

I.R. NO. 93-13

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FLORHAM PARK BOARD  
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-31

FLORHAM PARK EDUCATION  
ASSOCIATION,

Respondent.

SYNOPSIS

The Florham Park Board of Education sought to restrain an arbitration brought by the Florham Park Education Association. The grievance asserts that the Board disciplined a teacher without just cause when it withheld his increments and denied him reappointment to his extracurricular positions. The Commission Designee held that there is a substantial likelihood that the Commission will find that conduct occurring in the classroom during a regular class constitutes teaching performance. As such, the proper forum for this matter is before the Commissioner of Education and not arbitration.

Accordingly, the arbitration was restrained as to the question of increment. However, the non-reappointment to an extra-curricular activity is, pursuant to N.J.S.A. 34:13A-2.3, arbitrable and the arbitration was not restrained as to the denial of the assignment.

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Appearances:

For the Petitioner, Fogarty & Hara, attorneys  
(Stephen R. Fogarty, of counsel; Deborah Ustas, on the  
brief)

For the Respondent, Klausner, Hunter, Cige & Seid, attorneys  
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On October 16, 1992, the Florham Park Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Florham Park Education Association. The grievance asserts that the Board disciplined a teacher without just cause when it withheld his increments and denied him reappointment to his extracurricular positions. An application for an interim restraint accompanied the petition. The application was granted and a return date was set for January 7, 1993. A hearing was conducted on that date.

The parties have filed exhibits and briefs. These facts

appear.

The Association represents the Board's teachers and other personnel, with certain immaterial exceptions. The parties entered into a collective negotiations agreement effective for the 1989-1990, 1990-1991, and 1991-1992 school years. That contract lists girls' soccer coach and student council advisor as extracurricular positions. The grievance procedure ends in binding arbitration.

Jeffrey Gruenwald is an eighth grade social studies teacher at Ridgedale Middle School. On May 14, 1992, the principal observed Gruenwald teach a class on the Holocaust. The classroom observation report was generally favorable, noting that Gruenwald was knowledgeable and well-prepared. It also suggested several areas where Gruenwald could improve his teaching performance.

On June 5, 1992, a Friday, Gruenwald attended an in-service workshop outside the district. His principal, Frank Markowick, covered his fifth and sixth period classes. On June 8, a Monday, Gruenwald resumed teaching his classes.

On June 11, a parent of one of Gruenwald's students wrote a letter to the principal. The letter alleged that Gruenwald had acted inappropriately and unprofessionally in a June 8 class. The letter states, in part.

The students told Mr. Gruenwald that comments were made by you during the Friday's class. Mr. Gruenwald asked the students for more information and proceeded to comprise a list. All of this during teaching time. He then began to give his personal opinion on the job you are doing as

Principal. He told the students that the reason that Ms. Gonnella is leaving is because of you. The students were told that the staff doesn't like the way you are running the school and that he himself questions your competence. Mr. Gruenwald continued this discussion and told the class that you harass female staff members. One of them sexually.

After this class ended, the conversation and speculation continued on the part of the students. This incident spilled over into the next class where more conversation on the part of students continued. More lost learning time. I feel that this sort of behavior by a teacher, a so called professional, was anything but professional.

On June 22, the principal issued Gruenwald's yearly supervision report. Under Instructional Effectiveness, the report praised Gruenwald's skills and knowledge and under Personal Qualities, the report praised Gruenwald's activeness in the school community during the 1991-1992 school year. The report singled out for praise "the large number of student council activities and resulting opportunities for student participation."

On July 1, the superintendent wrote Gruenwald a letter critical of his conduct during the June 5 class and accusing Gruenwald of unprofessional behavior.

On July 17 after a meeting with the principal, Gruenwald and an association representative, the superintendent sent Gruenwald a letter stating that he would recommend withholding Gruenwald's employment and adjustment increments for the 1992-1993 school year. The superintendent based this recommendation on the June 8, 1992 incident. The letter also stated that the superintendent would

recommend that Gruenwald not be reappointed to the positions of coach of the girls' soccer team and student counsel advisor.

On August 11, the Board voted to accept the superintendent's recommendations based on his findings and reasons.

The Association demanded binding arbitration. It asserted that Gruenwald had been disciplined without just cause and it requested that the Board restore Gruenwald's increments and reinstate him to his extracurricular positions. This petition ensued.

Under N.J.S.A. 34:13A-26, increment withholdings of teaching staff members for predominately disciplinary reasons shall be reviewed through binding arbitration. But not all withholdings can go to arbitration. Under N.J.S.A. 34:13A-27(d), if the reason for a withholding is related predominately to an 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, the Commission must make that determination. N.J.S.A. 34:13A-27(a).

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

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. [Id. at 146]

Here, the denial of an increment is based upon conduct occurring in the classroom during a regularly scheduled class. Although this is an area where the Commission has not yet ruled, I believe there is a substantial likelihood that the Commission will find such conduct teaching performance.

Before 1990, extracurricular appointments and retentions were not mandatorily negotiable or legally arbitrable. Teaneck Teachers Ass'n v. Teaneck Bd. of Ed., 94 N.J. 9 (1983); Mainland Reg. Teachers Ass'n v. Mainland Reg. School Dist. Bd. of Ed., 176 N.J. Super. 476 (App. Div. 1980), certif. den. 87 N.J. 312 (1981). But in 1990, the Legislature amended N.J.S.A. 34:13A-1 et seq. to overrule that case law. N.J.S.A. 34:13A-23 now states:

All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations between an employer and the majority representative of the employees in a collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations. If the negotiated selection procedures fail to produce a qualified candidate from within the

district the employer may employ from outside the district any qualified person who holds an appropriate New Jersey teaching certificate. If the employer is unable to employ a qualified person from outside of the district, the employer may assign a qualified teaching staff member from within the district.

In Holmdel Tp. Bd. of Ed., P.E.R.C. No. 91-62, 17 NJPER 84 (¶22038 1991), the Commission refused to restrain binding arbitration of a grievance challenging the non-retention of a basketball and baseball coach since the amendment expressly permits an employer to agree to arbitrate disputes over the non-retention of an employee in an extracurricular position. The amendment and Holmdel control this case.

The Board argues that the amendment should not be construed to permit arbitration of this grievance, asserting that it has acted in good faith and prudently and it has a statutory right to set qualifications. But the amendment makes retention decisions mandatorily negotiable and permits agreements to submit particular non-retention decisions to binding arbitration. While a board may set the necessary qualifications, a grievant may contest a determination that he or she has not met those qualifications. The Board must therefore address its arguments to the arbitrator. I believe the Commission will allow the extracurricular activities portion of the grievance to go to arbitration.

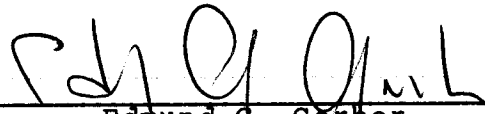
#### ORDER

The request of the Florham Park Board of Education for an interim restraint of binding arbitration is granted to the extent

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7.

the grievance challenges the withholding of increments from Jeffrey Gruenwald.

  
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Edmund G. Gerber  
Commission Designee

DATED: January 14, 1993  
Trenton, New Jersey