

P.E.R.C. NO. 97-121

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MARLBORO TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket Nos. SN-96-103
SN-96-128

MARLBORO EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Marlboro Township Board of Education for a restraint of binding arbitration of two grievances filed by the Marlboro Education Association. The grievances claim that the Board violated the "just cause" provision of the parties' collective negotiations agreement by using the evaluation process to reprimand a teacher for absenteeism. The Commission finds that the comments in the teacher's evaluation are predominantly evaluative and rejects the contention that this case involves an application of sick leave policies.

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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MARLBORO TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket Nos. SN-96-103
SN-96-128

MARLBORO EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Fogarty & Hara, attorneys (Rodney T. Hara, of counsel)

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

DECISION AND ORDER

On March 28 and May 14, 1996, the Marlboro Township Board of Education petitioned for scope of negotiations determinations. The Board seeks restraints of binding arbitration of two grievances filed by the Marlboro Education Association. The grievances claim that the Board violated the "just cause" provision of the parties' collective agreement by using the evaluation process to reprimand a teacher for absenteeism.

The parties have filed briefs and documents. The following facts appear.

The Association is the majority representative of the Board's certificated personnel with certain exceptions. The Board and Association entered a collective negotiations agreement

effective from July 1, 1994 to June 30, 1997. An article entitled "Employee Rights" provides, in part, that employees shall not be disciplined without just cause. The contract also has a grievance procedure ending in binding arbitration.

Anne Peters is a tenured teacher. On March 21, 1995, school principal Harvey Abramson wrote a memorandum to her summarizing a meeting a few days earlier. Abramson wrote of his concern about Peters' attendance record overall and especially in the 1994-95 term. She had purportedly been out 29 days in that term, 21 of them consecutively. He also wrote of absences taken immediately before or after weekends and holidays. He was especially concerned about "the loss of pupil instructional time," which "may be memorialized in the annual evaluation and result in withholding an increment."

On April 4, 1995, the Association filed a grievance. The grievance alleged that Abramson's memorandum was a "letter of reprimand without just cause." On April 11, Abramson denied the grievance but deleted that portion of his memorandum referring to the possible increment withholding.

On April 24, 1995, Peters received her annual evaluation. The section on the evaluation form entitled "Attendance Data" tallied her absences in the 1994-95 term. Under "Additional Comments," the principal wrote that her absences were "disturbingly high" and had resulted in an "obvious loss of educational continuity and instructional opportunities for her students." While noting that 21 absences were due to a single

illness, he added that the Board nevertheless "expects improvement in your overall attendance next year."

Peters wrote a response. She noted that 21 days of absence were caused by an automobile accident and five days of absence were caused by an upper respiratory infection and flu, as evidenced by her doctor's notes given to the Board. Two other days of absence were personal days taken to respond to a subpoena and to stay in a hospital for a medical problem.

On April 28, 1995, the Board informed Peters that it intended to "withhold your adjustment and employment increments for the 1995-96 school year." The letter listed nine reasons for the decision. The reasons did not include absenteeism. Peters is contesting this withholding before the Commission of Education.

On May 2, 1995, the Association filed a second grievance. This grievance alleged that Abramson's "additional comments" regarding attendance in the annual evaluation constituted an "unjust reprimand."

On May 5, 1995, the superintendent denied an appeal of the earlier-filed grievance, stating that the principal's comments about absenteeism were not disciplinary. Also on May 5, the principal denied the second grievance.

The Association demanded arbitration of both grievances. The Board subsequently removed the disputed March 21, 1995 memorandum from Peters' personnel file. It also revised the yearly evaluation report by deleting the statement that the teacher's absenteeism was "disturbingly high" and substituting the

phrase "an effect on" for the phrase "an obvious loss of" in referring to educational continuity and instructional opportunities. The parties agree that the sole grievance before the arbitrator concerns the comments in Peters' annual evaluation.

The Board contends that the grievance is not legally arbitrable because it concerns evaluation criteria. The Association asserts that the grievance is arbitrable because it involves an allegedly inequitable application of sick leave and attendance improvement policies and a disciplinary reprimand without just cause.

The boundaries of our jurisdiction are narrow.

Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 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 merits of the grievance.

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 negotiation and arbitration of allegedly unjust punitive actions by a public employer, but not to permit binding

arbitration where an employer has merely evaluated a teacher's performance. Under Holland, there is a presumption that remarks on an evaluation are not disciplinary, but the context of the employer's action is important and we will examine all the circumstances of each case.

We first note that SN-96-103 is moot because the Board has withdrawn the contested March 21, 1995 memorandum. We dismiss that petition.

We are next asked to determine whether the revised comments in Peters' evaluation are predominantly disciplinary and therefore legally arbitrable or predominantly evaluative and therefore non-arbitrable. We conclude that these comments are predominantly evaluative. The comments were part of an annual performance evaluation consistent with the Board's obligation under N.J.A.C. 6:3-1.21. The absence rate was tied to teacher performance and the revised evaluation does not formally reprimand Peters or warn of discipline if there is no improvement. While the Board withheld Peters' increments, it did not cite her absence rate as a reason for the withholding. We do not see a punitive purpose in these comments. See Hillside Bd. of Ed., P.E.R.C. No. 94-32, 19 NJPER 546 (¶24258 1993); Neptune Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988).


Finally, we reject the contention that this case involves an application of sick leave policies and is therefore legally arbitrable under Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). This case predominantly involves an

evaluation and there is no claim that sick leave benefits were wrongfully withheld.

ORDER

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

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Finn, Klagholz, and Ricci voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioners Boose and Wenzler were not present.

DATED: April 24, 1997
Trenton, New Jersey
ISSUED: April 25, 1997