

I.R. 87-8

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-86-78

OAKCREST-ABSEGAMI TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

In the matter brought by the Greater Egg Harbor Regional High School District Board of Education, a Commission Designee denies the School Board's request to temporarily restrain arbitration. The Respondent, the Oakcrest-Absegami Teachers Association sought arbitration concerning contractual procedures which were to be followed prior to the Board's denial of an increment to a teacher. The Commission Designee, however, restrained the arbitrator from fashioning any remedy which would rescind the Board's decision to deny an increment.

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Appearances:

For the Petitioner
Cassetta & Taylor
(Bruce Taylor, on the brief)

For the Respondent
New Jersey Education Association
(Eugene J. Sharp, Field Rep.)

INTERLOCUTORY DECISION

On April 21, 1986, the Greater Egg Harbor High School District Board of Education ("Board") filed a Scope of Negotiations Petition ("Petition") with the Public Employment Relations Commission ("Commission") seeking a finding that certain provisions of the collective negotiations agreement between itself and the Oakcrest-Absegami Teachers Association are illegal terms and conditions of employment and are non-negotiable. Subsequently, on September 22, 1986, the Board sought a restraint of arbitration concerning a grievance filed by the Association and filed an application for interim relief and an Order to Show Cause which was

executed and made returnable for September 26, 1986. The grievance is based upon certain contract provisions which are disputed in the Board's Scope Petition.

The grievance states:

The Board of Education did not comply with the procedure specified by the agreement prior to its determination to withhold the salary and adjustment increment for Michael Fanelli for the 1986-87 school year.

The Association sought the following remedy:

The Board be directed to rescind its action of March 24, 1986 and comply with the proper procedure as outlined in the Agreement.

The contract between the parties provides certain procedures for withholding adjustments or withholding increments, specifically Article 7 Section B.

The Board of Education believes that each employee whether or not tenured in this system will continually strive to improve his performance. Employment or adjustment increases may be withheld in whole or in part for inefficiency or other just cause related to the performance of duties and only in accordance with the following:

1. The salary increments specified in this guide are not automatically granted, but are conditioned upon the recommendation of the Superintendent as specified in and in accordance with the Board Policy adopted in September, 1979. This instrument shall be the instrument used for evaluation of teachers in the classroom setting.
2. Each employee shall be appraised [sic] of the results of his evaluation by his immediate supervisor. In the event a deficiency(ies) is detected, specific recommendations to overcome same shall be made by the supervisor. In no case will the Board of

Education, through the Superintendent, be informed of the recommendation to withhold a teacher's increment or part thereof before the elapsed time of thirty (30) calendar days prior thereto and in no case later than April 30. A Written Summary of the review and recommendation shall be provided to the employee.

3. Should there be a recommendation of the supervisor (department chairman) that a salary increment be withheld, the building principal shall notify the employee and provide him with a reasonable opportunity (not to exceed 10 school days) to speak in his own behalf.
4. Should the building principal, following his hearing with the employee, concur in the decision to recommend withholding, he shall state his reasons for so doing and forward same to the Superintendent for presentation to the Board.
5. The Board reserves the right to accept or reject any recommendation to withhold a salary increment.
6. Prior to voting on a recommendation to withhold a salary increment, the Board shall offer the employee the right to a judicial hearing before this Board. The employee has the right under law to appeal a decision of this Board to the Commissioner of Education.
7. Any employment increment or adjustment increment or part thereof under this provision shall be restored the following year unless the procedures set forth in this provision are followed once again, in which case the increment or increments previously withheld and any additional increments which may be due may be withheld in whole, or in part.

An arbitration hearing on this matter is now scheduled for October 14, 1986 and the Board seeks a temporary restraint staying arbitration pending a full Commission hearing. The Board maintains

that since the arbitration concerns the denial of an increment, this matter is not arbitrable. It argues that neither the denial of an increment nor the procedures surrounding the denial of an increment are negotiable and, therefore, neither is arbitrable. The Board relies upon Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311 (1979), where, the New Jersey Supreme Court held:

... the parties to a collective agreement may not validly contract to submit disputes concerning the withholding of salary increments for inefficiency or other good cause to final and binding arbitration. At 324.

