P.E.R.C. NO. 91-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SCOTCH PLAINS-FANWOOD
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-91-1

SCOTCH PLAINS-FANWOOD
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Scotch Plains-Fanwood Education Association against the Scotch Plains-Fanwood Board of Education. The grievance contests the withholding of a special education teacher's salary increment. The Commission finds that this withholding was intended to penalize the teacher for absenteeism and to induce her to improve her attendance. Therefore, pursuant to the 1990 statutory amendments, the merits of this grievance can properly be reviewed in the arbitration forum.

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Appearances:

For the Petitioner, Casper P. Boehm, Jr., attorney

For the Respondent, Balk, Oxfeld, Mandell & Cohen, attorneys (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On July 10, 1990, the Scotch Plains-Fanwood Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance being pursued by the Scotch Plains-Fanwood Education Association. The grievance contends that the salary increment of Mae Delle Horton was withheld without just cause.

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

The Association represents the Board's certified teaching personnel, lunch/general aides and instructional aides. The Association and the Board entered into a collective negotiations agreement effective from July 1, 1988 to June 30, 1991.

Mae Delle Horton is employed by the Board as a special education teacher. On November 8, 1989, she received an interim evaluation report from her principal. It stated that since her employment began on September 1, 1977, she had been absent due to personal illness over 300 days, including 27 days during the 1989-90 school year. It concluded that this accumulated record had "helped create a failure in providing good instructional leadership for your students." It specified these areas of concern:

> 1. Inability to maintain contact with mainstream teachers and parents of handicapped students regarding student progress in the educational program.
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> 2. Materials which have been ordered have not been used to full advantage. Equipment is not kept in proper order.
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> 3. Departmental curricula changes are in the process of implementation. You have not been trained in these areas.
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> 4. Lesson plans are not in the hands of substitute teachers.
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> 5. Grade books - It is standard practice that teachers record student grades in their grade book. I was unable to locate sufficient grades in yours to fairly assess student progress at the end of the school year in 1989.

On December 8, 1989, Horton submitted a response. She claimed that she was absent for 50-55 days from February to June 1989 for major surgery and a long recovery. She claimed that she was absent for 27 days during the 1989-90 school year to recover from injuries sustained in a train accident. Horton stated that despite these uncontrollable absences, she submitted lesson plans to

her supervisor or the head of the substitute service and is not responsible for the plans not always getting to the substitute. Horton also claimed that she was not told until the end of the 1988-89 school year that ten grades per student were required; several workbooks are used by her students and that one should not expect to see all pages completed so early in the year; the interim evaluation report was an unfair disciplinary action; and she would have preferred to be teaching rather than recovering from her train accident injuries.

On March 29, 1990, the principal wrote Horton's summary evaluation report. It noted that Horton was absent nearly 40 days during the first semester of the 1989-90 school year. It claimed that during this period, it was hard to maintain an effective educational program for her special education students. The report noted, however, that the difficulties had arisen only due to Horton's absences and that she makes an effort to meet all professional responsibilities including those suggested on the interim evaluation. It concluded that during the second semester, a review of available indicators revealed that, in general, students were making satisfactory progress toward achieving program goals.

On April 5, 1990, Horton responded. While pleased to read the report's positive comments on her professional responsibilities and the students' achievements, she was not pleased that her evaluator held her responsible for the maintenance of an effectual educational program during her prolonged absence.

On April 26, 1990, the Board's personnel specialist informed Horton that the Board had approved a recommendation that her salary for the 1990-91 school year be maintained at the 1989-90 level. The specialist stated that Horton's "absenteeism record has impaired your performance in the sense that you have failed to provide good instructional leadership for your students."

On May 24, 1990, Horton grieved the increment withholding. The Board denied the grievance, claiming that the withholding was for predominately educational reasons. The Association sought binding arbitration and this petition ensued.

The Board has requested an evidentiary hearing. According to its attorney, Horton's principal would testify that, in addition to the sustained absences, Horton was sporadically absent another ten days during the 1989-90 school year; her sustained absences caused the high school staff considerable difficulty; she never gave the staff more than one week's notice of her absences; in some instances she called in on a daily basis, in others she called and said she would be out for the rest of the week; the district was unable to hire a long-term substitute because of the way Horton handled her absences; her interim evaluation had to be mailed to her due to her absence; as soon as she received the evaluation, she quickly became well and returned; samples in her grade book show very poor recordkeeping and follow-through on student achievement; and her absences made it impossible for her to attend workshops provided for special education teachers. This proffered testimony

is not disputed. We therefore assume the truth of these factual assertions and deny the request for an evidentiary hearing.

