P.E.R.C. NO. 2002-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUMSON-FAIR HAVEN REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2001-62

RUMSON-FAIR HAVEN REGIONAL
EMPLOYEES ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that a grievance filed by the Rumson-Fair Haven Regional Employees Association was legally arbitrable. The grievance alleged that a teacher was disciplined by the Rumson-Fair Haven Regional Board of Education without just cause when his schedule was changed from teaching health and driver education classes to one consisting solely of physical education periods. An arbitrator issued an award sustaining the grievance. The Commission concludes that the assignments were disciplinary and that a grievance alleging that a schedule constituted discipline without just cause in violation of the agreement was legally arbitrable.

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.

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Appearances:

For the Petitioner, Reussille, Mausner, Carotenuto, Barger & Steel, LLC, attorneys (Martin M. Barger, on the brief)

For the Respondent, Klausner & Hunter, attorneys (Stephen B. Hunter, on the brief)

DECISION

On May 29, 2001, the Rumson-Fair Haven Regional High School Board of Education petitioned for a scope of negotiations determination. The petition sought a restraint of binding arbitration of a grievance filed by the Rumson-Fair Haven Regional Employees Association. The grievance alleged that a teacher was disciplined without just cause when his schedule was changed from teaching health and driver education classes to one consisting solely of physical education periods. On July 24, 2001, an arbitrator issued an award sustaining the grievance.

The parties have filed briefs, exhibits and certifications. These facts appear.[1/]

The Association represents teachers and certain other employees. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1998 through June 30, 2001. The grievance procedure ends in binding arbitration.

Art Harmon has been employed by the Board for 34 years as a physical education, health education, and driver education teacher. Prior to the 2000-2001 school year, Harmon had sometimes been assigned a schedule of only health education and driver education classes. In other years he also taught physical education classes. He received excellent evaluations.

Near the end of the 1999-2000 school year, Harmon advised his supervisor, Frank Azzaro, and his building principal, Peter Righi, that he anticipated retiring after the 2000-2001 school year. He said that orthopedic problems made it difficult for him to continue to teach physical education, but that he could teach health education and driver education without difficulty.

1/ The Board objected to any consideration of the arbitrator's award. We reject this objection. We requested that the parties submit any award issued with respect to the grievance. Such exhibits are standard in scope of negotiations cases involving grievance arbitrations. In such cases we consider the arbitrator's factual findings. Trenton Bd. of Ed., P.E.R.C. No. 88-139, 14 NJPER 458, 459 (¶19190 1988).

On July 12, 2000, Azzaro told Harmon that if he would write a letter stating his intent to retire at the end of the 2000-2001 school year, then Azzaro and Righi would assign him the teaching schedule he desired. Harmon told Azzaro that he did not want to write a letter pledging to retire in case he changed his mind. Harmon submitted an August 28, 2000 medical certification from a Worker's Compensation orthopedic surgeon. It states:

> Arthur Harmon continues as a patient in this office, with severe disabling injuries to his left knee. He has been arthroscoped, and fails to improve, as this knee is considerably osteoarthritic, as well as having torn cartilages. Despite physical therapy, multiple anti-inflammatory medications, injectable medications, the knee continues to be chronically painful. He is unable to increase his activity level. He has trouble walking steps and stairs, and changing direction. It is very difficult for him to get out of a chair. His knee is considerably damaged, with severe osteoarthritis to his medial joint space. Clearly, Mr. Harmon is a candidate of total knee replacement. Unable to ambulate more than very short distances, chronic knee pain, difficulty getting in and out of a chair, Mr. Harmon requires sedentary employment, and at this point, should not be teaching gym.

Harmon was assigned five physical education classes for the 2000-2001 school year, a schedule that required him to be on his feet for almost the entire school day.

On September 15, 2000, the Association filed a grievance alleging that Azzaro's solicitation of a letter from Harmon to announce his intention to retire violated section 3.1 of the parties' agreement "because it constitutes an inequitable

application of Board Policy." On September 22, the grievance was denied. On September 27, the grievance was moved to level two alleging that an attempt to induce an employee to make a retirement commitment is a violation of the employee's civil rights and pension law. On October 11, the superintendent denied the grievance stating that it failed to cite an applicable violation of Board policy, contract, or administrative decision. The grievance was denied at level three.

On November 27, 2000, the Association filed a demand for arbitration. The demand asserted that Harmon was disciplined without just cause.

