

P.E.R.C. NO. 2024-29

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEPTUNE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2024-014

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Neptune Board of Education's request for a restraint of binding arbitration of a grievance filed by the Neptune Education Association. The grievance alleges that the Board violated the CNA when it failed to extend the grievant's unpaid medical leave of absence even though she had exhausted all sick leave benefits. Separately, the grievance alleges that the Board's continued maintenance of a notice of termination was a disciplinary action that violated the CNA. The Commission finds that no statute or regulation, including N.J.S.A. 18A:30-6, preempts negotiations over extended unpaid leaves of absence. The Commission also finds that the grievance's challenge to the notice of termination to be legally arbitrable because it is discipline within the meaning of N.J.S.A. 34:13A-29(c) and therefore, the entire grievance is arbitrable.

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, Weiner Law Group, LLP, attorneys  
(Mark A. Tabakin, of counsel; Ashley L. Roessler, on  
the brief)

For the Respondent, Selikoff Cohen, attorneys (Keith  
Waldman, of counsel; Hop T. Wechsler, on the brief)

DECISION

On September 13, 2023, the Neptune Township Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Neptune Township Education Association (Association). The grievance asserts that the Board violated Articles XIII(D)(1), (5), and (7), and Article IV(C) of the parties' collective negotiations agreement (CNA) when it denied T.S.'s (the grievant) leave of absence and terminated her without just cause. The grievance also asserts that the Board's action in terminating the grievant was a disciplinary action making it subject to

arbitration under N.J.S.A. 34:13A-29 as amended by P.L. 2020, c. 66.

The Board filed briefs, exhibits and the certification of its Superintendent, Tami Crader. The Association filed a brief<sup>1/</sup>, exhibits and the certification of the grievant. These facts appear.

The Association represents all certificated educational personnel employed under contract, or on leave, in addition to Secretaries, School Safety Officers, Paraprofessionals, N.J. R.O.T.C. Naval Science Instructor, Educational Interpreters, Psychologists, Custodial Personnel, Athletic Trainer, Behaviorists, and District Technology Technicians and Parent Liaison. The Board and Association are parties to a CNA in effect from July 1, 2021 through June 30, 2026. The grievance procedure ends in binding arbitration.

Article XIII of the parties' CNA, entitled "Extended Leaves of Absences," provides in relevant part:

D. LEAVE OF ABSENCE DUE TO ILL HEALTH,  
INJURY OR OTHER EQUALLY GRAVE EMERGENCY

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<sup>1/</sup> Included in the Association's brief is a "request that all detailed medical information relating to T.S. be redacted and/or the relevant records be sealed pursuant to R. 1:38-11." This request is denied without prejudice. The Association may file a separate Motion to Seal setting forth the basis for an order sealing all or part of the record. The motion should be accompanied by a brief addressing: (1) the standard for sealing a record that the Commission, in the absence of a regulation, should adopt, and (2) when applying that standard to the facts here, why the motion should be granted.

- (1). A member in this school system may be granted a leave of absence for a maximum of one (1) school year for reasons of personal illness, accident, other equally grave emergency, and/or for rest and recuperation.
- (5). Whenever a leave of absence is granted for personal health reasons, said member must give acceptable professional evidence of recovered health before being permitted to return to duties in the school district.
- (7). The Board, depending on the nature of the reasons for the requested leave and/or in light of a short term leave, may extend the period of leave without loss of salary in the case of a member who has rendered long and/or outstanding service to the school district.

Article IV of the parties' CNA, entitled "Members' Rights," provides in pertinent part:

- (C). No member shall be reprimanded, suspended or discharged without just cause. Any such action asserted by the Board or Representatives thereof shall be subject to the Grievance procedure herein set forth.

The Superintendent certifies to the following facts. The Board hired the grievant as a paraprofessional for the 2006-2007 school year and has renewed her contract each year through the 2022-2023 school year. On April 8, 2022, the grievant commenced a leave of absence due to a personal medical condition. The grievant did not return to work for the rest of the 2021-2022 school year.

