P.E.R.C. NO. 97-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST WINDSOR-PLAINSBORO
REGIONAL BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-97-50

WEST WINDSOR-PLAINSBORO
SERVICE ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the West Windsor-Plainsboro Regional Board of Education for a restraint of binding arbitration of a grievance filed by the West Windsor-Plainsboro Service Association. The grievance asserts that the Board violated the parties' collective negotiations agreement when it allegedly reprimanded a secretary without just cause. The Commission holds that the memorandum is predominantly evaluative.

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, Carroll & Weiss, attorneys
(Robert J. Merryman, of counsel)

For the Respondent, Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On December 2, 1996, the West Windsor-Plainsboro Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the West Windsor-Plainsboro Service Association. The grievance asserts that the Board violated the parties' collective negotiations agreement when it allegedly reprimanded a secretary without just cause.

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

The Association represents the Board's bus drivers, custodians, maintenance workers, bus mechanics, tradesmen, secretaries and instructional assistants. The Association and the

Board are parties to a collective negotiations agreement. The agreement's grievance procedure ends in binding arbitration.

During the 1995-1996 school year, Margaret Royal was a secretary in the central office payroll department. On April 11, 1996, the Director of Personnel issued this memorandum to Royal:

> As you know, it is extremely important for you to manage the changes in employee status in regards to health insurance benefits.
>
> We know that you are well aware of the administrative procedures regarding COBRA. It is especially important that employees be terminated from their health insurance benefits at the end of the month when they are terminated and/or resign from their position. You are also required to notify the employee of their COBRA rights within 14 days from the date we receive notification of a qualifying event, i.e., employee resignation/termination. Qualified participants have 60 days from the date of the COBRA notice form to elect the COBRA coverage.
>
> As you know, the administration of our group plan procedures requires that each insurance carrier be notified of plan termination of benefits in a timely fashion. The effective date of benefits end the last day of the month in which the employee resigns/terminates their employment. They MUST be terminated from the benefit plans as soon as possible after we become aware of their resignation/termination. Benefit coverage will be reinstated retroactive to the last date of coverage, if the qualified beneficiary elects COBRA, and submits monies for insurance premiums for the retroactive coverage.
>
> I know that you are aware that if these changes are not done in a timely manner and/or the employee is not notified of his/her COBRA rights, the District could be held liable for damages, sued, or insurance premiums could be paid for an employee who is not entitled to benefits.

We recently received notices from our insurance carriers regarding a former employee by the name of Mrs. Lillian Heath. The insurance companies have informed us that they have a Rating and Underwriting Sixty-Day Rule. They have informed us that we cannot submit changes 60 days or more beyond the actual effective date. The insurance company will not accept these changes back-dated or retroactive beyond 60 days.

In the case of Mrs. Lillian Heath, she was terminated from the District on November 28, 1995. Her benefits should have been terminated effective the end of her termination month, November 30, 1995, unless she elected COBRA. As of this date, we have no record of her electing COBRA coverage.

We have been also informed by the Blue Cross/Blue Shield Prescription Plan Insurance Company that they did not receive notification that Mrs. Lillian Heath should be deleted from the insurance coverage until March 5, 1996, effective retroactive to December 31, 1995. May I ask why the date of December 31, 1995, was selected when the correct date of deletion should be been November 30, 1995?

I would also like to see the documentation regarding the ending of her benefits as submitted to her major medical carrier and when the COBRA notification was sent to her.

I would also like to know why the insurance Transmittal of Deletion Form was dated February 22, 1996, but was not received by the insurance company until March 5, 1996, in Newark, New Jersey?

We just received a similar letter from Delta Dental regarding the termination of dental coverage for Lillian Heath which stated "unfortunately the notice was received after a claim for the (ineligible) employee or ineligible dependent had already been received and processed. The claim paid included dates of service after the date of coverage termination. Therefore we are adjusting the date of termination of or date of coverage to

> 3/1/96 in order to collect premiums that will enable us to honor the dates of service on the claim." Therefore, we have the same problem with Delta Dental as we have with Blue Cross/Blue Shield. In addition, to make matters worse, Mrs. Heath and/or her dependents continued to use their insurance coverage beyond their termination date which is another reason why the insurance company refuses to make the termination of benefits retroactive.
>
> This apparent error on your part resulted in Mrs. Lillian Heath and/or her dependents receiving medical and dental benefits which they were not entitled for an extended period of time at District expense.

On April 24, 1996, the Association filed a grievance asserting that the Board violated the parties' agreement when it reprimanded Royal by memorandum without just cause. The Board denied the grievance and the Association demanded arbitration. This petition ensued.

The Board recognizes that employee discipline is legally arbitrable, but contends that the memorandum is an evaluation of the employee's performance of a particular task and is not disciplinary. It asserts that the memorandum addresses perceived problems with Royal's performance and contains no imposition of discipline or threat of discipline. It contends that the memorandum emphasizes the need to perform certain tasks promptly and requests information from Royal regarding her performance of those tasks in one instance.

The Association asserts that the memorandum does not involve Royal's performance of secretarial duties, but instead involves alleged misbehavior concerning district regulations and

causing damage to the Board. The Association contends that the questions posed in the memorandum tend to accuse the grievant of falsifying forms and that the use of the phrase "apparent error" substantiates the Association's contention that the memorandum is disciplinary. The Association also contends that a subsequent involuntary transfer of Royal from the central office to the high school office at the beginning of the 1996-1997 school year further substantiates its position that the memorandum is disciplinary rather than evaluative.[1/]

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 merits of the grievance or 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),

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1/ The grievance in this matter asserts only that the memorandum is a form of discipline imposed without just cause. Therefore, we will not consider the transfer.

we distinguished between a school board's prerogative to evaluate its employees and the employee's ability to seek arbitrable review of disciplinary reprimands. 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. [Id. at 826.]

Applying Holland's test, we conclude that the memorandum is predominantly evaluative. Although not part of the formal evaluation process, the memorandum summarizes the procedures to be followed pertaining to termination of health benefits and emphasizes the need to have certain tasks performed in a timely manner. The memorandum raises questions about Royal's performance

of these tasks and suggests she may have made an "apparent" error in one instance; but it does not foreclose Royal from explaining her actions, impose any form of discipline by itself, or suggest that any disciplinary action will be taken if a further review shows that Royal did in fact make an error. Further, the Board has expressly stated that the memorandum is not disciplinary and has thus foregone any right in future cases to cite it as a previous reprimand if a future disciplinary dispute arises. Under all these circumstances, we hold that the memorandum is predominantly evaluative.

ORDER

The request of the West Windsor-Plainsboro Regional Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: February 27, 1997
Trenton, New Jersey
ISSUED: February 28, 1997