

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DOWNE TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-2000-39

DOWNE TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Downe Township Board of Education for a restraint of binding arbitration of a grievance filed by the Downe Township Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when its superintendent wrote observation reports criticizing lessons taught by two teaching staff members. The only issue before the Commission is whether substantive comments about a teacher's presentation of a reading program should be viewed as an evaluation of her teaching performance or a disciplinary reprimand. The Commission holds that the comments predominantly involve teaching performance and cannot be reviewed or changed by an arbitrator. The Commission restrains arbitration over that portion of the grievance. The request is otherwise denied.

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
(William J. Yanonis, on the brief)

For the Respondent, Thomas Myers, NJEA UniServ
Representative, on the brief

DECISION

On October 12, 1999, the Downe Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Downe Township Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when its superintendent wrote observation reports criticizing lessons taught by two teaching staff members.

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, 1998 through June 30, 2001. The grievance procedure ends in binding arbitration.

Article 16 is entitled Teacher Evaluation. Section 16.5(c) provides that:

16.5 Evaluation reports shall be presented to each teacher by his/her immediate supervisor in accordance with the following procedures:

- * * *
- (c) Such reports shall be written in narrative form and shall include, when pertinent:
 - (1) Strengths of the teacher as evidenced during the period since the previous report.
 - (2) Weaknesses of the teacher as evidenced during the period since the previous report.
 - (3) Specific suggestions as to measures which the teacher might take to improve his/her performance in each of the areas wherein weaknesses have been indicated.
 - (4) Any other recommendations deemed appropriate by the administration.

Anjanette Mason and Barbara Sinnema are teachers in the school district. This case concerns observation reports of classes taught by them. The details follow.

Mason

On March 26, 1999, the superintendent observed Mason teaching a class. A reading lesson was scheduled for four students; two students worked independently; and one student left the class for a speech lesson. The students displayed a wide range of behavior, including anger, frustration, and aggression.

The superintendent completed an observation/evaluation form. The form has five sections. There are four possible ratings: Yes, No, Par (Partially) or N/A (Not Applicable).

Under Teacher Record Keeping, Mason received 4 Yes ratings, 1 No and 1 Par rating. Under comments concerning a Par rating in lesson plans, the superintendent stated that the lesson plans were generic. He also commented that the instructional techniques did not vary, even when students did not cooperate.

Under General Instructional Techniques, Mason received 4 Yes, 3 No and 2 PAR ratings. The superintendent wrote that no enthusiasm was displayed; the lesson did not vary; classroom rules were repeated ten times throughout the period; and alternative activities and opportunities could have strengthened the lesson and participation of the students.

Under Classroom Management, Mason received 4 Yes, 2 No and 2 Par ratings. The superintendent wrote that the students and Mason lacked mutual respect; student behaviors threw the group off task; and firm direction was lacking. The superintendent commented that Mason used the well-established point program related to positive listening and respect, but relied on this as a first and primary method of discipline. He suggested that the first level of discipline needed to be based on mutual respect and not on gaining or losing points.

Under Classroom Climate/Interpersonal Skills, Mason received 6 Yes and 2 No ratings. The superintendent wrote that

Mason stopped the whole lesson to deal with one student instead of using the classroom aides. He also suggested more emphasis on expanding reinforcement techniques.

Under Professional Development, Mason received all Yes ratings. The lesson summary stated:

Refer to all areas as noted throughout this observation. In addition, Mrs. Mason's technique of snapping her finger to solicit a verbal response in unison did not seem to be effective even though it followed the SRA system procedures. The two classroom aides were not used to the best advantage of all the students. One aide watched while the other one recorded the points on the Rules and Expected Behaviors student sheets.

In addition, the two students who worked independently could have also been better guided with assistance by the aides to answer their questions and to keep them on task. One student talked loudly and made a lot of unnecessary noise throughout the entire reading group time without intervention from either classroom aide or Mrs. Mason.

Mason submitted a rebuttal. She wrote that her lesson plans are not generic and the skill objective is always the same in the SRA Reading Program. She responded that one student was isolated with an aide and she did not seek the assistance of the other aide when another student had a problem because the aide was a first-time substitute and did not know the routine. She disagreed with the comment that instructional techniques did not vary and stressed that the SRA program is scripted and must be followed the way as written. She stated that the criticisms in the evaluation deal with the SRA program, which she followed.

Sinnema

On March 16, 1999, the superintendent observed a fifth grade math class taught by Sinnema. Five students were in the class. The lesson reviewed a chapter for a test the next day.

Under Teacher Record Keeping, Sinnema received 3 Yes ratings, 1 No rating and 2 Par ratings. The superintendent commented that the lesson plans did not include dates, there was very limited activity and material use, and recorded grades were difficult to understand.

Under General Instructional Techniques, Sinnema received 1 Yes rating, 5 No ratings and 3 Par ratings. He wrote that the information was presented without enthusiasm; the pace did not change; Sinnema did not demonstrate advanced knowledge of the potential math problems; examples were given only when students had difficulty; students were not directed to watch out for any type of problem for the test the next day; "hands on" in this lesson meant students do math problems on paper; and the entire lesson centered on correcting student's mistakes.

Under Classroom Management, Sinnema received 3 Yes ratings, 4 Par ratings and 1 N/A rating. The superintendent wrote that the students worked quietly, but were often off track; the lesson would have worked better for 30 students; the routine seemed awkward; time was wasted while students exited the room or went to get books; and the lesson was teacher-directed with little student involvement although students were respectful and participated when asked.