On September 21, 2022, the grievant submitted a doctor's note clearing her to return to work on December 1, 2022. The Board extended the grievant's leave of absence based on the emergent nature of her absence, even though she had exhausted all of her statutory and contractual leave entitlements. The leave was extended with a requirement to return to work on December 1, 2022.

On November 22, 2022, the grievant again requested to extend the leave of absence, submitting a doctor's note indicating she was unable to return to work until February 1, 2023. The District denied the grievant's request and reiterated that she was required to return to work by December 1, 2022. The grievant did not return to work December 1.

On December 6, 2022, the Board provided the grievant with written notice stating that "[s]ince you have exhausted all federal and contractual leave time to which you are entitled, should you fail to return to work, or be unable to return to work due to your continued medical disability, your employment with the Board will cease on December 16, 2022, due to your inability to perform the essential functions of your employment with or without reasonable accommodation." The grievant did not return to work by December 16.

On that same date, in response to the Board's correspondence, the grievant submitted a doctor's note clearing

her to return to work on December 19, 2022, with accommodations. The Board permitted the grievant to return to work with accommodations despite the fact that she did not return as directed, but required her to submit an updated doctor's note in one month.

On January 24, 2023, the grievant submitted a doctor's note recommending continued accommodations until surgery sometime in February. The Board advised the grievant that she was not entitled to additional time off for her surgery because she had exhausted all of her leave entitlements; therefore, her employment would cease if she failed to report to work due to her surgery.

On February 14, 2023, the grievant informed the Board that she was scheduled for surgery the next day and would be unable to work until April 1. On February 27, the Board denied the grievant's request for additional leave, and informed her that her employment would terminate on March 1 if she failed to return to work.

The grievant did not return to work on March 1, 2023. The same day, the Board notified the grievant that her employment ceased effective immediately due to her "inability to perform the essential functions of [her] employment with or without reasonable accommodations." On March 29, the Board passed a resolution memorializing the grievant's separation.

On March 29, 2023, the Association filed a grievance on the grievant's behalf claiming that the Board violated the CNA, specifically Article XIII(D)(1), (5), and (7) when it denied the grievant's leave request, and Article IV© when it terminated her without just cause," and that the Board's action in "terminating [the grievant] was "disciplinary" and therefore subject to N.J.S.A. 34:13A-29. On April 3, the Superintendent denied the grievance, explaining that the grievant had exhausted all of her leave entitlements and the Board was not required to extend her leave; the grievant was "basically abandoning her position."

The grievant certifies that at no time did she intend to permanently leave her position with the Board, nor did she abandon her position. On the contrary, she submitted multiple doctor's notes during her recovery process and repeatedly notified the Board whenever her estimated return to work date changed.

On April 28, 2023, the Association appealed its grievance to the Board of Education. On May 22, the Board affirmed the Superintendent's decision. On June 28, the Association filed a request for arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

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

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

[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.]

Where the petitioner asserts statutory or regulatory preemption, as is the case here, we apply the test set forth in Bethlehem Tp. Bd. of Ed. V. Bethlehem Tp. Ed. Ass'n, 19 N.J. 38



(1982). Negotiations are preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Id. at 44. The legislation must "speak in the imperative and leave nothing to the discretion of the public employer." Id.

In its petition, the Board seeks a restraint of arbitration of two aspects of the Union's grievance. First, the Board contends that its decision not to extend the grievant's unpaid leave of absence was a non-negotiable exercise of its statutorily compelled discretion pursuant to N.J.S.A. 18A:30-6. The Board asserts that the statute preempts any negotiated rule on extended leave of absences and instead that it must make those determinations on a case-by-case basis. The Board also requests a restraint of arbitration over the Board's memorializing of the separation of the grievant's employment due to job abandonment because it asserts that the action is not disciplinary in nature and not subject to arbitration.

