

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WATCHUNG HILLS REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-97-16

WATCHUNG HILLS REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Watchung Hills Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Watchung Hills Regional Education Association. The grievance asserts that the Board violated the parties' collective negotiations agreement when it placed letters of reprimand in the personnel files of some, but not all teachers, who did not turn in grades on time. The Commission finds that a memorandum that alleges past misconduct, threatens future discipline, and that is retained in a personnel file may be characterized as a written warning and may be used to justify future and stronger disciplinary actions. The Commission therefore concludes that an arbitrator may determine whether teachers were treated disparately and whether there was just cause to retain the memorandum in their personnel files.

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. 97-122

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Appearances:

For the Petitioner, Savage & Serio, attorneys (Thomas J. Savage, of counsel)

For the Respondent, Wills, O'Neill & Mellk, attorneys (Arnold M. Mellk, of counsel)

DECISION AND ORDER

On August 30, 1996, the Watchung Hills Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Watchung Hills Regional Education Association. That grievance asserts that the Board violated the parties' collective negotiations agreement when it placed letters of reprimand in the personnel files of some but not all teachers who did not turn in grades on time.

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

The Association represents the Board's teachers. The parties entered into a collective negotiations agreement effective

from July 1, 1995 to June 30, 1998. Its grievance procedure ends in binding arbitration of reprimands. N.J.S.A. 34:13A-29.

The 1995-1996 school year began without an agreement to replace the one that had expired on June 30, 1995. The Board did not pay salary increments after the new school year began. See Watchung Hills Reg. Bd. of Ed., I.R. No. 96-10, 22 NJPER 44 (¶27022 1995). Negotiations continued and the parties used mediation and factfinding in an effort to resolve their impasse. The Association urged teachers to exercise a statutory right not to work on Election Day, November 7, 1995, a State holiday. N.J.S.A. 18A:25-3. The Board closed school that day when many teachers did not report to work. On November 8, the Association membership voted to authorize its Executive Committee to call a strike.

On November 8, 1995, the Association urged teachers not to submit first term grades on their due date, November 13, 1995. About 83% of the teachers turned in their grades on time. Other teachers obtained an extension. Teachers who did neither were sent a memorandum prepared by the superintendent and issued by their department supervisors. The memorandum stated:

YOU HAVE FAILED TO GIVE ME YOUR GRADES BY
2:15 P.M. NOR HAVE YOU MET WITH ME TO GET MY
PERMISSION TO WAIVE THE SUBMISSION DEADLINE.

THIS IS TO NOTIFY YOU THAT UNLESS YOU
FORTHWITH CARRY OUT YOUR ASSIGNED DUTY AND
PROFESSIONAL RESPONSIBILITY, A CHARGE OF
INSUBORDINATION WILL BE ISSUED AGAINST YOU.
INSUBORDINATION CANNOT AND WILL NOT BE TOLERATED
AT WHRHS.

The remaining grades were turned in immediately and no formal disciplinary action was taken. However, a copy of the memorandum was kept in the personnel file of each teacher who had received it.

On December 14, 1995, the Association filed a grievance asserting that the Board had disparately issued reprimands to some teachers who had turned in late grades, while not issuing reprimands to other teachers who had also missed the deadline. The grievance sought removal of the memoranda from the personnel files.

On February 23, 1996, the factfinder issued a report addressing the negotiations issues between the parties. He specifically recommended rejecting an Association proposal that a "no-reprisal" pledge be adopted. He wrote:

As I understand it, teachers who failed to turn in their grades in response to the call from the Action committee were simply told that if they did not do so, they would be charged with insubordination. There were no charges of insubordination. Thus there were no letters of reprimand.^{1/}

The Board denied the grievance and the Association demanded arbitration. This petition ensued.

The Board asserts that the concerted refusal of some teachers to submit the grades by the deadline was an illegal work stoppage and that the memorandum was a necessary response to halt

^{1/} It is not clear whether he saw the memoranda or knew that they had been placed in personnel files.

it. The Board points to the factfinder's comments as evidence that there was no discipline.

The Association asserts that the only issue before us is whether the memorandum is disciplinary. It asserts that there is no teacher evaluation issue and the memorandum threatens insubordination charges and is thus disciplinary.

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 contractual merits of the Association's grievance or any contractual defenses the Board may have.

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), describes the test for distinguishing between disciplinary reprimands which may be arbitrated and mere evaluations which may not be arbitrated:

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. [12 NJPER at 826]


The issue before us is narrow. The Board contends that the memorandum was a necessary response to a concerted refusal of some teachers to submit their grades on time. We need not consider that contention because the memorandum accomplished its purpose of inducing teachers to turn in the remaining grades immediately and the grievance does not contest the Board's power to issue such a memorandum. The grievance asserts only that some teachers were treated disparately since other teachers who submitted late grades allegedly did not have the memorandum placed in their personnel files. A memorandum that alleges past misconduct, that threatens future discipline, and that is retained in a personnel file may be characterized as a written warning and may be used to justify future and stronger disciplinary actions. Englewood Bd. of Ed., P.E.R.C.

No. 91-118, 17 NJPER 341 (¶22153 1991), aff'd NJPER Supp.2d 269 (¶222 App. Div. 1992). Contrast West Windsor-Plainsboro Reg. Bd. of Ed., P.E.R.C. No. 97-99, 23 NJPER 168 (¶28084 1997). We therefore conclude that an arbitrator may determine whether teachers were treated disparately and whether there was just cause to retain the memorandum in their personnel files.

ORDER

The request of the Watchung Hills Regional Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, and Ricci voted in favor of this decision. Commissioner Klagholz voted against this decision. Commissioners Boose and Wenzler were not present.

DATED: April 24, 1997
Trenton, New Jersey
ISSUED: April 25, 1997