Under Classroom Climate/Interpersonal Skills. Sinnema received 6 Yes ratings and 2 Par ratings. The superintendent wrote that there was no positive reinforcement or encouragement or focus on the significance of the upcoming test.

Under Professional Development, Sinnema received all Yes ratings.

The superintendent summarized the lesson as totally teacher-centered, consisting of routine drill and practice. He recommended the following:

1. Involve students in more activity-centered activities.
2. Utilize a variety of teaching techniques to stimulate interest and hence understanding.
3. Introduce and use questioning techniques that solicit student understanding.
4. Change the gradebook to more easily identify students, dates and progress.
5. Take full advantage of only teaching five students at one time.
5. Refer to comments noted throughout this observation report.

On April 10, 1999, Sinnema submitted a rebuttal. She wrote that the report inaccurately pictured her instruction and Sinnema told the superintendent that the class was a practice session of skills already taught rather than a formal class. The rebuttal further explained that two students were remedial students and two were special education students; she needed to evaluate certain students during the lesson; she used the drill

and check method to provide practice, positive reinforcement and time to evaluate and help students having difficulty; this practice/evaluation session was used to decide whether to test the students or provide reinforcement lessons; and the drill and check method was beneficial to the students' needs at the time.

The Grievance

On May 5, 1999, the Association filed a grievance contesting the two observation reports. The grievance states:

D.T.E.A./C.A.R.E. is grieving the violation of Article 16.5c, subcategories 1 and 3 (Teacher Evaluations). Evaluations conducted on staff members Barbara Sinnema and Anjanette Mason did not discuss specific strengths, as mandated by the contract, nor did they offer specific suggestions as to measures which the teacher might take to improve her performance in each of the areas in which weaknesses were indicated. In addition, Ms. Mason was penalized for her faithful presentation of the SRA reading program, which requires a specific and rigid technique, despite her explanation to the Superintendent that the program required that delivery. Ms. Sinnema was penalized for her techniques in a small-group review setting, despite her request that she be observed at a more propitious time, and suggestions were made by the evaluator which did not take into account the personalities of the students involved and would not have been effective. The remedy sought was a positive change in the evaluations, including the teachers' strengths, concrete examples of strategies for improvement, and a reflection that teachers were following required techniques for which they may not be penalized.

On June 25, 1999, the Board denied the grievance. The Association then demanded arbitration and this petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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 contractual arbitrability or merits of this grievance nor do we consider any contractual defenses the Board may have.

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 annual evaluations of teaching performance, which cannot be contested through binding arbitration, and disciplinary reprimands, which may be. We 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.

The parties' briefs have narrowed this dispute considerably. The Board's brief does not dispute that Article 16 is mandatorily negotiable and that alleged procedural violations of such clauses are legally arbitrable. It cites Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997) and Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986). Instead, it asserts that specific portions of the grievance impermissibly challenge its superintendent's evaluative judgments. With respect to Mason, it seeks to block arbitration of the grievance's assertion that "Ms. Mason was penalized for her faithful presentation of the SRA reading program, which requires a specific and rigid technique." With respect to Sinnema, it seeks to block arbitration of the grievance's assertion that "Ms. Sinnema was penalized for her technique in a small-group review setting...and suggestions were made by the evaluator which did not take into account the personalities of the students involved and would not have been effective." With respect to both teachers, it challenges the grievance's remedy of "a positive change in the evaluation...and a

reflection that teachers were following required techniques for which they may not be penalized."

The Association's brief notes the Board's tacit concession that including strengths and suggesting improvements are procedural and negotiable aspects of the evaluation process. In addition to the cases cited by the Board, it cites Milltown Bd. of Ed., P.E.R.C. No. 97-66, 23 NJPER 28 (¶28020 1996). It further notes that the Board has not asked for a restraint of arbitration of those portions of the grievance and instead has limited its request to the issues specified in the Board's brief (and described above). With respect to Mason, the Association argues that she followed Board policy in teaching the SRA program as scripted and any criticism of her performance in doing so must be viewed as disciplinary. With respect to Sinnema, the Association withdraws its demand for arbitration of the portion of the grievance objected to by the Board as substantive.

The Board did not file a reply brief.


At this point, the only issue before us is whether the substantive comments concerning Mason's presentation of the SRA reading program should be viewed as an evaluation of her teaching performance or a disciplinary reprimand. Applying the Holland standards, we hold that these comments predominantly involve teaching performance and cannot be reviewed or changed by an arbitrator. Any claim that the evaluation arbitrarily faulted Mason for following the Board's educational policy on SRA teaching must

be presented to the Commissioner of Education. We will restrain arbitration over that portion of the grievance. We need not consider the other portions of the grievance because the Association has withdrawn its demand for arbitration over the substantive comments about Sinnema's teaching and the Board has not contested the demand to the extent it alleges a violation of the contractual provisions requiring that strengths be noted and improvements be suggested.

ORDER

The request of the Downe Township Board of Education for a restraint of arbitration is granted to the extent the grievance asserts that Anjanette Mason was improperly "penalized for her faithful presentation of the SRA reading program, which required a specific and rigid technique" and to the extent the grievance requests "a positive change in the evaluation...[to reflect] that [Mason was] following required techniques for which [she] may not be penalized." The request is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed.

DATED: December 16, 1999
Trenton, New Jersey
ISSUED: December 17, 1999