

P.E.R.C. NO. 88-114

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEPTUNE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-88-24

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Neptune Township Education Association against the Neptune Township Board of Education. The grievance seeks the removal of certain comments on a teacher's evaluation. The Commission finds that the comments were predominantly evaluative; not disciplinary.

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Appearances:

For the Petitioner, Metzler Associates
(James L. Rigassio)

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

DECISION AND ORDER

On September 25, 1987, the Neptune 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 Neptune Township Education Association ("Association"). The grievance seeks the removal of certain comments on a teacher's evaluation.

Both parties have filed briefs and documents. These facts appear.

The Association is the majority representative of the Board's teachers. The Board and Association are parties to a collective negotiations agreement effective from July 1, 1985 through June 30, 1988. The agreement's grievance procedure ends in binding arbitration.

Sharon Weaver is a tenured English and foreign languages teacher. She teaches the eighth grade. During the 1985/1986 and 1986/1987 school years, she gave birth twice. Each birth was earlier than expected and entailed complications. Between March 1, 1986 and March 1, 1987 she was absent 52 days: 45 personal illness days, three family illness days, and four personal business days. Weaver was granted a leave of absence from March 16 to May 15, 1987.

On March 27, 1987, Weaver received a year-end evaluation from the department chairperson and the junior high school principal. The evaluation covered March 1, 1986 through February 28, 1987. Weaver's overall performance was rated "acceptable" and she was "recommended for contract advancement on guide." In twelve of thirteen evaluation categories Weaver was rated "acceptable," but she received a rating of "needs improvement" in the category of "Attendance and Punctuality." These comments were on the evaluation:

"Because Mrs. Weaver has been absent fifty-two days (18 from September through February), a need to improve in the area of attendance is noted. Number one of the Teacher Job Description ("provides for a classroom environment that is conducive to learning") and number nine (#9) ("meets and instructs classes in the locations and at the times assigned") can only be effectuated if the teacher is present."

The Association filed a grievance seeking to have the remarks removed and the rating of "Attendance and Punctuality" changed to "acceptable." The grievance alleges that the Board violated certain contract articles including a "discipline for just cause" provision, Board policy #4010, N.J.S.A. 18A:6-6 and N.J.A.C. 6:3-1.21.

The grievance was denied. The report on the grievance by the Assistant Superintendent notes that 21 of the absences occurred either on a Monday or Friday and states that Weaver had been absent 19 days in the 1984/1985 school year and 25 days the next year. The Association demanded arbitration and this petition ensued.

The Board contends that the grievance is not arbitrable because it concerns evaluation criteria. It cites N.J.A.C. 6:3-1.21; Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n., 161 N.J. Super. 75 (App. Div. 1978), and Hazlet Tp. Bd. of Ed. v. Hazlet Tp. Teachers Ass'n, App. Div. Dkt. No. A-2875-78, 6 NJPER 191 (¶11093 1980). 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.

At the start of our analysis, we note 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 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 Holland Tp. Bd. of Ed. and Holland Tp. Ed. Ass'n, P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87), 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 action 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 and make a determination on a case by case basis.


Here, we are asked to determine whether the comments and rating in Weaver's evaluation are predominantly disciplinary and therefore arbitrable or predominantly evaluative and therefore non-arbitrable. We find that they are evaluative. The comments and rating were made on an annual performance evaluation summary, consistent with the Board's obligation under N.J.A.C. 6:3-1.21. The supervisor tied the teacher's absentee rate to her performance. The evaluation does not formally reprimand Weaver or warn her of more severe discipline if there is no improvement. The teacher was

recommended for advancement on the salary guide. We do not see any punitive purpose in the supervisor's comments.^{1/}

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
April 27, 1988
ISSUED: April 28, 1988

^{1/} We reject the contention that this case involves an application of sick leave policies, arbitrable under Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1983). This case predominantly involves an evaluation and there is no claim that sick leave benefits were wrongfully withheld.