

P.E.R.C. NO. 98-147

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUNTERDON-VOORHEES
REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-98-45

NORTH HUNTERDON-VOORHEES
REGIONAL EDUCATION ASSOCIATION,

Respondent.

DECISION

The Public Employment Relations Commission denies the request of the North Hunterdon-Voorhees Regional High School District Board of Education for a restraint of binding arbitration of a grievance filed by the North Hunterdon-Voorhees Regional Education Association. The grievance contests comments concerning absenteeism which were placed in certain teachers' personnel files during the 1995-1996 school year. The Commission concludes that the letters were reprimands that could properly be reviewed through binding arbitration.

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, Riker, Danzig, Scherer, Hyland &
Perretti, attorneys (Lance J. Kalik, on the brief)

For the Respondent, Wills, O'Neill & Mellk, attorneys
(Arnold M. Mellk, on the brief)

DECISION

On November 17, 1997, the North Hunterdon-Voorhees 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 North Hunterdon-Voorhees Regional Education Association. The grievance contests comments concerning absenteeism which were placed in certain teachers' personnel files during the 1995-1996 school year.

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

The Association is the majority representative of teachers. The Board and Association are parties to a collective

negotiations agreement, effective from July 1, 1996 through June 30, 1999. Article VII provides, in part:

A. Leaves of Absence with Pay:

1. Personal Days: Full time employees shall be granted three (3) days of absence for personal business without loss of pay. The building principal must be notified two (2) days in advance. No personal days are permitted immediately before or after a holiday. The number of personal days granted and taken on any given day shall be limited to ten (10) percent of the professional staff members and/or fifteen (15) percent of the support staff members in each building. In the event that more than ten (10) percent of the professional staff members and/or fifteen (15) percent of the support staff members in a building apply for a personal day on a given day, seniority in the district shall determine which employees are granted the personal day. On July 1 any personal days unused during the previous year shall be added to an employee's accumulated sick leave days.

6. Sick/Disability Leaves:

a. All employees shall be entitled to one sick (emergency disability) leave day each month of the work. All sick leave days for the coming year will be credited as of July 1 or on a new employees' date of employment whether or not the employee reports for duty on that day. Unused sick leave days will accumulate.^{1/}

Article X provides:

E. No employee shall be disciplined, reprimanded, or reduced in rank or compensation without just cause.

The grievance procedure ends in binding arbitration.

^{1/} N.J.S.A. 18A:30-2 provides that all school employees shall be allowed sick leave with full pay for a minimum of ten school days in a school year.

In the fall of 1995, Superintendent Charles Murphy identified all teachers who had used an average of ten days or more of sick and personal leave in each of the previous three years. He directed each teacher, with a few exceptions, to attend a conference with a principal or supervisor to discuss his or her absenteeism. The purpose was to try to decrease the employees' absences.

The attendance of these teachers was then monitored. In the spring of 1996, each teacher who had used additional leave was required to attend a second conference. If a teacher then used another leave day, he or she was required to meet with Murphy personally.

Catherine Long, Lynne Lothian and MaryBeth Kearns were required to attend all three conferences. On March 26 and April 16, 1995, Murphy sent them letters memorializing the substance of their conferences. The letters contained the following similar paragraphs:

Yesterday you, Mrs. Dontzin and I met to discuss your unsatisfactory attendance and the loss of instructional time for your students.

During the meeting it was pointed out that your assistant building principal met with you at the beginning of the year to discuss your poor attendance. The reason for this meeting was the fact that you had absented yourself from your students for [__] days in the previous three years in taking [__] sick days and [__] personal days.

Since that meeting you have continued to absent yourself from your students. Your principal has also met with you because of continued poor attendance.

...Please make every effort to come to school and instruct your youngsters. Continued absences on your part could lead to an unsatisfactory rating and possible increment withholding because of the loss of instructional time for your students.

The last paragraph in Long's letter states:

If your students continue to lose instructional time because of your absenting yourself, it will lead to an unsatisfactory rating for you and a possible increment withholding.

The letters were placed into the teachers' personnel files. The 1995-96 annual evaluations for these three teachers reflected that they "needed to improve their attendance."

In March and April 1996, the Association filed grievances requesting the removal of the letters from the teachers' files. The Board denied the grievances. The Board and Association submitted the dispute to arbitration. On October 15, 1997, the arbitrator began the hearing. The Board advised the arbitrator that it would proceed with the arbitration hearing, subject to its right to seek a scope of negotiations determination on whether the comments were evaluative. On January 5, 1998, the arbitrator sustained the grievance.

The arbitrator first found that, although the warning letters did not impose an immediate sanction, they were nevertheless disciplinary reprimands. He went on to examine whether there was just cause for issuing the letters. After applauding the Board's goal of eliminating unnecessary absenteeism, the arbitrator noted that the district had no written attendance policy, and that no notice of possible disciplinary repercussions for additional

absences was communicated to the teachers at their attendance conferences. Discipline was imposed even though the grievants remained within the bounds of their contractual leave limits. In addition, the arbitrator noted that there was no fair and objective investigation of the circumstances which led to the absences. The arbitrator ordered the letters of reprimand and all references to them expunged from the teachers' files. He urged the Board and the Association to cooperate in establishing a teacher attendance policy in order to reduce absenteeism.

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 stated that the disciplinary amendments to N.J.S.A. 34:13A-5.3 were designed to permit arbitration of allegedly unjust punitive actions

but not to permit binding arbitration where an employer has merely evaluated a teacher's performance. Under Holland, there is a presumption that remarks in an evaluation or observation report are not disciplinary. Where there is a dispute, we will examine all of the facts and 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 designed to enhance teaching performance.


The letters in this case do not predominately involve an evaluation of teaching performance. Cf. Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997) (increment withheld for excessive absenteeism not withheld based on evaluation of teacher performance). The letters contain warnings of future unsatisfactory ratings and increment withholdings; they were preceded by a series of conferences held with progressively higher levels of supervision, culminating with the superintendent and aimed at warning employees not to take sick or personal leaves; and they have been placed in the employees personnel files in addition to their annual evaluations. Under these circumstances, we conclude that the letters were reprimands that could properly be reviewed through binding arbitration. See Watchung Hills Regional Bd. of Ed., P.E.R.C. No. 97-122, 23 NJPER

294 (¶28134 1997) (memorandum that threatened future discipline and was retained in personnel file was predominately disciplinary).^{2/}

ORDER

The Board's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. Commissioners Boose and Klagholz abstained from consideration.

DATED: May 27, 1998
Trenton, New Jersey
ISSUED: May 28, 1998

^{2/} Contrast Marlboro Bd. of Ed., P.E.R.C. No. 97-121, 23 NJPER 293 (¶28133 1997); Hillside Bd. of Ed., P.E.R.C. No. 94-33, 19 NJPER 547 (¶24259 1993); North Plainfield Bd. of Ed., P.E.R.C. No. 93-58, 19 NJPER 110 (¶24050 1993). In these cases, arbitration was restrained where comments concerning absenteeism were informational or neutral. This case does not involve any challenge to the comments on attendance in the annual evaluation.