This dispute is over the arbitrability of a teacher's increment withholding. We begin by tracing the relevant legislation and decisions.

In 1979, the Supreme Court held that disputes over increment withholdings of teaching staff members could not validly be submitted to binding arbitration. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n., 79 N.J. 311 (1979). By enacting N.J.S.A. 18A:29-14, the Legislature had delegated to the Commissioner of Education the authority to review increment withholdings for inefficiency or other good cause.

In 1982, the Legislature enacted "disciplinary" amendments to the New Jersey Employer-Employee Relations Act. These amendments authorized binding arbitration of disciplinary disputes. N.J.S.A. 34:3A-5.3. The legislative history of those amendments reveals that the Legislature recognized that the denial of an increment constitutes discipline. See East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Dkt. No. 5596-83T6 (3/14/86), certif. den. 101 N.J. 280 (1985); State of New Jersey, P.E.R.C. No. 87-130, 13 NJPER 347 (¶18141 1987), aff'd App. Div. Dkt. No. A-4573-86T8 (4/7/88). It initially passed a bill that would have allowed withholdings to be reviewed through binding arbitration despite N.J.S.A. 18A:29-14's statutory review procedures. The Governor vetoed that bill and suggested that it be

revised to preclude binding arbitration when an alternate statutory appeal procedure existed. A bill incorporating that suggestion was passed and signed. We therefore continued to restrain binding arbitration of disputes over increment withholdings of teaching staff members. See, e.g., Jersey City Bd. of Ed., P.E.R.C. No. 89-117, 15 NJPER 286 (¶20126 1989).

Against this backdrop, new amendments went into effect on January 4, 1990. They expand the scope of negotiability and arbitrability for school board employees.

The Legislature authorized negotiations over schedules setting forth the acts and omissions for which minor discipline may be imposed. N.J.S.A. 34:13A-24.[1/] Negotiations would lead to the

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1/ N.J.S.A. 34:13A-24 provides:

> a. Notwithstanding any other law to the contrary, and if negotiated with the majority representative of the employees in the appropriate collective bargaining unit, an employer shall have the authority to impose minor discipline on employees. Nothing contained herein shall limit the authority of the employer to impose, in the absence of a negotiated agreement regarding minor discipline, any disciplinary sanction which is authorized and not prohibited by law.
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> b. The scope of such negotiations shall include a schedule setting forth the acts and omissions for which minor discipline may be imposed, and also the penalty to be imposed for any act or omission warranting imposition of minor discipline.
>
> c. Fines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of N.J.S. 18A:6-10.

adoption of a "progressive" or "corrective" discipline policy to address infractions which would warrant a penalty more severe than a reprimand but less severe than an increment withholding or tenure charges. The types of conduct which might be addressed by such a policy could include, for example, insubordination, tardiness, absenteeism, and violations of call-in procedures. Depending on the frequency and severity of the alleged misconduct, the negotiated agreement could call for a form of minor discipline or the employer could impose a more severe form of discipline such as the withholding of an increment or even tenure charges.

The Legislature also addressed the arbitrability of increment withholdings and decided that teaching staff withholdings that are for predominately disciplinary reasons shall be reviewed through binding arbitration. N.J.S.A. 34:13A-26.[2/] But not all

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2/ N.J.S.A. 34:13A-26 provides:

> Disputes involving the withholding of an employee's increment by an employer for predominately disciplinary reasons shall be subject to the grievance procedures established pursuant to law and shall be subject to the provisions of section 8 of this act [34:13A-29].

