

P.E.R.C. NO. 94-77

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON TOWNSHIP  
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-86

BURLINGTON TOWNSHIP  
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Burlington Township Education Association against the Burlington Township Board of Education. The grievance asserts that the Board violated the parties' collective negotiations agreement when it included disciplinary comments in a teacher's annual review and when it missed the contractual deadline for holding the teacher's annual review conference.

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Appearances:

For the Petitioner, David M. Serlin, attorney

For the Respondent, Selikoff & Cohen, P.A., attorneys  
(Joel S. Selikoff, of counsel; Carol H. Sapakie, on the  
brief)

DECISION AND ORDER

On March 23, 1993, the Burlington 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 Burlington Township Education Association. That grievance asserts that the Board violated the parties' collective negotiations agreement when it included disciplinary comments in the teacher's annual review and when it missed the contractual deadline for holding the teacher's annual review conference.

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

The Association represents the Board's certified and non-certified staff. The grievance procedure appears to end in advisory arbitration, but N.J.S.A. 34:13A-29 entitles a teacher to contest a reprimand through binding arbitration.

Sharon Cleghorn teaches at Hopkins Middle School. Cleghorn's husband is also a teacher employed by the Board. In 1992, Cleghorn's husband was indicted for allegedly having sexually assaulted four middle school children.

On May 26, 1992, the middle school principal wrote Cleghorn a memorandum reprimanding her for alleged misconduct. The reprimand stated:

Now that I have completed my inquiries of the events of March 3, 1992, involving a High School student and Middle School student(s), it is necessary to summarize your involvement and state my conclusions.

It seems to me that you engaged in unprofessional conduct when requesting and directing a High School student to assist you in serving as your "eyes and ears" in the legal matter of your spouse, Richard Cleghorn. You acted irresponsibly in the obvious pre-planning of this phone request for the High School student to report to you and a fellow colleague and likewise disrupted the educational program of this student. In addition, it was revealed that the High School student was asked to make direct contact with an alleged victim and her family in an attempt to encourage the dropping of charges against Mr. Cleghorn. Although I have not spoken to student(s), I have personally met with High School administration and counselors and each has shared a number of observations that support these allegations.

In addition, parents of a Middle School student expressed similar concerns about your conduct with Middle School students, specifically,

eliciting support for Mr. Cleghorn and requesting students to reveal names of the alleged victims.

I should hardly need to tell you that such actions are not acceptable to me personally, nor are they professionally in keeping with teacher code of ethics. District Policy and N.J. Revised Statutes may address this behavior as "conduct unbecoming a teacher," "insubordination," and "misconduct" of a tenured teacher.

As a result of this unprofessional behavior with students I feel obliged to reprimand you formally and to direct that a copy of this letter be filed with your permanent records.

Any repetition of this kind of behavior will not be in your professional best interests. In the future, it is expected that you will refrain from such actions and respond to administrative requests and directives in a way that reflects credit on you, your profession, school and district.

You have many outstanding qualities and have demonstrated them consistently over a number of years. I know your personal life has been upset amid the emotional stress of all that has occurred. Although I can understand and sympathize, I cannot overlook this most recent behavior and conduct that was incompatible with school district and community expectations of its teaching staff.<sup>1/</sup>

Cleghorn received this reprimand on June 9 or 10. She promptly wrote a response describing the reprimand as a "tissue of lies" and requesting that it be removed from her personnel file.

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<sup>1/</sup> On April 11, 1992, the Board's attorney sent Cleghorn's attorney a draft of this reprimand and advised him of the Board's intention to place the reprimand in Cleghorn's file in lieu of more severe discipline. The Board's attorney asked if Cleghorn had any objections and if she would waive a hearing. Cleghorn declined to accept the reprimand or waive a hearing. The reprimand was then redrafted to delete one accusation.

She specifically denied asking any student to contact any alleged victims.

On June 9, 1992, Cleghorn's supervisor completed an annual teacher review and professional development plan. Cleghorn was rated "satisfactory" (the highest rating) in all subcategories in the categories of Education, Administrative Ability, Instruction, Evaluation on Instruction (student), and Attitude. In the category of Professional Responsibilities, she was rated "unsatisfactory" (the lowest rating) in one subcategory -- "accepts and executes administrative and Board of Education policies" -- and "needs improvement" in one subcategory -- "uses good judgment." In the three subcategories under Professional Ethics, she was rated "unsatisfactory" in two -- "maintains professional attitudes and behavior" and "handles confidential materials properly." The narrative portion of the annual review lauded Cleghorn's outstanding teaching performance and commended her for not letting a difficult year affect her dedication to her students and job. However, Sections J and K of the narrative elaborated upon the ratings of "needs improvement" and "unsatisfactory":

J. Areas Suggested for Teacher Improvement

(E.8) You must be cautious in your judgments. If you are not, someone is likely to suffer as is the case this year. You cannot lose your professional maturity, responsibility and perspective. Making judgments is our responsibility as educators, but not making them is too! Quick and subjective judgments may be totally inaccurate or unfair. Better judgment is necessary when student's welfare, confidentiality and character are in jeopardy.

K. Unsatisfactory Areas Requiring Teacher Improvement

(E.2) Appeals and directives by administrators for employees from personal involvement in a complex legal situation [were] apparently ignored and personal inquiries, appeals and investigations were elicited and/or conducted with students. It is expected that improvement will be made in adhering to policies and procedures.

