

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-86-79

OLD BRIDGE TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, and denies, in part, a request by the Old Bridge Township Board of Education to restrain binding arbitration of a grievance which the Old Bridge Township Education Association filed. The grievance alleges that the Board violated the collective negotiations agreement by failing to discipline a supervisor who allegedly attacked another employee. The Commission finds that the Board's decision not to discipline an employee is not reviewable through negotiated disciplinary review procedures and that provisions setting terms and conditions of employment for non-unit employees are not mandatorily negotiable. The Commission further finds that the Association's damage claim for intentional injuries attributable to the Board is not preempted by the New Jersey Workers' Compensation Law, N.J.S.A. 34:15-1 or the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. and declines to restrain binding arbitration of that part of the grievance.

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Appearances:

For the Petitioner, Rand, Algeier, Tosti Woodruff & Frieze,  
Esqs. (David B. Rand, of counsel and on the brief)

For the Respondent, Oxfeld, Cohen & Blunda, Esqs.  
(Arnold S. Cohen, of counsel and on the brief)

DECISION AND ORDER

On April 22, 1986, the Old Bridge Township Board of Education ("Board") filed a Petition for Scope of Negotiations Determination. The Board seeks a restraint of binding arbitration of a grievance which the Old Bridge Township Education Association ("Association") filed. The grievance alleges that the Board violated the parties' collective negotiations agreement by failing to discipline a supervisor who allegedly attacked another employee.

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

The Association is the majority representative of the Board's non-supervisory professional and non-professional

employees. The Board and the Association are parties to a collective negotiations agreement with a grievance procedure ending in binding arbitration.

On November 27, 1985, Martin Regan, a maintenance department employee, was allegedly assaulted by his direct supervisor, Jeremiah O'Connell. O'Connell is not a member of the Association's negotiations unit. On February 11, 1986 assault charges lodged by Regan against O'Connell were dismissed after a municipal court trial.

The Association filed a grievance seeking this relief:

1. That the supervisor involved in the attack of 11/27/85 be afforded the same punishment as prescribed for Mr. Frank Auriemma for a similar incident.<sup>1/</sup>

2. That the Board of Education hand out the same fair handed justice to supervisors as has been previously afforded an employee found to have assaulted Mr. O'Connell.

3. Pay grievant damages for humiliation, injury and disgrace incurred at the hand of his supervisor. Mr. J. O'Connell. This sum to be negotiated.

The Association then demanded arbitration and the Board filed the instant petition.

The Board contends that the grievance is not arbitrable because it involves an employee who is not represented by the Association and challenges the Board's non-negotiable decision to

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<sup>1/</sup> The Association states that Auriemma was discharged for attacking O'Connell in a prior incident.

impose discipline. See Willingboro Bd. of Ed., P.E.R.C. No. 85-73, 11 NJPER 57 (¶16030 1984); Keansburg Bd. of Ed., P.E.R.C. No. 85-55 10 NJPER 649 (¶15313 1984). It contends that the grievant's claim for damages is preempted by the Workers' Compensation Act (N.J.S.A. 34:15-8) and the New Jersey Tort Claims Act (N.J.S.A. 59:1-1 et seq.).

The Association counters that an employer's failure to impose discipline on a supervisor is arbitrable and affects whether unit employees will have a safe working environment through an even-handed application of discipline. The Association disagrees that the claim for humiliation damages has been preempted.

N.J.S.A. 34:13A-5.3 provides, in part:

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.  
[Emphasis supplied]

We find that a board's decision not to discipline an employee is not reviewable through negotiated disciplinary review procedures. Discipline means "action by an employer...against an employee for infraction of company or contract rules." Roberts Dictionary of Industrial Relations, (3d ed. 1986) at 150 (emphasis supplied). A disciplinary action is one in which a punishment or sanction is contemplated. City of Newark v. Belleza, 159 N.J. Super. 123 (App. Div. 1978). These authorities suggest that inaction cannot be equated with discipline.

Even if an employer's failure to impose discipline is itself a "disciplinary determination," the Association may not negotiate or use a disciplinary review procedure to challenge discipline imposed on a non-unit employee. Provisions setting terms and conditions of employment for non-unit employees are not mandatorily negotiable. See City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985); Trenton Bd. of Ed., P.E.R.C. No. 83-37, 8 NJPER 574 (¶13265 1982), mot. for recon. den., P.E.R.C. No. 83-62, 9 NJPER 15 (¶14006 1982), aff'd App. Div. Docket No. A-1606-82T3 (3/16/84).

Finally, the Association seeks damages for "humiliation, injuries and disgrace." The Board argues only that the relief sought is available exclusively under the New Jersey Workers' Compensation Law, N.J.S.A. 34:15-1, or the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

In Millison v. E. I du Pont de Nemours & Co., 101 N.J. 161 (1985), the Supreme Court held that the intentional wrongs of an employer (through its employees) as well as those of co-employees fall outside the boundaries of the Compensation Act. Id. at 185; N.J.S.A. 34:15-8. Thus, the Compensation Act does not preempt arbitration of claims for injuries caused by intentional acts.<sup>2/</sup>

N.J.S.A. 59:1-4 provides, in part, that nothing in the Tort Claims Act shall affect liability based on contract. Thus, the Tort Claims Act does not preempt arbitration of claims arising under the parties' collective negotiations agreement.

Accordingly, we deny the Board's request to restrain arbitration of that part of the grievance which seeks damages under the parties' contract for intentional injuries attributable to the Board.<sup>3/</sup>

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<sup>2/</sup> Cf. Atchison, Topeka & Santa Fe R.R. v. Buell, \_\_\_ U.S. \_\_\_, 124 LRRM 2953 (1987) (breaches of duty to provide safe workplace may at times be remedied through grievance arbitration as well as Federal Employers' Liability Act).

<sup>3/</sup> In making this determination, we have not considered whether the subject matter of this dispute is within the parties' arbitration clause or whether the grievant would be entitled to any relief under such a clause. See Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975).

ORDER

The Board's request for a restraint of binding arbitration is granted except to the extent the grievant seeks damages under the parties' contract for intentional injuries attributable to the Board.

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  
April 22, 1987  
ISSUED: April 23, 1987