P.E.R.C. NO. 82-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JEFFERSON TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and- Docket No. SN-81-115

JEFFERSON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding, the Commission denies a request by the Jefferson Township Board of Education to restrain arbitration of two grievances filed by the Jefferson Township Education Association. Both grievances contained allegations of discrimination against Association members in retaliation for their actions as union leaders. The Commission concludes that the grievances are arbitrable under the facts presented, noting that discrimination motivated by anti-union animus cannot be an inherent management prerogative pertaining to the development of governmental policy.

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Appearances:

For the Petitioner, Murray, Granello & Kenney, Esqs.
(James P. Granello, of Counsel, David F. Corrigan,
on the Brief)

For the Respondent, Sterns, Herbert & Weinroth, P.A.
(Michael J. Herbert, of Counsel and on the Brief)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination was filed with the Public Employment Relations Commission on June 30, 1981 by the Jefferson Township Board of Education (the "Board") seeking a determination as to whether certain matters in dispute between the Board and the Jefferson Township Education Association (the "Association") were within the scope of collective negotiations. The Board alleges that the scope of negotiations dispute concerns the negotiability and arbitrability of disciplinary determinations and requests that the arbitration of two grievances filed by the Association be restrained based on the Appellate Division's recent decision in State of New Jersey v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), pet. for certif. pending.

The facts giving rise to the scope of negotiations dispute are not in dispute.[1/] The grievances concern certain adverse actions taken by the Board against two school bus drivers represented by the Association. On March 30, 1981, the Board informed Linda Watson that she would not be offered a position for the 1981-82 school year. The reason given was her poor attendance and performance. On the same day, the Board also informed Patricia Yavit that she would not receive a pay raise in the 1981-82 school year due to her unsatisfactory performance during the 1980-81 school year.

By letters dated May 1, 1981, a representative of the Association grievance committee wrote to the Superintendent of Schools initiating grievances on behalf of both women contesting the action taken. The letters were brief and quite similar. After an introductory paragraph indicating that the purpose of the letter was to initiate a grievance, the Watson letter states:

> Mrs. Watson has been an active Association Representative during this past year. This may have led to some situations where there was antagonism between her and her Supervisor and the Administration. We feel that she is being disciplined to the extreme by her firing and that this is without just cause.
>
> Therefore, we ask you to reconsider this matter.[2/]

1/ This is not to suggest that the parties do not vigorously dispute the facts underlying the grievances.

2/ The letters and other documents pertaining to these grievances, including the collective negotiation agreements, were appended as exhibits to the parties' briefs.

In like manner, the Yavit letter states:

> Mrs. Yavit is one of our most senior drivers and has had many years of excellent service in the district. This past year she has been an active Association Respresentative and this has possibly led to antagonism between her and her supervisor and the Administration. We feel she is being disciplined without just cause.

In separate letters dated May 13, 1981, the Superintendent denied both grievances. He iterated the reasons given Ms. Watson and Ms. Yavit on March 30, 1981 and stated that neither woman's Association's activities had any bearing on their performance. By letters dated May 20, 1981, the Association submitted both grievances to the Board. The letters were virtually identical to those used to file the grievances on May 1, 1981. The Board affirmed the Superintendent's denial of the grievances for the reasons stated in his letters. The Association then sought to invoke the arbitration step of the grievance procedure in the parties' contract which provides for binding arbitration. By letter dated June 23, 1981, the Association applied for arbitration of both grievances summarizing them as:

1. The non-renewal of contract for Mrs. Linda Watson.

2. The withholding of a raise for Mrs. Patricia Yavitt(sic).

The Board responded by instituting this proceeding.

It is the Board's position that by couching these grievances in terms of "discipline without just cause" the Association has placed itself squarely within the holding of State of

New Jersey v. Local 195, IFPTE, supra and Jersey City v. Jersey City Police Officers Benevolent Ass'n, 179 N.J. Super 137 (App. Div. 1981), pet. for certif. pending. The Board argues that both of these cases hold:

> That the matter of discipline of public employees is plainly a subject of essential inherent managerial prerogative which has been delegated by our Legislature to the public employer, and cannot be negotiated away by agreement with the public employer. State v. Local 195, 179 N.J. Super. at 152.

Nor can such disputes be submitted to binding arbitration. Id. at 153. Based on these cases, and the Association letters, the Board seeks a restraint of the arbitrations.

