

P.E.R.C. NO. 2009-44

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HAMBURG BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2009-016

HAMBURG EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Hamburg Board of Education for a restraint of binding arbitration of a grievance filed by the Hamburg Education Association. The grievance contests the withholding of a part-time teaching staff member's step and adjustment increments. The reason for the withholding was based on the staff member's chaperoning of two students to an out-of district event on her day off and without district approval. Because the withholding is not predominantly related to the evaluation of teaching performance, the Commission denies the Board's request for a restraint of 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  
(Matthew J. Giacobbe, of counsel; Yaacov Brisman, on  
the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys  
(Gail Oxfeld Kanef, on the brief)

DECISION

On September 9, 2008, the Hamburg Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Hamburg Education Association. The grievance contests the withholding of a part-time teaching staff member's increments. We find that the Board's reasons are not predominantly related to the evaluation of teaching performance and therefore decline to restrain binding arbitration.

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

The Association represents teaching staff members and the Child Study Team. The parties' collective negotiations agreement is effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in advisory arbitration. However, by operation of law, increment withholding disputes may be submitted to binding arbitration if the reasons do not predominately relate to teaching performance. See N.J.S.A. 34:13A-26, 29.

The grievant is a guidance counselor who is a school testing coordinator. Her position is part-time and she works a Monday to Wednesday schedule at the Hamburg School.

On Thursday, March 13, 2008, a non-working day for her, the counselor came to the Hamburg School and signed out two eighth-grade students to transport them, in her private vehicle, to a Sussex County Middle School Summit. This was not a school-sanctioned activity. The counselor states that she took the students on this trip at the request of their parents, who were her friends. The parents were not able to attend the event.

On March 17, 2008, the superintendent issued a memorandum to the counselor asserting that signing out the two pupils and taking them to the event in her private vehicle violated Board policies relating to unapproved field trips and transporting students in a private vehicle without district permission. The memorandum asserts that the unauthorized trip placed the counselor, the students, and the district in serious jeopardy.

The superintendent asserted that the actions could be construed as "unbecoming conduct" and that future disciplinary action could be taken based on the incident.

In April 2008, the counselor responded, asserting that on the date of the trip, she was not at work and was acting as a family friend to the parents of both students who had given her permission to take the students to the event. She also related that she had taken a student to the same event under the same circumstances two years earlier with the knowledge of the district and had not been reprimanded. She attached written statements from both parents attesting that she had their permission to take their children out of school to attend the event.

On May 13, 2008, the superintendent sent a letter to the counselor advising that he would recommend to the Board that it withhold her increments for the 2008-2009 school year. On May 14, the Board voted to withhold the increments. On May 15, the superintendent wrote to the counselor informing her of the Board's action. His letter stated:

This action was taken based upon your teaching performance because it was determined that you inappropriately transported at least two eighth grade pupils in your personal vehicle to an unauthorized field trip.

Thus, due to dissatisfaction with your teaching performance, the Board withheld your employment and adjustment increments.

On July 9, 2008, 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).

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 the Commissioner of Education must review this dispute because the increment withholding was based upon the counselor's performance as a teacher, as her actions set a poor example for students and showed that she is "wholly incompetent."

The Association asserts that the superintendent's March 17, 2008 memorandum accusing the counselor of unbecoming conduct and advising that additional sanctions may be imposed establishes that the increment was withheld for reasons unrelated to her performance as a guidance counselor.

This guidance counselor is accused of violating school policies and procedures. We have held that similar allegations against a teaching staff member are unrelated to teaching performance. Hackettstown Bd. of Ed., P.E.R.C. No. 2003-48, 29 NJPER 22 (¶6 2003) (nurse's refusal to go on overnight school-sanctioned trip involved alleged insubordinate refusal to perform, not an evaluation of her performance as a school nurse); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992) (alleged violations of work rules and other misconduct,

including falsifying a sign-out sheet -- not assessments of teaching performance).

Although the Board asserts that the counselor set a "bad example" for students, the facts of this case are not at all comparable to the facts in the cases cited by the Board. They involved allegations of inappropriate and insensitive comments made by teaching staff to students. See, e.g., Willingboro Bd. of Ed., P.E.R.C. No. 2001-68, 27 NJPER 236 (¶32082 2001); Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994); Southern Gloucester Cty. Reg. H.S. Dist., P.E.R.C. No. 93-26, 18 NJPER 479 (¶23218 1992).

We serve a limited gatekeeping function. Our task is limited to determining if the Board acted for reasons related to an evaluation of teaching performance, not whether it had just cause to discipline the guidance counselor by withholding her increment. See, e.g., Hunterdon Central Reg. H.S. Dist. Bd. of Ed. v. Hunterdon Central Reg. H.S. Ed. Ass'n, 20 NJPER 411 (¶25209 App. Div.) certif. den. 137 N.J. 316 (1994) (where coach who was a volunteer chaperone on a trip to a wrestling clinic failed to promptly report drug abuse by four students on trip, Court vacated arbitration award and found that withholding was for cause, but rejected argument that withholding involved teaching performance). This withholding was disciplinary under N.J.S.A. 34:13A-22 and therefore subject to binding arbitration

in accordance with N.J.S.A. 34:13A-29. The merits of the withholding are for the arbitrator to review.

ORDER

The request of the Hamburg Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: February 26, 2009

Trenton, New Jersey