

P.E.R.C. NO. 2017-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STAFFORD TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2017-020

STAFFORD TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Board for a restraint of binding arbitration of a grievance contesting the discipline of four teaching staff members for alleged inappropriate behavior at a professional development workshop. Finding that letters issued by the Board referred to themselves as "disciplinary action," the Commission holds that the letters are reprimands and, therefore, the grievance may proceed to arbitration.

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, Sciarrillo Cornell Merlino McKeever & Osborne, LLC, attorneys (Anthony P. Sciarrillo, and Kathleen A. Nestor, on the brief)

For the Respondent, Detzky Hunter & DeFillippo, LLC, attorneys (Stephen B. Hunter, of counsel and on the brief)

DECISION

On December 21, 2016, the Stafford Township Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Stafford Township Education Association (Association). The grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) when four teaching staff members were disciplined without just cause for alleged inappropriate behavior during a professional development workshop.

The Board filed briefs, exhibits and the certification of Superintendent George J. Chidiac. The Association filed a brief,

exhibits, and the certification of its counsel, Stephen B. Hunter.^{1/} These facts appear.

The Association represents teachers, nurses, librarians, learning disability teacher consultants, medical assistants, social workers, psychologists (full time), teacher assistants, bus drivers, custodians, secretaries, cafeteria/playground assistants, guidance counselors, transportation attendants, mail courier, bus mechanics and attendance officer; but excluding certified administrators and central office staff. The Board and Association were parties to a CNA effective from July 1, 2013 through June 30, 2016. The grievance procedure ends in binding arbitration "on issues concerning the interpretation of the agreement."

Superintendent Chidiac certifies that on September 27, 2016, the Stafford Township School District held a professional workshop on literacy. Grievants E.L., J.P., D.S. and J.S. attended the workshop. On the same day, the Director of Curriculum and Instruction in the District contacted him by way of electronic mail regarding the conduct of J.S. at the literacy workshop. Shortly thereafter, he learned that teachers E.L., J.P. and D.S. were also involved in the situation. The behavior

^{1/} We remind the parties that because certifications and affidavits must be based upon personal knowledge, certifications from attorneys will rarely be appropriate or constitute admissible evidence.

in question included using mobile phones throughout the workshop, interrupting and challenging the presenter, engaging in distracting side conversations, and inserting disrespectful and negative comments into the group discussion. The behavior resulted in the presenter's inability to present the entirety of the program due to time restraints.

According to Chidiac, he contacted by electronic mail the principal of the building in which the four teachers were employed and informed him of the behavior in question because the principal was not present at the workshop. On September 28, 2016, Chidiac met with the workshop presenter, as well as several other school administrators to discuss the conduct of the teachers in question. The workshop presenter confirmed that the teachers' behavior was distracting and disruptive.

Chidiac further certifies that on September 28 the principal met with the four teachers individually to address their behavior at the literacy workshop. The principal emphasized that the teachers' behavior was inappropriate and reflected poorly upon both the school and the District. He noted the importance of such behaviors not reoccurring. On September 30, the principal sent letters to E.L. and D.S. The letters informed the teachers that their behavior at the literacy workshop was unacceptable and reminded them of the appropriate behavior and standards of professionalism.

The following letter issued to E.L. stated:

Dear [Grievant]:

It has been reported to me that during a district professional offering on Tuesday, September 27, 2016 you were negative and challenging to the presenter and the district administration. Because of these actions the presenter had difficulty getting through all of her training materials which negatively impacts you and your colleagues.

It is important to support the district's vision and its programs, this includes during training. The Schoolwide training was to benefit you and your colleagues. The disturbance during the training resulted in a training that was not completely fulfilled.

Please keep in mind that during all meetings, especially those by outside presenters, you are representing your grade level, building and district. As such, you should always treat everyone present in a respectful and professional manner.

When we met on September 28, 2016 you raised several areas of confusion. The questions you raised at that time were answered at a meeting on September 29, 2016. When asked if you need clarification on the scoring of students on DRA, you stated you did not and were not comfortable with the assessment. The other concern addressed was regarding your request for assistance and materials from Mrs. Scherlin and you emailing her on September 3, 2016 and not hearing back from her. Mrs. Scherlin presented the email correspondence you two had as a result of the initial email. Additionally, Mrs. Ulbricht shared the conversation you two had regarding the materials. You then clarified and stated it was more of not seeing or meeting with Mrs. Scherlin face to face. Mrs. Scherlin shared that she requested the DRA scores of your students as data to justify the need for the lower LLI kit. Mrs. Scherlin also stated

how it will take 3 to 6 weeks to go through the process of ordering. Stop gap solutions were discussed such as 100 Book Challenge, Grab and Go, and Achieve 3000.

