

P.E.R.C. NO. 94-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSIDE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-89

HILLSIDE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by a teacher represented by the Hillside Education Association against the Hillside Board of Education. The grievance contests a comment concerning an attendance conference on a teacher's annual evaluation. The Commission has repeatedly held that an evaluation's informational comments concerning attendance are not legally arbitrable.

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Appearances:

For the Petitioner, Yauch, Peterpaul, Clark & Vitolo,
attorneys (Frank J. Peterpaul, of counsel)

For the Respondent, Balk, Oxfeld, Mandell & Cohen,
attorneys (Sanford R. Oxfeld, of counsel; Randi Doner, on
the brief)

DECISION AND ORDER

On March 29, 1993, the Hillside Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by a teacher represented by the Hillside Education Association. The grievance contests a comment concerning an attendance conference on the teacher's annual evaluation.

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

The Association represents the Board's classroom teachers and certain other employees. The parties entered into a collective negotiations agreement effective from July 1, 1991 to June 30, 1993. Article IV, Section B states that "no employee shall be

disciplined...without just cause." The grievance procedure ends in binding arbitration.

Katherine Pender teaches kindergarten at the Hurden-Looker School. She is tenured. She is also the Association's president.

In March 1992, Pender's principal completed her professional staff evaluation report for the 1991-92 school year. The report listed 11 days of absence that year. Under "Personal Characteristics," it stated:

Mrs. Pender uses good judgment in her dealings with youngsters. She is flexible, accepting of new ideas and pleasant. Conference held regarding attendance.

The report was otherwise favorable and the principal recommended that she receive a salary increment for the next school year.^{1/}

Pender wrote a response on the evaluation form. She wrote:

I object to the inclusion of a negative reference to the attendance conference. The conference was based on number and was not investigatory of the nature of the days taken and illnesses involved. I will attach a written explanation of the days I was absent and I request that the notation be deleted from the final evaluation.

On April 14, 1992, Pender filed a grievance. She sought removal from her evaluation of "all statements regarding attendance that are not simply factual numbers" and added that "conference notations should be investigatory and not ambiguously negative."

^{1/} The Board has withheld one teacher's increment for absences and has sent memoranda to other teachers regarding absences which have been used to show that the employees knew of the Board's concerns before the Board disciplined the employees.

She also stated that she had a contractual right to use sick leave, personal leave, Association leave, funeral leave, and family illness days and that "statements regarding absence based upon an arbitrary number (6) are punitive, disciplinary in nature and imply wrongdoing for utilizing a negotiated right."

On April 28, 1992, the superintendent denied the grievance. She stated:

The Board of Education has the right to establish an absentee policy and to monitor the same. The statements regarding absences are not punitive or disciplinary in nature -- and are not intended to imply wrongdoing. The purpose is merely a reminder to staff about the value of continuity of instruction.

On May 5, 1992, the Association appealed the denial to the Board. It stated:

The Board's right to establish and monitor policy must be tempered by the employees' bargained rights and benefits. The inclusion of a 'reminder' in an evaluation is clearly disciplinary and in violation of the Board's own policy; the Commission's directives, and caselaw. The practice must be stopped! Illegal comments must be removed from employees' files.

It is wrongful and improper for employees to be 'conferenced' regarding absence because of an arbitrarily determined number. The conference itself is negative in nature rather than investigatory.

The Hillside Education Association demands the termination of the practice of attendance letters, attendance conferences and the implication of wrongful use of established contractual right without proper declaration and documentation.

The arbitrary number of six or more absences -- or, indeed, any specific number must be abandoned and each case treated on an individual basis.

The Board held a hearing and the superintendent reiterated that the comment was not disciplinary. On June 9, 1992, the Board denied the grievance.

The Association demanded binding arbitration. The Board responded that the grievance was neither contractually arbitrable nor mandatorily negotiable. After hearing, the arbitrator determined that the grievance was contractually arbitrable and directed the Board to file a scope petition within 45 days or have the merits of the grievance determined. 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.

We have specifically and repeatedly held that an evaluation's informational comments concerning attendance are not legally arbitrable. North Plainfield Bd. of Ed., P.E.R.C. No. 93-58, 19 NJPER 110 (¶24050 1993); Ridgefield Park Bd. of Ed., P.E.R.C. No. 92-66, 18 NJPER 54 (¶23022 1991); North Plainfield Bd.

of Ed., P.E.R.C. No. 89-94, 15 NJPER 252 (¶20102 1989); Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 88-129, 14 NJPER 413 (¶19165 1988); Neptune Tp. Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988); see also Town of Kearny, P.E.R.C. No. 92-40, 17 NJPER 481 (¶22233 1991). These cases apply here. The evaluation simply states that Pender was absent 11 times and that a conference was held. The Board has a prerogative to require employees absent a certain number of days to attend conferences, Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984), and a mere neutral reference to such a conference on an evaluation cannot be considered disciplinary. The superintendent and the Board have also stated that they do not consider the attendance comments to have been disciplinary. No adverse action was taken against Pender based on her attendance record. Nor do we consider the pertinent content of the evaluation to constitute a reprimand. Thus, the contents of the evaluation are not legally arbitrable.

ORDER

The request of the Hillside Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

DATED: September 24, 1993
Trenton, New Jersey
ISSUED: September 24, 1993