

P.E.R.C. NO. 88-138

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-88-36

OLD BRIDGE TOWNSHIP
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains, in part and declines to restrain, in part, grievances which the Old Bridge Education Association filed on behalf of two tenured teachers. The grievances allege that the Board violated the parties' collective negotiations agreement when, after tenure charges had been certified, it suspended the teachers without pay for 120 days. The Commission finds that one of the grievances was preempted because the Acting Commissioner of Education had upheld the suspension for one teacher, but found that the other grievance could proceed to arbitration.

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Appearances:

For the Petitioner, Wilentz, Goldman & Spitzer, P.C.
(Steven J. Tripp, of counsel)

For the Respondent, Oxfeld, Cohen, Blunda, Friedman, LeVine
& Brooks, Esqs. (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On December 16, 1987, the Old Bridge Township Board of Education ("Board") filed a Petition for Scope of Negotiations Determination. The petition sought a restraint of binding arbitration of grievances which the Old Bridge Education Association ("Association") filed on behalf of two tenured teachers. The grievances allege that the Board violated the parties' collective negotiations agreement when, after tenure charges had been certified, it suspended the teachers without pay for 120 days.

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

The Association is the majority representative of the Board's certified personnel. The Board and the Association entered a collective negotiations agreement effective from July 1, 1985 through June 30, 1988. Article IV, Section D provides:

Any suspension of a teacher will be with full pay up to the time of termination.

The negotiated grievance procedure ends in binding arbitration.

Richard Pappa is a tenured teaching staff member. He teaches gifted and talented students. He has received excellent evaluations and his innovative programs have been praised in The New York Times and The Wall Street Journal.

On September 25, 1986, Pappa was arrested and charged under N.J.A.C. 2C:14-4 with open public lewdness at a rest area on the Garden State Parkway. On November 6, Pappa pled guilty in the Cranford Municipal Court.

On March 30, 1987, the Board certified tenure charges against Pappa alleging conduct unbecoming a teacher. It filed the charges with the Commissioner of Education pursuant to N.J.S.A. 18A:6-10 and then suspended Pappa without pay for 120 days pursuant to N.J.S.A. 18A:6-14.

The Association immediately filed a grievance asserting that the suspension without pay violated Article IV, Section D and other contract provisions. It asked that Pappa be paid his full salary and have withheld wages restored and that the Board pay \$1,000. The Board denied this grievance and the Association sought binding arbitration.

William Wagner is a tenured teaching staff member. He teaches co-ed physical education and coaches track and field at Madison Central High School.

On August 3, 1987, the Board certified tenure charges against Wagner alleging conduct unbecoming a teacher. The charges alleged that during the 1984-85 and 1985-86 school years, Wagner had improperly touched five female students and made improper remarks about two others. The Board filed the charges with the Commissioner of Education and suspended Wagner without pay for 120 days.

The Association immediately filed a grievance asserting that the suspension without pay violated Article IV, Section D and other contract provisions. It asked that Wagner's salary and benefits be reinstated immediately, with interest. The Board denied this grievance and the Association sought binding arbitration.

When the Board filed this petition it asked for a temporary restraint of binding arbitration pending this final decision. A Commission designee denied that request. I.R. No. 88-8, NJPER (¶ 1988).

On January 19, 1988, an arbitrator concluded that the two unpaid suspensions violated Article IV, Section D. He ordered the Board to pay Pappa and Wagner the wages withheld for the first 120 days of their suspensions, with interest at the rate of 1% per month.^{1/}

^{1/} He rejected the Association's contention that a late response to the Pappa grievance required an award of all requested relief.

On February 4, 1988, an Administrative Law Judge issued his recommended decision on the tenure charges against Pappa. He found that Pappa had been publicly lewd. He concluded that dismissal was not warranted in light of Pappa's outstanding career and that the proper penalty was the 120 day unpaid suspension permitted by N.J.S.A. 18A:6-14.^{2/}

On March 14, 1988, the Acting Commissioner of Education upheld the recommendation that Pappa not be dismissed. He accepted the recommendation that the 120 day suspension without pay be upheld and added the penalty of an increment withholding. Noting the

^{2/} That statute provides:

Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal.... Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

arbitrator's award, he declined to decide whether the contract did not permit the Board to suspend without pay because N.J.S.A. 18A:6-10 empowered the Commissioner to levy whatever penalty he deemed best.

We have not received any decisions concerning the tenure charges against Wagner. A hearing was scheduled for January 12, 1988.

The Board contends that arbitration is precluded under N.J.S.A. 34:13A-5.3 because N.J.S.A. 18A:6-10 provides an alternate statutory appeal procedure for resolving the propriety of these unpaid suspensions. It emphasizes the conflict between the arbitration award invalidating Pappa's unpaid suspension and the Acting Commissioner's decision upholding it and asserts that the latter must prevail.^{3/}

The Association asserts that N.J.S.A. 18A:6-14 gives the Board discretion to suspend employees with or without pay and that under Essex Cty., P.E.R.C. No. 87-156, 13 NJPER 579 (¶18213 1987), the Board may negotiate over how to use that discretion.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

^{3/} The Board has requested oral argument. We deny that request.

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. [78 N.J. at 154]

In Essex, a Civil Service employer suspended an employee without pay until disciplinary charges were resolved. The employee filed a grievance claiming that the employer had violated a provision requiring the employer to maintain suspended employees on pay status. We held that this contractual provision was mandatorily negotiable, stating:

An employee's ability to serve a suspension with pay until guilt or innocence is departmentally determined directly affects his work and welfare and protects his interest in due process. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 118 LRRM 3041 (1985); Brock v. Roadway Express, Inc., ___ U.S. ___, ___ S.Ct ___, 95 L.Ed.2d. 239 (1987). It does not significantly interfere with the County's ability to discipline. Article XXII, section 3(k) relieves an employee of the burden of waiting for the required disciplinary procedure to run its course without the employee's primary means of support. [13 NJPER at 581]


We cautioned, however, that under section 5.3 only the Civil Service Commission could review the major disciplinary action and determine the appropriate penalty for any proven misconduct. Id. at 581 nn.

As in Essex, this contractual provision requiring full pay until the resolution of tenure charges is mandatorily negotiable in the abstract. But this case is different from Essex in one critical respect: the Acting Commissioner of Education has upheld an unpaid suspension of 120 days as an appropriate penalty for Pappa's misconduct. Thus, the arbitrator's award has been preempted by that determination. With respect to Wagner's grievance, the arbitration award is within the scope of negotiations, but the Commissioner of Education retains his statutory discretion to determine whether or not an unpaid suspension is an appropriate penalty if the employer proves its tenure charges.

ORDER

Article IV, Section D is mandatorily negotiable. The arbitration award is within the scope of negotiations except to the extent it requires the Board to restore with interest wages withheld from Richard Pappa for the first 120 days of his suspension.

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
June 23, 1988
ISSUED: June 24, 1988