

P.E.R.C. NO. 2014-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH BRUNSWICK,

Petitioner,

-and-

Docket No. SN-2013-074

SOUTH BRUNSWICK SUPERVISORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of South Brunswick for a restraint of binding arbitration of a grievance filed by the South Brunswick Supervisors Association. The grievance contests the inclusion of two comments in a unit member's annual performance review. The Commission finds that a comment regarding the grievant being out for 72 days on Workers Compensation due to an injury from an at-fault accident is arbitrable because it is more disciplinary than evaluative as it does not serve to improve his work performance and is accusatory and punitive in nature. The Commission finds that a comment about the grievant's absence during Hurricane Sandy is arbitrable because it is more disciplinary than evaluative given the employer's admission that grievant's essential personnel status was not clearly communicated.

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.

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Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, attorneys (Frederick T. Danser, of counsel)

For the Respondent, Pellettieri Rabstain & Altman, attorneys (Andrew L. Watson, of counsel)

DECISION

On June 6, 2013, the Township of South Brunswick petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by its Fire Marshall who is represented by the South Brunswick Supervisors Association. The grievance contests the inclusion of two comments in grievant's annual performance review which the Township characterizes as evaluative and the Association characterizes as disciplinary.

The parties have filed briefs and exhibits. The Township has filed a certification of its Department Head/Director of Code Enforcement.

The Association represents all supervisory employees employed by the Township. The parties have entered into a collective negotiations agreement with a term of January 1, 2012 through December 31, 2015. The grievance procedure ends in binding arbitration.

On November 21, 2012, the Director issued grievant's annual performance review. The review contains 13 categories, one of which is "Work Habits- (Attendance, punctuality, observation of rules and regulations, observance of safety practices, understands and follows direction)". The grievant was rated "less than satisfactory" in this area. The review detailed that as of 11/21/2012, grievant had used 14 sick hours, 147 vacation hours, and 21 work hours. The Director noted as follows "[Grievant] was out on Workers Compensation for 72 days due to an injury from an at fault accident in the township vehicle." On another section of the form entitled "Supervisor's Comments" the Director noted as follows: "[t]here was a situation during Hurricane Sandy where Fire Safety personnel were not initially present at the EOC. As [grievant] is in the EOP Annex as being in charge of hazardous materials, he was considered "essential personnel." I do take some blame for this, for not communicating clearly his role at that time." The grievant received satisfactory or more than satisfactory ratings in the other categories.

The Director certified that the grievant was never disciplined for the accident or for taking 72 days off. The Director further certified that he reviewed the details of the accident at the time of the review since grievant missed nearly 25% of the work year due to the accident and that he relied on the police report from the accident which stated that grievant had attempted to pass the vehicle in front of him and he collided with another vehicle, and that the grievant had caused the collision by improperly passing the uninvolved vehicle in an unsafe manner. The Director certified that although grievant maintained that he was not at fault for the accident, he did not seek to have the police report amended or file a supplemental report to correct the purported mistakes.

On December 6, 2012, the Association filed a grievance seeking the removal of the two comments made in the grievant's performance evaluation. The grievance was denied at two levels and the Association sought binding arbitration. 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]

There is a presumption that substantive comments on a performance evaluation that are designed to improve performance are not disciplinary and cannot be challenged in binding arbitration, while comments that are disciplinary in nature can be challenged in binding arbitration. 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). In Holland, we distinguished between performance evaluations and disciplinary reprimands. We set forth the following approach:

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 nonnegotiable. 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. [Id. at 826]

The Township argues that arbitration must be restrained because the comments are evaluative, not disciplinary. The Association responds that the comments constitute a form of discipline.

We find that the Director's comment that the grievant was out on Workers Compensation for 72 days due to an injury from an at fault accident in the township vehicle is disciplinary and not evaluative. While attendance is a consideration under the "Work Habits" category, the record does not support that there were any issues with grievant's attendance aside from than missing work on account of his injuries from a Workers Compensation claim. The Director's comment does not serve to improve grievant's work performance, and is accusatory and punitive in nature. We also find the Director's comment relating to his expectation that grievant should have been present during Hurricane Sandy to be more disciplinary than evaluative in nature. The Director admits that grievant's "essential personnel" status was not clearly communicated to him. In light of that admission, the comment is

not primarily intended to improve grievant's performance and is unduly critical.

ORDER

The request of the Township of South Brunswick for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed

ISSUED: March 27, 2014

Trenton, New Jersey