

P.E.R.C. NO. 88-129

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-88-22

OLD BRIDGE EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Old Bridge Education Association against the Old Bridge Board of Education. The grievance challenges comments on the evaluation of a custodian. The Commission finds that the comments pertain to an evaluation.

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Appearances:

For the Petitioner, Wilentz, Goldman & Spitzer, Esqs.
(Steven J. Tripp, of counsel)

For the Respondent, Oxfeld, Cohen, Blunda, Friedman,
LeVine & Brooks, Esqs. (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On August 28, 1987, the Old Bridge Township Board of Education ("Board") filed a Petition for Scope of Negotiations Determination. The Board seeks to restrain binding arbitration of a grievance filed by the Old Bridge Education Association ("Association"). The grievance challenges comments on the 1986-1987 evaluation of a custodian.

The Board has filed a brief and documents. The Association has not. These facts appear.

The Association is the majority representative of the Board's professional and non-professional employees, including custodians. The parties have a collective negotiations agreement

effective from July 1, 1985 through June 30, 1988 with a grievance procedure ending in binding arbitration.

Helen Wiget, a custodian, received a "D" rating ("below average but acceptable") for attendance on her year-end evaluation for the 1986-87 school year. The Board did not issue a reprimand, withhold her employment increment or take any other action based on her attendance evaluation.

On May 4, 1987, the Association filed a grievance asking that the Board apply a uniform attendance measurement standard, provide documentation for the grievant's attendance rating, upgrade the grievant's attendance rating and pay damages of \$1,000. The Board denied the grievance and the Association demanded arbitration. This petition ensued.^{1/}

The Board contends that the Association is seeking to arbitrate non-negotiable aspects of its evaluation criteria. It cites Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Hazlet Tp. Bd. of Ed. v. Hazlet Tp. Teachers Ass'n, App. Div. Dkt. No. A-2875-78, 6 NJPER 191 (¶11093 1980); Hoboken Bd. of Ed., P.E.R.C. No. 84-139, 10 NJPER 353 (¶15164 1984) and Montville Tp. Bd. of Ed., P.E.R.C. No. 84-10, 9 NJPER 537 (¶14221 1983).

^{1/} Arbitration has been temporarily restrained. I.R. No. 88-4, 13 NJPER 745 (¶18281 1987).

The Association agrees that evaluation criteria are non-arbitrable, but it asserts that there is a disciplinary component in Wiget's evaluation.^{2/} The Board denies that Wiget was disciplined.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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. [78 N.J. at 154]

Thus, we do not consider the merits of the Association's grievance or any of the Board's defenses. We consider only whether the Board can legally agree to submit this grievance to binding arbitration.

In Local 195, IFPTE v. State, 88 N.J. 393 (1982) ("Local 195"), the Supreme Court articulated the standards for determining whether a subject is mandatorily negotiable:

^{2/} The Association's counsel alleged during a hearing on the Board's request for a temporary restraint that Wiget was absent eight or nine days and received a lower attendance rating than employees absent as much as 20 days.

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405].

In Montville the Commission held that an attendance rating system and its application on an evaluation were non-arbitrable. 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-2053-86T8 (10/23/87), the Commission observed that the disciplinary amendments to N.J.S.A. 34:13A-5.3 were designed to permit negotiation and arbitration about allegedly unjust punitive action, but not to permit binding arbitration where an employer had merely evaluated 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 and make a determination.

Here, if the rating in Wiget's evaluation is predominantly disciplinary, the dispute is arbitrable. If predominantly evaluative, the rating is non-arbitrable. The rating was made on an annual performance evaluation. The evaluation does not formally

reprimand Wiget or warn her of more severe discipline if there is no improvement. The custodian was not subjected to any loss of earnings. There is no apparent punitive purpose in the attendance rating. Accordingly, we hold that the rating is evaluative and not arbitrable. Neptune Tp. Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER ___ (¶ 1988).

ORDER

The Board's request for a permanent restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
May 25, 1988
ISSUED: May 26, 1988