

P.E.R.C. NO. 2009-3

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROBBINSVILLE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2008-069

WASHINGTON TOWNSHIP EDUCATION  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Robbinsville Board of Education for a restraint of binding arbitration of a grievance filed by the Washington Township Education Association. The grievance contests the withholding of a teaching staff member's increment for the 2008-2009 school year. The reason for the withholding was based on allegedly inappropriate remarks to students in a classroom setting. Because the withholding is based predominately on an evaluation of teaching performance, the Commission restrains binding arbitration.

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, Scarinci Hollenbeck, attorneys  
(Robin T. McMahon, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys  
(Arnold Shep Cohen, on the brief)

DECISION

On April 15, 2008, the Robbinsville Board of Education<sup>1/</sup> petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Washington Township Education Association. The grievance contests the withholding of a teaching staff member's increment for the 2008-2009 school year. Because the withholding is based predominately on an evaluation of teaching performance, we restrain binding arbitration.

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<sup>1/</sup> The employer was formerly the Washington Township Board of Education.

The parties have filed briefs and exhibits. The Board has submitted the certification of the superintendent of schools, John J. Szabo. The Association has not submitted a certification disputing the facts as alleged. The following facts are derived from Szabo's certification.

The Association represents teachers and support staff. The parties' collective negotiations agreement is effective from July 1, 2005 through June 30, 2008. The grievance procedure ends in binding arbitration.

On November 30, 2007, the middle school principal reported to the superintendent that a teacher had reportedly told an eighth grade student to pull up his pants. When he asked why, she responded that he did not want to "dress like a wigger." A special education teacher and a teacher's aide were in the classroom at the time. The aide asked the teacher what she said to the student and the teacher repeated the statement to the aide.

Szabo states that the term wigger is "a pejorative term for a white person who mimics the language, dress and mannerisms of urban blacks." Because the teacher used the term in the presence of students and staff, he recommended that the Board withhold her increment for the 2008-2009 school year.

On December 19, 2007, Szabo notified the teacher that the Board had voted to withhold her increment based on her:

teaching performance because it was determined that you made inappropriate statements to one of your students, in front of your fellow teaching staff during instructional time. . . . This statement constitutes inappropriate use of instructional time. Moreover, for your inappropriate use of instructional time and failing to fulfill your responsibilities to set an example as an educator and role model for your students in the classroom environment.

On January 2, 2008, the Association filed a grievance contesting the withholding. On January 4, Szabo denied the grievance stating that the withholding was based predominately on teaching performance and any appeal must be to the Commissioner of Education. On March 3, the Association demanded arbitration. This petition ensued.

Under N.J.S.A. 34:13A-26 et seq., all increment withholdings of teaching staff members may be submitted to binding arbitration except those based predominately on the evaluation of teaching performance. Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), aff'g P.E.R.C. No. 97-40, 22 NJPER 390 (¶27211 1996). Under N.J.S.A. 34:13A-27d, if the reason for a withholding is related predominately to the evaluation of teaching performance, any appeal shall be filed with the Commissioner of Education.

If there is a dispute over whether the reason for a withholding is predominately disciplinary, as defined by N.J.S.A. 34:13A-22, or related predominately to the evaluation of teaching

performance, we must make that determination. N.J.S.A. 34:13A-27a. Our power is limited to determining the appropriate forum for resolving a withholding dispute. We do not and cannot consider whether a withholding was with or without just cause.

In Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991), we articulated our approach to determining the appropriate forum. We stated:

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 [NJPER Supp.2d 183 (¶161 App. Div. 1987)], 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. [17 NJPER at 146]

The Board argues that this withholding is based on teaching performance because the improper, racially insensitive comment was made to the teacher's student while in the classroom. The Association responds that it is clear from the superintendent's letter that his recommendation was a form of discipline. The

Association maintains that the teacher's comment was an isolated remark outside the scope of her duties as a teacher and more like a violation of a rule or regulation.

We have long held that withholdings based on a teacher's allegedly inappropriate remarks made to students in a classroom setting cannot be submitted to binding arbitration. See, e.g., Greater Egg Harbor Reg. H.S. Bd. of Ed., P.E.R.C. No. 95-58, 21 NJPER 116 (¶26071 1995), recon. den., P.E.R.C. No. 95-84, 21 NJPER 175 (¶26110 1995). We have restrained arbitration in such cases on the theory that they -- like classroom control or disciplinary technique cases -- involve a board's subjective educational judgment as to what is appropriate in a classroom environment. That logic applies in this case where the comments were allegedly made to a student in the classroom. That the comment may have been isolated and extreme does not change the fact that it involves the Board's judgment that this interaction with a student in the classroom was inappropriate. Accordingly, review of this withholding must be before the Commissioner of Education.

ORDER

The request of the Robbinsville Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson and Commissioners Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Branigan was not present.

ISSUED: August 7, 2008

Trenton, New Jersey