P.E.R.C. NO. 89-80

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FREEHOLD TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and- Docket No. SN-89-15

FREEHOLD TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Freehold Township Education Association against the Freehold Township Board of Education. The grievance alleges that the employer violated the parties' collective negotiations agreement when it reprimanded a teacher without just cause. The Commission finds that the letter issued to a teacher, on balance, was disciplinary within the meaning of N.J.S.A. 34:13A-5.3, and that the grievance is therefore arbitrable.

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Appearances:

For the Petitioner, Anton & Sendzik, P.A.
(Martin J. Anton, of counsel)

For the Respondent, Hayden L. Messner, Jr., UniServ
Representative, New Jersey Education Association

DECISION AND ORDER

On September 14, 1988, the Freehold Township Board of Education ("Board") filed a Petition for Scope of Negotiations Determination. The Board seeks a restraint of binding arbitration of a grievance filed by a teacher represented by the Freehold Township Education Association ("Association"). The grievance alleges that the employer violated the parties' collective negotiations agreement when it reprimanded a teacher without just cause.

The parties have filed briefs and exhibits. These facts appear.

The Association is the majority representative of the Board's teachers and certain other employees. The parties entered a collective negotiations agreement effective from July 1, 1986 through June 30, 1989. Article 4, Section A provides:

> No employee shall be disciplined, reprimanded, or reduced in rank or compensation without just cause in conformance with Board policy and the provisions of this Agreement. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure to the extent herein set forth.

The grievance procedure ends in final and binding arbitration.

On June 1, 1988, the principal of West Freehold School sent a letter to Pamela Horrisberger, a teacher. That letter stated that the principal had investigated questions about events on the morning of May 4, 1988 and had interviewed five persons, including Horrisberger. The principal reached two conclusions:

> After leaving the Applegate School, you absented yourself from the district without notifying anyone of your whereabouts. Although the nature of your program makes it inappropriate to sign in and out of each and every building you enter during a day, authorization from either Mr. Gealey or myself should be obtained prior to leaving the district.
>
> It was Mrs. Brennan's intention to have the fourth grade Applegate Shared Time students report to you for instruction at the West Freehold School upon the conclusion of CAT testing. Your response during your phone conversation prevented this from occurring.

The letter then stated:

> Should a similar situation arise again, good judgment would dictate that the decision of the principal be honored. Any concerns regarding such can subsequently be directed to either Mr. Gealey or myself.

It ended by noting that the negotiated agreement permitted a response to be attached to the letter. The letter was placed in Horrisberger's personnel file.

On June 14, 1988, Horrisberger wrote the principal that she disagreed with the letter. An accompanying grievance asserted that the written reprimand violated Article 4, Section A and asked that it be removed from her personnel file.

On July 8, 1988, the Superintendent denied the grievance. He concluded that the letter was evaluative and therefore not subject to the grievance procedure.

On July 22, 1988, the Board's attorney wrote an NJEA field representative that the superintendent's conclusion that the letter was evaluative made the letter non-arbitrable under 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).

On August 23, 1988, the Association demanded binding arbitration. This petition ensued.

The Board reiterates that the superintendent's statement that the letter was "evaluative" ends the case. The Association argues that this label is not dispositive and that the investigation illustrates the letter's disciplinary nature.

Our jurisdiction is narrow. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 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. [Id. at 154]

We thus do not determine whether there was just cause to issue the letter and place it in Horrisberger's personnel file.

Holland states the standards for deciding whether a document is evaluative or disciplinary:

> 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 non-negotiable. 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.

We believe that the June 1 letter, on balance, was disciplinary within the meaning of the amendment to section 5.3. The letter was issued after an investigation and apart from the normal evaluative procedures. This fact alone is relevant, but not dispositive; we must examine the letter's thrust as well. It does not evaluate Horrisberger's teaching, but rather accuses her of being absent without authorization and implies she was also

insubordinate. The letter was placed in Horrisberger's personnel file and the Board, if its actions are found proper, could use it to support future disciplinary actions if she repeats the misconduct investigated and recorded. Under all these circumstances, the letter is predominantly disciplinary. Holland; Union Beach Bd. of Ed., P.E.R.C. No. 87-44, 12 NJPER 828 (¶17317 1986), aff'd App. Div. Dkt. No. A-1714-86T7 (10/2/87).

ORDER

The request for a restraint of binding arbitration is denied.

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
January 9, 1989
ISSUED: January 10, 1989