The Board further argues that the withholding of increments is a statutory procedure which preempts negotiations. N.J.S.A. 18A:29-14 provides:

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.

The Association argues that the arbitration concerns compliance with contractual procedures only and it does not seek to negotiate the criteria for the denial of the increment.

At the outset of our analysis, the narrow boundaries of the Commission's scope of negotiations jurisdiction must be stressed. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Id. at 154]

The Commission has not before been called upon to decide whether or not procedures concerning the denial of increments are negotiable. However, it is settled that in dealing with other personnel actions such as promotions, the criteria applied in the decision making process are not negotiable but the procedures are, particularly in the area of promotions. See, Snitow v. Rutgers University, 103 N.J. 116 (1986); Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 32 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); State v. State Troopers NCO Ass'n of New Jersey, 179 N.J. Super. 80 (App. Div. 1981) ("State Troopers"); Bd. of Ed. Tp. of N. Bergen v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976). See New Jersey Institute of Technology, P.E.R.C. 87-23, NJPER ____.

It is not disputed that the decision to withhold an increment is not arbitrable. As the Court in Bernards stated

...withholding of salary increments for "inefficiency or other good cause" are not terms and conditions of employment but rather pertaining to the quality of the educational system. As such, these matters are to be determined in the first instance by local boards of education, subject to review by the Commission. at 324

Pursuant to State v. State Supervisory Employee Association, 78 N.J. 54 (1978), the arbitrator cannot consider any action taken once the Board voted on the denial of the increment. N.J.S.A. 18:2A-14 states "a majority must vote" and a statement of reason must be served within 10 days.^{1/}

It is clear, therefore, that an arbitrator has no authority to review or rescind the decision of the Board to deny an increment.

However, the Board's argument that Bernards holds that the procedure for the denial of an increment is not arbitrable is an over-broad interpretation of the Courts finding. The Court held only that arbitration of a denial of an increment is not procedural and therefore, arbitration cannot be substituted for the decision of a school board.

The arbitrator here is limited to considering whether contractual procedures which are to take place before the Board takes action were complied with.

^{1/} Statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the employer may not be contravened by negotiated agreement. State v. State Supervisory Employees Association, supra. at 80.

It is significant that in Bernards, the Supreme Court viewed advisory arbitration favorably since this procedure does not substitute the judgment of the arbitrator for the Board of Education. Here, if the Association prevails, the arbitrator might order that the Board review its denial of the increment in compliance with the terms of the contract. The Association would simply be able to put before the Board the factors it feels are significant. Under the terms of this decision the denial of the increment must remain in force. As in advisory arbitration, the Board would be free to act as it wishes; it is only being exposed to a different view of the circumstances surrounding its action.

Moreover, the statute is silent as to procedures prior to the Board's vote. To the extent that Article 7 creates procedures to be followed prior to the Board voting on the denial of increment, those procedures are not precluded by statute and are thus appropriate for review by an arbitrator.

It is noted that Article 7(B)(1) states that the denial of an increment shall be done in accordance with "the Board Policy adopted in September 1979. This instrument shall be the instrument used for evaluation of teachers in the classroom setting."

Although these criteria were set by the Board, the Board cannot be bound to follow these criteria. This portion of the


contract is not arbitrable for it infringes on the Board's ability to establish and alter criteria.^{2/}

However, the balance of the procedures in Article 7 do not conflict with the Boards right to establish criteria and can stand independent of 7(B)(1).

If arbitration is proper in general, the Commission will not engage in speculation of any potential decision which might unlawfully interfere with the Board's managerial prerogative. However, here N.J.S.A. 18:28-14 gives the Board the right to deny increments and the arbitration is restrained from fashioning any remedy which might interfere with that right.

Accordingly, this arbitration shall not be temporarily restrained. However, the arbitration will be restrained only to the extent that the arbitration may otherwise order the Board to rescind its denial of an increment.

BY ORDER OF THE COMMISSION



Edmund G. Gerber
Commission Designee

DATED: October 3, 1986
Trenton, New Jersey

^{2/} It is noted that a contract provision calling for notice of a change in criteria would be arbitrable.