue is Karczewski's Pathway III placement.

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]

Under this 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); 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. They are also enforceable through binding arbitration. Newark State-Operated School Dist., P.E.R.C. No. 97-118, 23 NJPER 240 (¶28115 1997).

The prerogative to evaluate performance encompasses the rights to select evaluators, change evaluative criteria, and establish an evaluative rating scale. See, e.g., Rutgers v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 120 (App. Div. 1992), aff'd 131 N.J. 118 (1993); State v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 91 (App. Div. 1981); High Bridge Bd. of Ed., P.E.R.C. No. 94-26, 19 NJPER 537 (¶24252 1993). In addition, a board has a prerogative to prepare supervisory plans designed to

correct deficiencies detailed in evaluations. See Woodbury Bd. of Ed., P.E.R.C. No. 2000-108, 26 NJPER 313 (¶31127 2000) and cases cited therein.

In applying the principle that evaluation procedures are generally negotiable, we have held that the most basic employee interests sought to be protected by evaluation procedures are having some form of notice of when the evaluation has taken place, being able to receive suggestions for improvement and know specific criticisms, and having the opportunity to respond if appropriate. Ocean Tp. Bd. of Ed., P.E.R.C. No. 85-123, 11 NJPER 378 (¶16137 1985), aff'd NJPER Supp.2d 164 (¶144 App. Div. 1986), certif. den. 105 N.J. 547 (1986).

Within this framework, we recently held to be not legally arbitrable a Board's decision to place four teachers in a differentiated supervision plan for "marginally effective" teachers, where they would participate in an intensive program of observations, coaching sessions and conferences. Woodbury. The teachers were advised of their placements in their evaluations, which noted that their performance had been less than satisfactory or had raised concerns.

Woodbury reasoned that the placement decisions were tied to the content of the teachers' evaluations and reflected an educational policy judgment that the teachers required intensive supervision. It rejected an argument that the Board was required to negotiate over criteria for placement in the program, holding

that the application of evaluative criteria for purposes of triggering intensive supervision was a managerial prerogative, State Troopers, and that negotiations over guidelines concerning the exercise of that prerogative would significantly interfere with it.

Woodbury governs here. As in that case, placement in Pathway III was triggered by the Board's concerns about a teacher's classroom performance -- specifically, in-class comments made to his students. As in Woodbury, the decision to apply a particular type of supervision represents an application of evaluative criteria, not a change in mandatorily negotiable procedures. Similarly, identifying a teacher as in need of improvement in a fundamental competency is also the application of evaluative criteria, not a disciplinary reprimand.

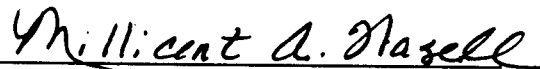
Woodbury also militates against a conclusion that a Pathway III placement is disciplinary because it could lead to an increment withholding. Woodbury noted that the teachers in that case had been warned that their increments would be withheld if their performance did not improve, but held that that circumstance did not alter the conclusion that the Association could not legally arbitrate the substantive decision to place the teachers in the differentiated supervision program. Woodbury commented that the warning focused on the Board's educational concerns for the future and were not in the nature of reprimands for past actions.

Karczewski did not receive the type of warning that the Woodbury teachers did but, as in that case, the increased supervision was prompted by a concern that he improve his teaching -- in Karczewski's case by refraining from the types of in-class remarks that administrators had described. As in Woodbury, we find that the Pathway III placement is an application of evaluative criteria, not a disciplinary action. The fact that the Board generally does not withhold an increment unless a teacher has first been given the opportunity to improve under a more intensive and focused supervision and evaluation process does not automatically make such placements disciplinary. Compare 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) (discipline amendment not intended to permit binding arbitration where an employer has simply evaluated teaching performance).

ORDER

The request of the West Morris Regional High School District Board of Education for a restraint of binding arbitration is granted to the extent the grievance challenges the Joseph Karczewski's placement in Pathway III.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato and Ricci voted in favor of this decisions. None opposed. Commissioner Sandman was not present.

DATED: July 25, 2002
Trenton, New Jersey
ISSUED: July 26, 2002