

I. R. NO. 86-9

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GREATER EGG HARBOR REGIONAL  
HIGH SCHOOL DISTRICT BOARD  
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-86-26

OAKCREST-ABSEGAMI TEACHERS  
ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee of the Public Employment Relations Commission denies the request of the Greater Egg Harbor Regional High School District Board of Education to restrain the arbitration on a grievance filed by the Oakcrest-Absegami Teachers Association. The Association grieved the Board's decision to withhold increments over an employee's extracurricular position. The Board argued a restraint was appropriate because the increment withholding could be appealed to the Commissioner of Education. The Association argued that the Commissioner would not hear appeals over the withholding of extracurricular increments.

The Commission Designee concluded that the Board did not establish that the Commissioner would consider such appeals. Therefore, the request for a restraint was denied.

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Appearances:

For the Petitioner

Donio, Bertman, Johnson, Sahli and Greco, Esqs.  
(Louis J. Greco, of Counsel)

For the Respondent

Eugene J. Sharp, NJEA UniServ Representative

INTERLOCUTORY DECISION

On October 29, 1985, the Greater Egg Harbor Regional High School District Board of Education ("Board") filed a Petition for Scope of Negotiations determination with the Public Employment Relations Commission ("Commission"). The Board seeks a permanent restraint of binding arbitration of a grievance filed by the Oakcrest-Absegami Teachers Association ("Association") on behalf of employee Michael Fanelli. The grievance contests the action taken by the Board to withhold Fanelli's increments for his band director and summer band director extracurricular positions. Fanelli had

apparently engaged in certain misconduct for which he was reprimanded and over which the increments were withheld. The Association filed the grievance alleging that the withholding of the increments violated the parties' agreement and was unnecessary discipline.

On November 18, 1985 the Board, pursuant to N.J.A.C. 19:14-9.1, filed an application for interim relief with a proposed order to show cause seeking a temporary restraint of arbitration pending a final decision in this matter. Arbitration is scheduled for December 16, 1985. Both parties filed briefs by December 2, 1985. An Order to Show Cause was executed on December 5, 1985 scheduling a hearing for December 10, 1985. On December 9, 1985, however, the Petitioner's attorney advised me of his unavailability for hearing during the week of December 10-13, 1985, he waived oral argument, and he requested that I consider the request for interim relief based upon the pleadings. The Respondent also waived oral argument on December 9, 1985.

There is apparently no dispute that Fanelli, as band director, engaged in certain misconduct which resulted in a reprimand and a withholding of his band director increments totaling approximately \$216.00. The Association filed the grievance alleging the increment withholding was discipline without just cause, a violation of Article 4(c) of the parties' collective agreement. The grievance was denied internally, but has now reached the binding arbitration stage.

The Board seeks a restraint because it alleges that Fanelli may appeal the increment withholding to the Commissioner of Education pursuant to N.J.S.A. 18A:29-14, and that therefore the Commission does not have jurisdiction over this matter. That statute provides:

18A:29-14. Withholding increments; causes; notice of appeals

Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

N.J.S.A. 18A:29-6 defines Employment Increment and Adjustment Increment as follows:

"Employment increment" shall mean an annual increase of \$250.00 granted to a member for one "year of employment";

"Adjustment increment" shall mean, in addition to an "employment increment," an increase of \$150.00 granted annually as long as shall be necessary to bring a member, lawfully below his place on the salary schedule according to years of employment, to his place on the salary schedule according to years of employment; provided, that a fraction of an "adjustment increment" may be granted when such amount is sufficient to bring such member to his place on the schedule according to years of employment.

The Association argued that 18A:29-14 does not cover increments for extracurricular positions, but was only intended to cover increments related to a teacher's full-time teaching position. The Association further argued that the Commissioner would not consider appeals of increment withholdings of extracurricular positions. The Association relied upon Commissioner decisions in Boney v. City of Pleasantville Bd.Ed., 1971 SLD 579; and Dignan v. Rumson-Fair Haven Reg. H.S. Bd.Ed., 1971 SLD 336, 345 to support its position that the Commissioner has held that there would be no tenure for extracurricular positions, and that there would be no hearings for non-tenured positions. The Association concluded that since the instant increment withholding was disciplinary in nature, and since there is no statutory appeal procedure available regarding that appeal as contemplated by N.J.S.A. 34:13A-5.3, as amended, then binding arbitration was appropriate. In re East Brunswick Bd.Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Docket No. A-5596-88T6, pet. for certif. den. \_\_\_ N.J. \_\_\_ (May 31, 1985).

The standard in determining whether to grant interim relief is settled. The charging party must establish a substantial likelihood of success on its legal and factual allegations, and it must demonstrate that irreparable harm will occur if the requested relief is not granted, e.g., In re Hopatcong Bd.Ed., I.R. No. 85-10, 11 NJPER 151 (¶16066 1985); In re Alexandria Twp. Bd.Ed., I.R. No. 84-5, 10 NJPER 1 (¶15000 1983).

In consideration of the above facts and the law I find that the Board has not established a substantial likelihood of success at this time. The Board's request for a restraint must therefore be denied. N.J.S.A. 18A:29-14 does not on its face appear to provide an appeal procedure to the Commissioner for increment withholdings for extracurricular positions. In addition, the definitions of increments in 18A:29-6 appear to concern regular salary positions, not stipended positions. The Board has not cited any decisions or provided any other material support for its argument that the instant increment may be appealed to the Commissioner. Absent such material, the Board has failed to establish a substantial likelihood of success.

I note that although the Commission in East Brunswick, supra, found that non-tenured teachers may also institute appeals pursuant to 18A:29-14, that decision concerned teachers performing their regular teaching function, it did not concern teachers performing extracurricular functions.

The Board has also failed to establish irreparable harm. My decision will not terminate a consideration of the instant dispute. The Commission must consider the underlying issue in its determination of the scope of negotiations petition, and in so doing the Commission will have the opportunity to ascertain whether the Commissioner will, in fact, entertain an appeal over the withholding of an increment for an extracurricular position. If the Commission finds that an appeal to the Commissioner is possible, it could

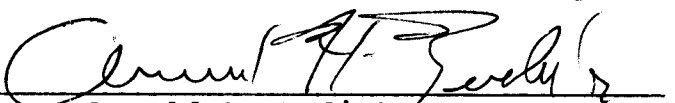
restrain the binding nature of any arbitration decision and give the same an advisory effect.

The Commission, and indeed the Supreme Court, favor the use of arbitration to resolve labor disputes. The Supreme Court in Bernards Twp. Bd.Ed. v. Bernards Twp. Ed.Ass'n, 79 N.J. 311 (1979), and in Teaneck Bd.Ed v. Teaneck Teachers Ass'n, 94 N.J. 9, 19-20 (1983) emphasized the advantages of advisory arbitration to resolve such disputes. A restraint of arbitration at this time may actually cause greater damage to the parties' relationship. The Board, of course, might win the arbitration which could moot any further consideration of the issue. But even if it were to lose the arbitration, a successful litigation of the scope petition could result in eliminating the binding nature of any arbitration award. In that event an advisory award could still prove to be the basis for a settlement, or could be useful by the Commissioner in determining the increment denial issue if the matter reaches that level. A restraint of arbitration is therefore inappropriate at this time.

ORDER

The Board's application for interim relief seeking a stay of arbitration is denied.

BY ORDER OF THE COMMISSION

  
Arnold H. Zudick  
Commission Designee

Dated: December 11, 1985  
Trenton, New Jersey