In its opposition, the Association concedes that it is not challenging the Board's discretion to grant or deny leave requests as a general matter. Instead, it avers that the Board's application of its leave policy violated the CNA, which is a distinct claim. Further, the Association contends that the Board's argument that it did not terminate the grievant's employment but instead memorialized a voluntary separation from

employment should be disregarded because the certified facts show that the grievant never directly or by implication showed the requisite intent to abandon her job.

In reply, the Board maintains that the Association incorrectly argues that any severance of the employment relationship is tantamount to disciplinary action regardless of the circumstances and that the certified facts in this case detail that the employment relationship ended due to the grievant's own volition, and therefore the matter is not legally arbitrable.

The first aspect of this dispute concerns the Board's denial of the grievant's request for an extended unpaid leave of absence, which we find to be legally arbitrable. While the Board asserts that this issue is preempted by N.J.S.A. 18A:30-6, since the grievance seeks an extended unpaid leave of absence, no controlling statute exists to preempt negotiations on this subject.

It is well-established that "[l]eave time for employees in the public sector is a term and condition of employment within the scope of negotiations, unless the term is set by a statute or regulation." Headen v. Jersey City Bd. of Ed., 212 N.J. 437 (2012). N.J.S.A. 18A:30-6 addresses the salary of an employee who exhausts all accumulated sick leave as follows:

When absence, under the circumstances described in section 18A:30-1 of this

article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

N.J.S.A. 18A:30-6 does not "expressly, specifically and comprehensively" preempt the issue of the grievant's request for an extended unpaid leave of absence. The cases relied on by the Board are inapposite as they address salary payment during an extended leave of absence, while it is undisputed that the grievant's request was for unpaid leave. See Board of Education v. Piscataway Maintenance & Custodial Asso., 152 N.J. Super. 235 (App. Div. 1977) (holding that payment of salary during extended total disability leave was non-negotiable where Legislature required Board of Ed. to use managerial discretion); Waldwick Bd. of Ed., P.E.R.C. No. 2004-61, 30 NJPER 104 (¶41 2004), aff'd, 2005 N.J. Super. Unpub. LEXIS 838 (App. Div. 2005) (CNA provision requiring the extension of partial paid sick leave preempted by N.J.S.A. 18A:30-6.); see also West Orange Bd. of Ed., P.E.R.C. No. 2016-86, 43 NJPER 44 (¶10 2016) (supplementary paid sick days available after exhaustion of sick time non-negotiable); South Orange Maplewood Bd. of Ed., P.E.R.C. No. 2020-14, 46 NJPER 153 (¶36 2019) (arbitration restrained where CNA provided additional allowance of paid sick leave based on years of service following

exhaustion of leave benefits). Paid sick leave and unpaid sick leave are distinct benefits. N.J.S.A. 18A:30-6 preempts only the issue of payment for full or partial salary during an extended leave of absence. The statute does not address the Board's individual discretion when determining whether or not to extend an unpaid absence after the exhaustion of sick leave.

We next consider whether a separation of employment due to alleged job abandonment is a disciplinary action pursuant to N.J.S.A. 34:13A-29. N.J.S.A. 34:13A-29© grants non-teaching employees of boards of education:

[T]he right to submit to binding arbitration any dispute regarding whether there is just cause for a disciplinary action, including, but not limited to, reprimands, withholding of increments, termination or non-renewal of an employment contract, expiration or lapse of an employment contract or term, or lack of continuation of employment, irrespective of the reason for the employer's action or failure to act, and irrespective of any contractual or negotiated provision or lack thereof.

The statute further defines discipline as "all forms of discipline, except tenure charges...or the withholding of increments." N.J.S.A. 34:13A-22. On this record, the Board's assertion that the grievant's termination was a non-disciplinary separation is without legal support or factual distinction from a disciplinary termination.

Finally, the issue of the maintenance of documentation in grievant's personnel file concerning her termination is also

legally arbitrable. See, e.g., N.J.S.A. 34:13A-29(C) (letters of reprimand included in definition of discipline).

For all the reasons stated above, the grievance is legally arbitrable and the Board's request for a restraint of binding arbitration is denied.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Higgins and Papero voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: December 14, 2023

Trenton, New Jersey