P.E.R.C. NO. 93-98

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOWER CAMDEN COUNTY REGIONAL
HIGH SCHOOL DISTRICT NUMBER
ONE BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-93-48

LOWER CAMDEN COUNTY REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Lower Camden County Regional Education Association against the Lower Camden County Regional High School District Number One Board of Education to the extent the grievance contests the annual evaluation of a clerk-typist. The Commission declines to restrain arbitration over the portion of the grievance contesting the withholding of the employee's increment.

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Appearances:

For the Petitioner, Weinberg, McCormick and Chatzinoff, attorneys (Barry Chatzinoff, of counsel)

For the Respondent, Selikoff & Cohen, P.A., attorneys (Steven R. Cohen, of counsel)

DECISION AND ORDER

On December 15, 1992, the Lower Camden County Regional High School District Number One Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by a clerk-typist represented by the Lower Camden County Regional Education Association. That grievance asserts that the Board violated the parties' collective negotiations agreement when it gave the clerk-typist an adverse evaluation for the 1991-1992 school year and withheld her increment for the 1992-1993 school year.

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

The Association represents all Board personnel except full-time administrative and supervisory personnel, central office personnel, and substitutes and other temporary employees. The parties entered into a collective negotiations agreement effective from July 1, 1989 through June 30, 1992. Article V provides that "no employee shall be disciplined, reprimanded, reduced in rank or compensation, or given adverse evaluation of his services without just cause." The contract contains a salary guide with yearly increments for secretaries and clerks, but Article XLI, Section D specifies that an increment may be withheld when "a non-certified employee's overall performance falls below the level acceptable to the Administrative Staff." Under Section D.2, one or more of the following conditions must be present before an increment is withheld:

> a. chronic or habitual lateness to work or assigned duties or obligations
>
> b. unsatisfactory performance of duties, documented
>
> c. abuse of sick leave or personal leave
>
> d. unbecoming conduct
>
> e. failure to abide by and/or uphold established rules, regulations, and policies of the Board of Education and Administration.

The grievance procedure ends in binding arbitration.

Lorraine Reynolds is a clerk-typist SO-3 at the Regional Day School. On April 27, 1992, her principal completed her evaluation for the 1991-1992 school year. She was rated "average" in four categories, "below average" in eight categories, and "poor"

in three categories. The evaluation stated that Reynolds could improve in these areas:

> 1. Typing proficiency must improve. This is the fifth consecutive year this deficiency has been noted and there has been no significant improvement. It is once again recommended that Mrs. Reynolds enroll in and complete a typing course to improve her proficiency. This is the third consecutive year this recommendation has been made.
>
> 2. Errors in the compilation of daily lunch orders must be significantly reduced. The entire prescribed lunch ordering procedure must be implemented and used consistently.
>
> 3. Punctuality remains a problem area. This was noted in last year's evaluation but has not improved during the current evaluation period. In fact there was a slight increase in the number of documented latenesses.
>
> 4. Mrs. Reynolds must improve in the area of following established procedures. For example when leaving her desk another member of the clerical staff must be notified - this procedure is routinely ignored as is leaving promptly at 12:30 pm for lunch.
>
> 5. The number of filing errors must be significantly reduced. More attention to detail is necessary.
>
> 6. Mrs. Reynolds must learn to accept constructive criticism and use it to improve her job performance. When presented with an error Mrs. Reynolds too often becomes extremely defensive and does not grasp the point being made by the supervisor.
>
> 7. The number of errors in the work performed must be reduced.

The principal recommended withholding her increment for the next school year, thus freezing her salary.

On June 8, 1992, the Board voted to withhold Reynold's increment. It based its decision on the principal's recommendation, her unsatisfactory performance, and her failure to improve to the district's minimum standards.

On June 23, 1992, Reynolds filed a grievance. She asserts that she was given an adverse evaluation and disciplined without just cause. She asks that she be given a satisfactory evaluation and that her increment be restored.

After the grievance was denied, the Association demanded binding arbitration. This petition ensued.

The Board contends that the contents of the evaluation report are not negotiable and that the withholding of increments for evaluative reasons may not be submitted to binding arbitration under N.J.S.A. 34:13A-26. The Association responds that the discipline amendment to N.J.S.A. 34:13A-5.3 permits binding arbitration of this withholding and that adverse evaluations of non-professional employees may also be arbitrated.

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.

In 1982, the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., was amended to require negotiations over disciplinary disputes and disciplinary review procedures. N.J.S.A. 34:13A-5.3 now provides, in part:

> In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.
>
> * * *
>
> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

Under the discipline amendment, parties may agree to submit a disciplinary dispute to binding arbitration if the disciplined employee has no alternate statutory appeal procedure for contesting the particular type of discipline imposed. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984); Bergen Cty. Law Enforcement Group v. Bergen Cty., 191 N.J. Super. 319 (App. Div. 1983).