The Association submits several arguments in response. Its primary argument is that the real issue in dispute in both grievances is discrimination based on anti-union animus, not discipline per se; and that the Appellate Division decisions in Local 195 and Jersey City could not have intended to include actions motivated by illegal discrimination. Alternatively, the Association argues that these two Appellate Division decisions do not accurately reflect the state of the law, and should not be followed. The Association cites Township of West Windsor v. PERC, 78 N.J. 98 (1978) as a Supreme Court case which upholds discipline as a mandatorily negotiable and arbitrable term and condition of employment.[3/] It also distinguishes Local 195 and Jersey City by pointing out that unlike the employees in those

3/ See also such cases as Plumbers and Steamfitters Local 270 et al. v. Woodbridge Board of Education, 159 N.J. Super. 83 (App. Div. 1978), holding that, in the absence of a statute, a clause giving employees a degree of job security by providing that
(continued)

cases, these bus drivers have no Civil Service or other statutory protection against unjust discharge or discipline.

While there may be merit to the Association's argument that the holdings of Local 195 and Jersey City are inconsistent with Township of West Windsor and prior decisions of the Appellate Division, we do not believe that this case requires us to choose between two apparently conflicting lines of cases, as we agree with the Association that discrimination motivated by anti-union animus cannot be an inherent management prerogative pertaining to the development of governmental policy. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). Therefore, such illegal action could not be within the term discipline as discussed in Local 195 and Jersey City.

As we initially discussed in In re Fairview Board of Education, P.E.R.C. No. 79-34, 5 NJPER 28 (¶10019 1978), freedom from discrimination intimately and directly affects employees' work and welfare. This very Act protects public employees in "the right freely and without fear of penalty or reprisal to form, join and assist any employee organization." N.J.S.A. 34:13A-5.3. The authority to discriminate against an employee for exercising this

3/ (continued)
they will not be discharged without good cause is mandatorily negotiable, and Board of Education of Vocational Schools of Camden County v. Haines, et al., App. Div. Docket No. A-4930-76 (App. Div. 3/30/78), which upheld the negotiability and arbitrability of a clause providing: "No teacher shall be disciplined subject to a written reprimand or reduced in compensation without just cause."

right is not an "essential inherent managerial prerogative which has been delegated by our Legislature to the public employer." Local 195, supra 179 N.J. Super. at 152. Therefore, a grievance alleging that an employee has been discharged or reduced in compensation in retaliation for assisting an employee organization must relate to a term and condition of employment.

In analyzing scope of negotiations disputes, we have repeatedly held that we cannot be bound by the labels placed on the dispute by the contesting parties. Since the parties will frequently, and understandably, attempt to frame the matter in dispute in terms most favorable to the result they desire, it is often necessary to review the relevant contract clauses, the grievances, demands for arbitration and the factual context of the dispute in an effort to focus on the dominant or real issue.4/ In re Elizabeth Board of Education, P.E.R.C. No. 80-10, 5 NJPER 303 (¶10164 1979); In re West Paterson Board of Education, P.E.R.C. No. 80-17, 5 NJPER 377 (¶10193 1979); In re Englewood Board of Education, P.E.R.C. No. 80-43, 5 NJPER 419 (¶10220 1979). In the instant case, the allegations of discrimination for Association activities are not a recent change in position by the Association made in an effort to avoid the Board's Local 195 argument. It

4/ The Board is correct that the Association's letters alleged the discrimination as discipline without just cause and that Article IV A of the contract provides:

> No employee shall be disciplined in any manner or form without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall not be made public unless formal charges are made, and shall be subject to the grievance procedure herein set forth.

However, as indicated, we do not believe that such discrimination can be included with "discipline" as that term is discussed in Local 195.

(continued)

has been maintained as the basis for the grievances since they were initiated on May 1, 1981, before Local 195 or Jersey City were decided, and those allegations were carried forward when the grievances were filed at the Board level.

Under the circumstances of this case, we find that the dominant issue of the grievances are the allegations of discrimination for participation in Association activities which relate to terms and conditions of employment. As such we do not believe that the rationales and holdings of the Local 195 and Jersey City Appellate Division decisions are applicable to these disputes. Therefore, we conclude that the grievances at issue herein can proceed to arbitration if otherwise arbitrable under the parties contract.

ORDER

The restraints of arbitrations sought by the Jefferson Township Board of Education are hereby denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcells, Graves and Suskin voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed.

DATED: October 2, 1981
Trenton, New Jersey
ISSUED: October 5, 1981

4/ (continued)

Additionally, the grievance definitions within the parties' contract states:

> A "grievance" shall mean a complaint by any employee or group of employees that there has been to him or them, or to the Association, an inequitable, improper or unjust application, interpretation or violation of Board policy, this Agreement, or administrative decision.

Whether the terms discipline or grievance in the parties' contract were intended to include the type of conduct alleged herein is, of course, a question for the arbitrator.