This letter is to let you know that your behavior and attitude during the professional development training was inappropriate and unacceptable. Any additional actions of this nature could result in further disciplinary action.

The letter issued to D.S. stated:

Dear [Grievant]:

It has been reported to me that during a district professional offering on Tuesday, September 27, 2016 your behavior was not supportive of the training to the presenter and the district administration.

It is important to support the district's vision and its programs, this includes during training. The Schoolwide training was to benefit you and your colleagues. The disturbance during the training resulted in a training that was not completely fulfilled.

Please keep in mind that during all meetings, especially those by outside presenters, you are representing your grade level, building and district. As such, you should always treat everyone present in a respectful and professional manner.

This letter is to let you know that your behavior and attitude during the professional development training was inappropriate and unacceptable. Any additional actions of this nature could result in further disciplinary action.

On October 3, 2016, the principle issued letters to J.P. and J.S. The letter to J.S. stated:

Dear [Grievant]:

It has been reported to me that during a district professional offering on Tuesday, September 27, 2016 you were disruptive and disrespectful to the presenter and the district administration. Because of these actions the presenter had difficulty getting through all of her training materials which negatively impacts you and your colleagues.

The district will be implementing Schoolwide in Stafford and you will be required to implement this program with fidelity. The district is providing staff with professional development to help with successful implementation, but when you act in an unprofessional manner you are missing out on the resources the district is offering to assist you in implementation.

Please keep in mind that during all meetings, especially those by outside presenters, you are representing your grade level, building and district. As such, you should always treat everyone present in a respectful and professional manner.

During the workshop you were observed on your phone several times. Although you pointed out that it was for school purposes regarding your substitute and email correspondence with parents, it is important to either wait until a break or inform the administration of the issues that you were addressing.

When we met on September 28, 2016 you raised several areas of confusion. The questions you raised at that time were answered at a meeting on September 29, 2016. There was a concern about the amount of guided reading resources. It was explained by Mrs. Ulbricht the books have been ordered since late spring and hopefully will be here shortly. The district will explore the possibility of attaining additional books, as you teach two homerooms. Other solutions were discussed such as Zing, Grab and Go, 100 Book Challenge

and Achieve 3000. Another concern addressed was sending books home with students. Mrs. Pacheco explained she would like the books to go home and will budget for replacement books. Some solutions were to send home the 100 Book Challenge books and Grab and Go books. The final area of concern regarding the level of books students were reading. Mrs. Pacheco explained students should read various levels; however, teachers are to be vigilant to monitor the students reading log to ensure they are not consistently reading books off their level.

This letter is to let you know that your behavior and attitude during the professional development training was inappropriate, unacceptable and borderline insubordinate. Any additional actions of this nature could result in further disciplinary action.

The letter to J.P. stated:

Dear [Grievant]:

It has been reported to me that during a district professional offering on Tuesday, September 27, 2016 you were negative and disrespectful to the presenter and the district administration. Because of these actions the presenter had difficulty getting through all of her training materials which negatively impacts you and your colleagues.

The district will be implementing Schoolwide in Stafford and you will be required to implement this program with fidelity. The district is providing staff with professional development to help with successful implementation, but when you act in an unprofessional manner you are missing out on the resources the district is offering to assist you in implementation.

Please keep in mind that during all meetings, especially those by outside presenters, you are representing your grade level, building and district. As such, you should always

treat everyone present in a respectful and professional manner.

This letter is to let you know that your behavior and attitude during the professional development training was inappropriate, unacceptable and borderline insubordinate. Any additional actions of this nature could result in further disciplinary action.

Chidiac certifies that no further action was taken by administration with regard to the teachers' behavior following the dissemination of the letters.^{2/} On October 11, 2016, the principal met with Association Grievance Chairpersons regarding the letters sent to the four teachers. The meeting constituted the submission of a Level I grievance. The grievance was denied by the principal on October 11. On October 14, the Association requested the rescission of the letters and other relief to a Level II grievance which was denied by the principal on October 16. A Level III grievance was submitted on October 19 and denied on October 21. On November 21, the Board of Education issued a written response to the Association's grievance in which it affirmed Chidiac's decision to deny the relief requested. On December 15, the Association filed a Request for Submission to a Panel of Arbitrators. This petition ensued.

2/ Attached to the certification of Association attorney Hunter are the written accounts of each of the teachers as to their version of what transpired at the training session. Our task is to determine whether the principal's letters to each of the teachers are disciplinary or evaluative rather than resolve any factual disputes as to what happened at the meeting.

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.]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Board may have.

A school board has a managerial prerogative to observe and evaluate employees. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982). Disciplinary reprimands, however, may be contested through binding arbitration. N.J.S.A. 34:13A-29; N.J.S.A. 34:13A-5.3.