N.J.S.A. 34:13A-29 provides:

> a. The grievance procedures that employers covered by this act are required to negotiate pursuant to section 7 of P.L.1968, c. 303 (C.34:13A-5.3) shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act.
>
> b. In any grievance procedure negotiated pursuant to this act, the burden of proof shall be on the employer covered by this act seeking to impose discipline as that term is defined in this act.

withholdings can go to arbitration. If the reason for a withholding is related predominately to the evaluation of a teaching staff member's teaching performance, any appeal shall be filed with the Commissioner of Education. N.J.S.A. 34:13A-27(d).[3/] If there is a dispute over whether the reason for a withholding is predominately disciplinary, we must make that determination. N.J.S.A. 34:13A-27(a).[4/] Our power is limited to determining the appropriate forum for resolving an increment withholding

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3/ N.J.S.A. 34:13A-27(d) provides:

> If a dispute involving the reason for the withholding of a teaching staff member's increment is submitted to the commission pursuant to subsection a. of this section, and the commission determines that the reason for the increment withholding relates predominately to the evaluation of a teaching staff member's teaching performance, the teaching staff member may file a petition of appeal pursuant to N.J.S. 18A:6-9 and N.J.S. 18A:29-14, and the petition shall be deemed to be timely if filed within 90 days of notice of the commission's decision, or of the final judicial decision in any appeal from the decision of the commission, whichever date is later.

4/ N.J.S.A. 34:13A-27(a) provides:

> If there is a dispute as to whether a transfer of an employee between work sites or withholding of an increment of a teaching staff member is disciplinary, the commission shall determine whether the basis for the transfer or withholding is predominately disciplinary.

dispute.[5/] We do not and cannot consider whether an increment withholding was with or without just cause.

The fact that an increment withholding is disciplinary does not guarantee arbitral review. Nor does the fact that a teacher's action may affect students automatically preclude arbitral review. Most everything a teacher does has some effect, direct or indirect, on students. But according to the Sponsor's Statement and the Assembly Labor Committee's Statement to the amendments, only the "withholding of a teaching staff member's increment based on the actual teaching performance would still be appealable to the Commissioner of Education." As in Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-8678 (10/23/87), we will review the facts of each case. We will then balance the competing factors and determine if the withholding predominately involves an evaluation of teaching performance. If not, then the disciplinary aspects of the withholding predominate and we will not restrain binding arbitration.

5/ Today, we are restraining arbitration in three increment withholding disputes because they are predominately based on an evaluation of teaching performance. Tenafly Bd. of Ed., P.E.R.C. No. 91-68, 17 NJPER ___ (¶_______ 1991)(alleged corporal punishment of student, retaliation through lowering grade and inappropriate disciplinary techniques); Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER ___ (¶_____ 1991)(alleged poor classroom management, poor teaching skills and inappropriate langauge in classroom); Bergen Cty. Voc. Schools Bd. of Ed., P.E.R.C. No. 91-70, 17 NJPER ___ (¶_____ 1991) (alleged inadequate discipline and supervision of students, inadequate attention to shop safety and instructional difficulties).

We now address the particular withholding in dispute. Horton's increment was withheld because of her absenteeism record. Rather than involving an evaluation of her teaching performance, the withholding flows from Horton's alleged failure to perform by virtue of her sustained and sporadic absences. Some of the Board's complaints concerned Horton's alleged failure to give adequate notice of her absences. Others concerned Horton's inability to attend training workshops and her unavailability to students, other teachers and parents.

We believe that this withholding was intended to penalize Horton for absenteeism and to induce her to improve her attendance. Pursuant to the 1990 statutory amendments, the merits of this grievance can properly be reviewed in the arbitration forum.

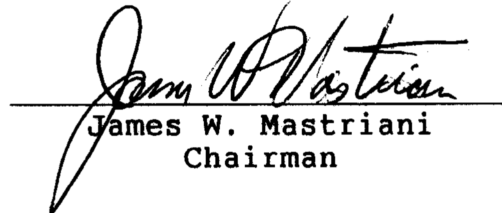
We recognize that excessive absenteeism can adversely affect students. But a concern for that effect, while legitimate, does not predominately involve an evaluation of teaching performance. Absenteeism can also affect other aspects of job performance. None of these concerns need go unaddressed. Whether an employer imposes minor discipline pursuant to a negotiated schedule of penalties or chooses to withhold an increment, the choice of forum for reviewing the employer's determination does not limit the employer's right to raise its legitimate concerns.[6/]

6/ For a comprehensive review of the long-standing practice of arbitrators reviewing discipline for absenteeism, see Redeker, Discipline: Policies and Procedures, at 56 (BNA 1983).

ORDER

The request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Goetting and Smith voted in favor of this decision. Commissioner Wenzler voted against this decision. Commissioners Regan and Bertolino abstained from consideration.

DATED: Trenton, New Jersey
February 27, 1991
ISSUED: February 28, 1991