On March 9, 2001, the assigned arbitrator set June 26, 2001 as the hearing date. On May 29, the Board filed this petition. On June 13, the Board asked us to postpone arbitration because it had commenced a scope of negotiations proceeding. It did not seek an interim restraint of arbitration pending the issuance of this final decision. See N.J.A.C. 19:13-3.10. The Association would not consent to an adjournment and the arbitrator advised the Board the hearing would not be postponed. The hearing was held without the Board's participation.

The Association framed the issue for arbitration as "Was the Grievant, Arthur Harmon, disciplined for just cause, and if not, what shall be the remedy?" The Association presented written stipulations and exhibits. Harmon and an Association officer testified. The Association sought an order that the Board

cease and desist from using the scheduling process to discipline teachers.

The arbitrator credited Harmon's testimony about the conversation with Azzaro before the 2000-2001 schedule was made up. The arbitrator found that Harmon, for the first time in 34 years, was assigned a schedule made up entirely of physical education classes, despite disabilities attested to by a physician and in the absence of any demonstrated need by the Board to achieve an educational or operational objective. The arbitrator found that Harmon was given the schedule in reprisal for his not pledging in writing to retire. He ordered the Board to cease and desist from unjustly scheduling Harmon for disciplinary reasons.

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 normally do not consider the contractual merits of the grievance or any contractual defenses the parties may have. We specifically do not entertain the Board's assertion that the Association's grievance presented no allegation that the Board

violated the contract. Here, the arbitrator determined that the Association had alleged a violation of the agreement and he sustained the grievance. We will not entertain the Board's challenge, made in the certification submitted by Superintendent Smith, to the arbitrator's factual findings. The arbitrator found that Smith, Azzaro and Righi were available and could have testified at the June 26, 2001 hearing. We do not have jurisdiction to question the arbitrator's procedural decisions not to grant a requested postponement and to proceed with the hearing without the Board's participation. See, respectively, N.J.A.C. 19:12-5.6 and N.J.A.C. 19:12-5.7.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

The Board argues that arbitration was inappropriate because the dispute concerns its non-negotiable right to make

assignments and deploy its teaching staff. It states, without further specification, that Harmon's schedule was set to "meet the needs of the district" and "for scheduling and administrative reasons." Other than to question whether Harmon was truly incapable of teaching physical education and to list Harmon's alleged physical activities during the 2000-2001 school year, the Superintendent's certification recites no educational reason that prompted the composition of Harmon's all physical education class schedule or those of the two staff members who taught only health and driver education. The superintendent denies that Harmon's assignment to the physical education class schedule was a disciplinary action.

The Association argues that Harmon was assigned the five periods of physical education to punish him for not providing the letter of intention to retire. The Association contends that the Board has not asserted any educational, staffing or operational objectives for assigning Harmon to that schedule. The Association asserts that teaching assignments and transfers for disciplinary reasons are mandatorily negotiable.

The determination of a teacher's class schedule is normally a non-negotiable matter of educational policy that cannot be challenged in arbitration. See, e.g., Wood-Ridge Bd. of Ed., P.E.R.C. No. 98-45, 23 NJPER 570 (¶28285 1997). However, where a school district transfers a teacher or rearranges a class schedule for disciplinary reasons, the Act authorizes submission of such

disputes to binding arbitration.[2/] See Mt. Arlington Bd. of Ed., P.E.R.C. No. 98-4, 23 NJPER 450 (¶28211 1997) (teacher's reassignment from fourth grade to basic skills classes was disciplinary where it related to incident involving misuse of testing materials for which teacher had been reprimanded and had her increment withheld).

We conclude that Harmon was given a schedule consisting of five physical education periods because he would not write a letter pledging to retire at the end of the 2000-2001 academic year. Even if Harmon was capable of teaching the five physical education periods, the Board has not rebutted the arbitrator's factual findings that Harmon was disciplined without just cause. Accordingly, we conclude that the assignments were disciplinary and that a grievance alleging that the schedule constituted discipline without just cause in violation of the agreement was legally arbitrable.

ORDER

The grievance concerning Art Harmon was legally arbitrable.

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: September 26, 2001
Trenton, New Jersey
ISSUED: September 27, 2001

2/ Where the disciplinary transfer moves the teacher to a different school building, the Act requires that the transfer be rescinded. N.J.S.A. 34:13A-25.