P.E.R.C. NO. 2001-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DELRAN BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2001-17

DELRAN EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Delran Board of Education for a restraint of binding arbitration of a grievance filed by the Delran Education Association. The grievance asserts that two memoranda placed in a teacher's personnel file were reprimands without just cause. The Commission finds that this dispute is focussed on what instruction is appropriate for future classes, not on what punishment is warranted for past behavior. Under all the circumstances, the Commission concludes that the memoranda are not disciplinary.

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.

P.E.R.C. NO. 2001-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DELRAN BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2001-17

DELRAN EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, John T. Barbour, P.A., attorney

For the Respondent, Steven Swetsky, NJEA Field Representative

DECISION

On October 23, 2000, the Delran Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Delran Education Association. The grievance asserts that two memoranda placed in a teacher's personnel file were reprimands without just cause.

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

The Association represents teachers and certain other employees. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1999 through June 30, 2002. The grievance procedure ends in binding arbitration.

Maxine Carter is a tenured teacher. She has taught in the Delran school system for 25 years and is a fifth grade teacher.

On January 17, 2000, the parents of a student wrote a letter to the Board complaining about a lesson in Carter's fifth grade class. The lesson addressed the topic of racial prejudice and involved a simulation in which, according to the parents, children with light hair color were asked to leave the classroom and wait in the hall and were instructed not to talk to any of their classmates, play with them at recess, sit with them at lunch, or e-mail or call them. Children remaining in the classroom were told to go in back of the line. According to the parents, the students were not told what was happening and why until the next day when they were asked for their reactions. The parents wrote that the lesson upset their son and made him not want to go to school the next day. They asked the Board to stop the teacher from "performing this destructive experiment on our children in the future."

Carter has used this simulation about 15 times in her 25-year career. She first became aware of the simulation in a special edition of the NJEA Reporter, an issue targeted at providing teaching strategies in the areas of prejudice and multi-cultural relations. According to the Association, the class was randomly divided into two groups and instructed not to interact with one another until further notice. A debriefing was

held the next day, where the class discussed the simulation in a "nurturing, supportive discussion session."

On January 28, 2000, the superintendent sent a memorandum to Carter. He wrote:

> It has come to my attention that you recently conducted what could be called a psychological experiment in an attempt to introduce the concept of prejudice. Having learned the details of this activity, and the effect it had on the children, I find the activity to be totally inappropriate. As such, I am directing you to cease and desist from conducting this or any similar "blind" activity, now and in the future. There are many appropriate ways to introduce necessary concepts without subjecting nine and ten year olds to psychological stress.

Copies of the memorandum were sent to the principal and placed in Carter's personnel file. The superintendent did not observe the lesson or speak to Carter about it before writing the memorandum.

On February 7, 2000, Carter and two union representatives met with the superintendent. On February 9, the superintendent sent the following memorandum to Carter:

> As a result of [the February 9 meeting], it was agreed that the activity (simulation) as discussed, would not be repeated in the future. It is also recommended that before using other simulations, they are reviewed with your principal. Finally, if you intend to conduct any activities that could be unsettling to sensitive children, you should provide parents with notification of what you are planning to do, and have them sign-off as to whether or not they want their child to participate.

Copies of this memorandum were sent to the principal and placed in Carter's personnel file.

On February 23, 2000, Carter replied that the February 9 memorandum had not accurately described the lesson. She wrote that the lesson was a nationally-known, widely-used simulation teaching strategy and was not a "psychological experiment" or "blind activity" and that the uneasy feeling students might have experienced was not "psychological stress" and was appropriately addressed in the discussion the next day. She asked that the January 28 memorandum be removed from her file because it was inaccurate. She further sought to clarify her understanding that it had been agreed at the February 7 meeting that she could continue to do the simulation, provided that the discussion session took place the same day.

On February 25, 2000, the superintendent responded to this memorandum. He wrote, in bold letters: "I do not approve of the simulation/activity you conducted, and do not want it conducted again." He concluded that "[t]he original directive was to cease and desist, and that directive still holds true today."

On February 25, 2000, the Association filed a grievance asserting that the two memoranda from the superintendent were reprimands without just cause. The grievance sought removal of the memoranda from all files.

On February 29, 2000, the superintendent denied the grievance. He wrote that there had been no reprimand; instead Carter had been directed to stop an instructional activity.

On March 28, 2000, the Board denied the grievance. It stressed that it did not consider the memoranda to be disciplinary actions. It also stated that it had the responsibility to determine the curriculum and that the lesson that led to the memoranda was not an acceptable part of the curriculum. It upheld the superintendent's directive not to conduct such activity again.

On June 21, 2000, the Association demanded arbitration. It described the dispute as involving a "letter of reprimand" and asked that the letter be removed from the personnel file and all copies be destroyed. This petition ensued.

The Board asserts that this directive is based on teaching performance and is educationally motivated and that any challenge must be submitted to the Commissioner of Education. It stresses that it does not consider the memoranda to be disciplinary actions. The Association responds that the Board has imposed a directive on Carter alone and such treatment is discriminatory and disciplinary. The Association also asserts that this matter does not involve an evaluation, observation or other benign form of constructive criticism meant to improve teaching performance.

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 whether the lesson was appropriate or whether the principal had just cause to issue the memorandum.

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), we distinguished between evaluations of teaching performance and disciplinary reprimands. Only reprimands may be submitted to binding arbitration. We found that by enacting the discipline amendment to N.J.S.A. 34:13A-5.3, the Legislature had not meant to make an evaluation, as opposed to a reprimand, a form of discipline. We then stated:

> 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. [Id. at 826]

This dispute centers on a decision that Carter's lesson about racial prejudice should not be repeated. The focus is on what instruction is appropriate for future classes, not on what punishment is warranted for past behavior. Deciding the best way to teach children about racial prejudice is an educational policy decision reserved to the Board, subject to any appropriate review by the Commissioner of Education. While only Carter received the directive, we have not been informed that any other teachers taught that lesson. And while the wording of the memoranda is harsh, we accept the Board's representation that it does not consider these memoranda to be disciplinary; these memoranda thus cannot be viewed as disciplinary in any future disciplinary proceeding. Wanaque Bor. Bd. of Ed., P.E.R.C. No. 2000-7, 25 NJPER 371 (¶30161 1999). Under all the circumstances, we conclude that the memoranda are not disciplinary and we restrain arbitration over the claim that they were issued without just cause.

ORDER

Binding arbitration is restrained over the claim that the January 28 and February 9, 2000 memoranda were reprimands issued without just cause.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: January 25, 2001
Trenton, New Jersey
ISSUED: January 26, 2001