(F.1 and 2) Confidentiality reflects the highest level of professionalism. As educators, we have the responsibility to keep information about students, teachers, parents and other personnel confidential. If we cannot protect information, we cannot protect people. To reveal information indiscriminately about students/staff is to violate their privacy out of our position of privilege. As such, eliciting support for a colleague, and directly or indirectly revealing names of the alleged victims in a legal matter was unprofessional and unethical.

Cleghorn and her supervisor met on June 10 to discuss the annual summary review.

On June 11, 1992, Cleghorn wrote her supervisor a rebuttal requesting that the annual review be removed from her personnel file. She denied speaking with any students about her husband's case or being aware of anyone suffering except her and her husband.

Cleghorn subsequently filed a grievance (#01:91-92) contesting the May 26 reprimand and the annual review to the extent it reflected the reprimand. She asked that the reprimand be removed from her file, that all ratings be changed to "satisfactory," and that all related comments be deleted.

Cleghorn also filed a second grievance (#01:92-93). This grievance asserted that her annual review conference was held beyond the contract deadline without good cause. The contract requires

that the conference he held "on or before the 6th day, prior to the last teacher work day." Thus, Cleghorn's conference should have been held on or before June 9. The grievance requested that supervisors be informed of this problem and that the Board and the Association develop some penalty for non-compliance. The supervisor denied this grievance, asserting that he had good cause for holding a late conference because Cleghorn had been absent for two weeks and because it was important that Cleghorn meet with her principal first, "as part of the evaluation referred to the letter of reprimand he gave you."

On September 30, 1992, the principal revised the May 26 reprimand to delete the allegation that Cleghorn had pre-planned the phone request for a high school student to report to her. The second sentence in paragraph two of the reprimand was corrected to read: "The student was present in our school as a result of a telephone request for her to report to a fellow colleague, and as a result, disrupted the educational program." The annual review was not changed.

The superintendent and the Board denied both grievances. On January 5, 1993, the Association demanded binding arbitration under N.J.S.A. 34:13A-29. The demand requested that the letter of reprimand and any related references, correspondences, or documents be removed from Cleghorn's personnel file and that the annual review "be modified to reflect a performance rating of satisfactory where such ratings are reflective of the letter of reprimand." This petition ensued.

The Board does not contest the demand for arbitration to the extent it grieves the reprimand, but it does seek a restraint of arbitration to the extent the demand challenges the annual review and the timing of the conference. It contends that the disputed contents of the annual review are evaluative rather than disciplinary and are therefore not legally arbitrable under the standards set forth in Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-205A3-86T8 (10/23/87). It also contends that the timing of the conference is not subject to N.J.S.A. 34:13A-29 and is not contractually arbitrable. The Association contends that the disputed contents of the annual review are disciplinary rather than evaluative under the Holland standards because they merely repeat allegations of misconduct cited in the May 26 reprimand. It concedes that the dispute over the timing of the conference is not subject to N.J.S.A. 34:13A-29 and may not contractually be submitted to binding arbitration, but asserts that advisory arbitration is contractually available and should not be restrained.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

Thus, we do not consider the contractual merits of the Association's grievances or any contractual defenses the Board may have.

We begin with the grievance contesting the timing of the annual review conference. The Association wishes to submit this grievance to advisory arbitration and the Board does not oppose that request. We decline to restrain arbitration.

We next consider the grievance contesting both the reprimand and the annual review to the extent it reflects the reprimand. The parties agree that this reprimand is disciplinary and may be arbitrated. The only question before us is whether the parts of the annual review reflecting the reprimand are also disciplinary.

N.J.S.A. 34:13A-29 requires that grievance procedures covering teachers culminate in binding arbitration of disputes over reprimands. But neither this statute nor N.J.S.A. 34:13A-5.3 overrules caselaw prohibiting binding arbitration of evaluations of teaching performance. Holland articulates this approach for distinguishing between reprimands and evaluations:

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.

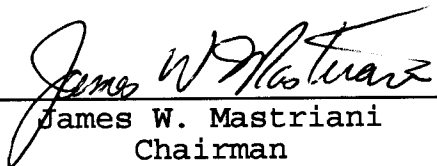
The accusations in the May 26 reprimand center on Cleghorn's alleged insubordination and misconduct and do not touch upon her teaching performance. These accusations stemmed from the employer's investigation of third-party complaints. Cleghorn denied these accusations and the principal has since retracted one of them. The Association's demand for arbitration is limited to contesting those parts of the review that reflect the reprimand. The Board has not denied that the contested parts of the annual review are based solely on that reprimand. Repeating a reprimand's accusations of misconduct and insubordination in an evaluation does not shield them from being arbitrated. Washington Tp. Bd. of Ed., P.E.R.C. No. 90-109, 16 NJPER 326 (¶21134 1990); see also Bloomfield Bd. of Ed., P.E.R.C. No. 92-68, 18 NJPER 56 (¶23024 1991). Cf. Morris Dist. Bd. of Ed., P.E.R.C. No. 93-50, 19 NJPER 50 (¶24023 1992); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992). If the allegations are false, as Cleghorn contends, they may

be deleted without compromising the Board's ability to evaluate Cleghorn.<sup>2/</sup> Under these circumstances, we conclude that the contested parts of the annual review are predominately disciplinary. We decline to restrain arbitration over them.

ORDER

The request of the Burlington Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: January 24, 1994  
Trenton, New Jersey  
ISSUED: January 25, 1994

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<sup>2/</sup> If, however, the allegations are true, the arbitrator may not second-guess the ratings based on them.