

P.E.R.C. NO. 98-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WASHINGTON TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

WASHINGTON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

Docket No. SN-97-86

SYNOPSIS

The Public Employment Relations Commission grants the request of the Washington Township Board of Education for a restraint of binding arbitration of a grievance filed by the Washington Township Education Association. That grievance protests a Board member's alleged public criticism of Township teachers. The Commission denies the Board's request for a restraint of binding arbitration of a second grievance filed by the Association contesting the Board's refusal to hold a hearing on the first grievance.

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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WASHINGTON TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

WASHINGTON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

Docket No. SN-97-86

Appearances:

For the Petitioner, Capehart & Scatchard, attorneys
(Craig D. Bailey, of counsel)

For the Respondent, New Jersey Education Association
(Eugene J. Sharp, UniServ Representative)

DECISION

On February 27, 1997, the Washington Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of two grievances filed by the Washington Township Education Association. The first grievance protests a Board member's alleged public criticism of Township teachers. The second grievance contests the Board's refusal to hold a hearing on the first grievance.

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

The Association represents certified professional employees and secretaries. The parties entered into a collective

negotiations agreement effective from July 1, 1994 through June 30, 1997. Step three of the parties' contractual grievance procedure provides for a request for a hearing before the Board or a designated committee of the Board. Step four provides for binding arbitration.

At a public Board meeting on September 24, 1996, a Board member stated:

One of the things that came in our packet was Mr. Kern's note to the principal regarding end of year activities. I would really like to see it passed along that no books are collected until that week either. Because it's been my experience that, like around the first of June, our kids stop all working. And the teachers start packing up the classrooms. And I don't think I'm the only person that's observed that. So . . . if we refrain from any picnics and other activities until Monday, June 9th, then we should also refrain from collecting any textbooks until then. Kinda hard to have instruction without textbooks.

The Board member also allegedly stated that Township teachers discipline students for not providing their own supplies.

On September 26, 1996, the Association filed a "class action" grievance on behalf of the Township's teachers alleging that the Board member had violated Article IV, Section E of the parties' agreement, prohibiting public criticism of staff. The grievance asked that the Board member apologize to staff at a public meeting.

Through a letter from the Board secretary, the Board denied the grievance, stating that it involved a non-negotiable managerial prerogative. The Board refused the Association's

subsequent request for a Board hearing and reiterated that it had denied the grievance on the merits. The Association filed a second grievance alleging a violation of the contractual grievance procedure. The Board declined to hear the grievance asserting that it did not have a contractual obligation to conduct a hearing on every grievance. The Association demanded arbitration on both grievances. 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]

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

Article IV, Section E of the parties' contract provides:

Any question or criticism by a supervisor, administrator or board member of an employee shall be made in confidence and not in the presence of students, parents, or other public gatherings.

The Board argues that the Commission has held that identical clauses interfere with an employer's managerial prerogative to initiate discipline. The Association counters that

our case law should be re-examined in light of N.J.S.A. 34:13A-22 to -29 ("1990 amendments"), concerning discipline of school employees.

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]

Applying this balancing test, we have found that contract provisions prohibiting all public rebukes are not mandatorily negotiable. Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 90-58, 16 NJPER 40 (¶21018 1989); Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986); Keansburg Bd. of Ed., P.E.R.C. No. 85-55, 10 NJPER 649 (¶15313 1984). But we have also found a provision barring public criticism of an individual teacher without justifiable, substantive reasons to be mandatorily negotiable. Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER

428 (¶23194 1992). These cases balance an individual employee's interest in not being unjustifiably humiliated with a board's interest in criticizing a teacher publicly when necessary.

Applying the balancing test to the facts of this case, we restrain binding arbitration over the first grievance, but not the second. A school board member has a right to raise concerns about instructional issues and to criticize teachers generally. This case does not involve any form of reprimand or discipline triggering a right to binding arbitration under N.J.S.A. 34:13A-29. However, N.J.S.A. 34:13A-5.3 requires negotiations over grievance procedures, including intermediate steps before the employer's representative. Thus, although the substance of the Board member's statements may not be contested through binding arbitration, the Association may arbitrate its claim that the Board was required to consider its contentions that the disputed comments were unfounded or unwarranted through the first three steps of the negotiated grievance procedure. See Somerville Bd. of Ed., P.E.R.C. No. 96-66, 22 NJPER 135 (¶27066 1966) (disputes over non-negotiable personnel actions may be submitted to advisory arbitration).

ORDER

The request for a restraint of binding arbitration of the grievance contesting the September 24, 1996 statements of a Board member is granted. The request for a restraint of binding

arbitration of the grievance seeking a Board hearing on the grievance contesting the statements is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Boose and Klagholz were not present.

DATED: November 20, 1997
Trenton, New Jersey
ISSUED: November 21, 1997