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), certif. den., 110 N.J. 173 (1988), we distinguished between evaluations of teaching performance 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.]^{3/}

Courts have emphasized that the legislature's intent was to allow review through binding arbitration of discipline imposed on teaching staff except for those sanctions based upon actual

^{3/} The Holland standard is used both in cases where increments are withheld and cases requiring a determination whether a memorandum or other document constitutes discipline or an evaluation of performance. See The Ridgefield Educ. Ass'n v. PERC., 1999 N.J. Super. Unpub. LEXIS 14, 25 NJPER 183 (¶30084 App. Div. 1999), involving a reprimand, which cites increment cases including Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n, 139 N.J. 141 (1995).

teaching performance. Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n, 139 N.J. 141, 154-155 (1995), citing and quoting the Assembly Labor Committee Statement to L. 1989, c. 269, explains:

"[A]ll discipline, including reprimands, may be appealed through the locally negotiated grievance procedures which must provide for binding arbitration as the final step in the procedure." However, "the withholding of a teaching staff member's increment based on actual teaching performance would still be appealable to the Commissioner of Education." If a dispute occurs over the proper characterization of an increment withholding, PERC "determine[s] whether the basis for the . . . withholding is predomina[ntly] disciplinary." N.J.S.A. 34:13A-27a.

* * *

"Discipline" is defined to include "all forms of discipline, except . . . the withholding of increments pursuant to N.J.S.A. 18A:29-14." N.J.S.A. 34:13A-22. We construe that definition of "discipline" to reflect a legislative determination to distinguish the withholding of an increment for disciplinary reasons from an increment-withholding for reasons of teaching performance. Hence, we conclude that the statutory standard governing the withholding of increments based on teaching performance does not apply to the withholding of an increment as a means of discipline. However, N.J.S.A. 18A:29-14, and the case law interpreting that provision, remain applicable when "the reason for the increment withholding relates predomina[ntly] to the evaluation of a [teacher's] teaching performance." N.J.S.A. 34:13A-27d.

[139 N.J. at 154-155, emphasis added.]

We have also relied on the context and form of the adverse personnel action as presumptive, albeit not conclusive, earmarks to classify the nature of the dispute. As we said in Holland:

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.

See Plainsboro Tp., P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008) (strongly worded Performance Improvement Plan issued to police officer was evaluative, not disciplinary). Compare West Windsor-Plainsboro Reg. Bd. of Ed., P.E.R.C. No. 97-99, 23 NJPER 168 (¶28084 1997) (memorandum issued to secretary about error regarding employee's health coverage was evaluative).

Also significant, but again, not conclusive, are the contents of the documents issued in support of the personnel action. Among these factors are the inclusion, or absence, of:

1. Description of the employee's action as grounds for discipline;^{4/}

^{4/} See Franklin Tp., P.E.R.C. No. 94-96, 20 NJPER 193 (¶25090 1994) (letter of reprimand about officer's moving violations was evaluative as it did not warn of future discipline). Compare North Haledon Bd. of Educ., P.E.R.C. No. 2015-26, 41 NJPER 403 (¶126 2015) (holding that portion of an evaluation in which supervisor described certain comments as a "reprimand" regarding improper alterations of a sign-in book and warned of future discipline was arbitrable as it was unrelated to evaluation of teaching performance).

2. Warning of future discipline for repeated conduct or failure to correct cited actions;^{5/}

Turning now to the letters at issue, we find them to be disciplinary reprimands even though attending mandatory professional training is part of a teaching staff member's job duties. We base our conclusion on the ending paragraph of each letter, particularly its second sentence:

This letter is to let you know that your behavior and attitude during the professional development training was inappropriate and unacceptable. Any additional actions of this nature could result in further disciplinary action.

The use of the term "further" suggests that the letters memorialize conduct the administration already deemed to warrant discipline. Applying the factors from Holland Tp. and its progeny, we also note that the documents are not part of the formal evaluation process, but instead criticize the teachers' actions at a specific, albeit professional, event. Accordingly, the grievances may proceed to arbitration.^{6/}

^{5/} See Wanaque Borough Bd. of Ed., P.E.R.C. No. 2000-7, 25 NJPER 371 (¶30161 1999) (memorandum reminding teachers not to dismiss students early was not arbitrable; it was not punitive and did not threaten future discipline). Compare Watchung Hills Reg. Bd. of Ed., P.E.R.C. No. 97-122, 23 NJPER 294 (¶28134 1997) (memorandum in capital letters and issued to teachers who failed to submit grades on time was arbitrable as discipline).

^{6/} Our determination does not prevent the Board from arguing to the arbitrator that it had just cause to issue these letters (continued...)

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Jones recused himself. Commissioner Wall was not present.

ISSUED: March 30, 2017

Trenton, New Jersey

6/ (...continued)
to the teachers and that they should be retained in their personnel files.