The Legislature considered increment withholdings to be a form of discipline under the discipline amendment. East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd, App. Div. Dkt. No. A-5576-83T6 (3/19/85), certif. den., 101 N.J. 280 (1985); see also State of New Jersey (OER), P.E.R.C. No. 87-130, 13 NJPER 347 (¶18141 1987), aff'd App. Div. Dkt. No. A-4573-86T8 (4/7/88). The discipline amendment thus permits an agreement to arbitrate a dispute over an increment withholding unless the employee has an alternate statutory appeal procedure. Non-professional employees do not have appeal rights under N.J.S.A. 18A:29-14 or any other statute. East Brunswick therefore held that a school board could agree to permit binding arbitration of increment withholding disputes involving non-professional employees.

The Board concedes that this dispute is legally arbitrable if we apply the discipline amendment and East Brunswick. But it contends that later amendments to the Act have overruled East Brunswick. We disagree.

In 1990, the Act was amended to expand the scope of negotiations for school board employees. Some of the amendments

addressed increment withholdings. N.J.S.A. 34:13A-26 and N.J.S.A. 34:13A-29, read together, require binding arbitration of withholdings of employee increments for predominately disciplinary reasons. N.J.S.A. 34:13A-27(a) empowers us to determine whether the basis for withholding the increment of a teaching staff member is predominately disciplinary. If we answer this question affirmatively, then the dispute must be addressed through the grievance procedure and the procedure must terminate in binding arbitration. N.J.S.A. 34:13A-27(c). If, however, we determine that the reason for the withholding relates predominately to the evaluation of a teaching staff member's teaching performance, then the teaching staff member must invoke N.J.S.A. 18A:29-14 and petition the Commissioner of Education for relief. N.J.S.A. 34:13A-27(d).

N.J.S.A. 34:13A-28 provides that nothing in the 1990 amendments "shall be deemed to restrict or limit any right established or provided by [section 5.3]," and that the amendments "shall be construed as providing additional rights in addition to and supplementing the rights provided by that section." Under the discipline amendment to section 5.3, non-professional employees had the right to seek an agreement to submit all increment withholdings to binding arbitration. The 1990 amendments did not restrict that right.

Under the discipline amendment to section 5.3, teaching staff members could not negotiate for an agreement to submit any

increment withholdings to binding arbitration since they had an alternate statutory appeal procedure. The 1990 amendments created a right for teaching staff members to arbitrate withholdings predominately based on disciplinary reasons, but continued to deny them the power to arbitrate increment withholdings predominately based upon an evaluation of teaching performance. Cherry Hill Bd. of Ed., P.E.R.C. No. 92-119, 18 NJPER 308 (¶23131 1992). The distinction between disciplinary reasons and teaching performance reasons applies only to teaching staff members and was not meant to restrict the preexisting negotiations rights of non-professional employees under the discipline amendment and East Brunswick. Therefore, we decline to restrain binding arbitration of the grievance to the extent it contests the withholding of an increment from Lorraine Reynolds.

We will, however, restrain binding arbitration over the portion of the grievance contesting the adverse evaluation given Reynolds for the 1991-1992 school year. A school board has a managerial prerogative to evaluate its employees. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982). The discipline amendment was designed to permit negotiations and arbitration over allegedly unjust punitive action such as increment withholdings and reprimands, but not to permit binding arbitration where an employer has merely evaluated an employee. Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17131 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87). We have thus restrained arbitration of performance evaluations of non-professional

employees. Trenton Bd. of Ed., P.E.R.C. No. 89-82, 15 NJPER 99 (¶20046 1989); State of New Jersey (OER), P.E.R.C. No. 89-8, 14 NJPER 512 (¶19216 1988); Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 88-129, 14 NJPER 413 (¶19165 1988). Cf. Sayreville Bd. of Ed., P.E.R.C. No. 89-47, 14 NJPER 689 (¶19292 1988), aff'd App. Div. Dkt. No. A-1727-88T1 (6/20/89), certif. den. 118 N.J. 199 (1989) (declining to distinguish between teachers and secretaries in holding promotional criteria to be non-negotiable). The Association has not contended or demonstrated that this particular evaluation should be considered a reprimand. We will accordingly restrain binding arbitration over the grievance to the extent it contests the contents of the annual evaluation of Lorraine Reynolds.

ORDER

The request of the Lower Camden County Regional High School District Number One Board of Education for a restraint of binding arbitration is granted to the extent the grievance contests the annual evaluation of Lorraine Reynolds for the 1991-1992 school year. The request for a restraint of binding arbitration is otherwise denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration. Commissioner Grandrimo was not present.

DATED: April 29, 1993
Trenton, New Jersey
ISSUED: April 30, 1993