

P.E.R.C. NO. 2002-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HAMILTON TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2002-7

HAMILTON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Hamilton Township Board of Education for a restraint of binding arbitration of a grievance filed by the Hamilton Township Education Association. The grievance contests the withholding of a teacher's salary increments alleged for negligence in classroom supervision of students. The Commission concludes that this withholding relates predominately to the evaluation of teaching performance and must be addressed by the Commissioner of Education.

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, Destribats, Campbell, DeSantis & Magee, attorneys (Dennis M. DeSantis, on the brief)

For the Respondent, Wills, O'Neill & Mellk, attorneys (Arnold M. Mellk, on the brief)

DECISION

On September 17, 2001, the Hamilton Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Hamilton Township Education Association. The grievance contests the withholding of a teacher's salary increments.

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

The Association represents teachers, certified personnel and support staff. The Board and the Association are parties to a

collective negotiations agreement effective from July 1, 2000 through June 30, 2001. The grievance procedure ends in binding arbitration. Article 3:3-5(C), however, prohibits arbitration of any matter for which a method of review is provided for by law or any regulation of the Commissioner of Education.

Dawn Weston is a tenured special education teacher employed by the Board since 1994. In September 2000, she was assigned to the Crockett Middle School.

On October 5, 2000, the building principal issued an Observation Report concerning a September 26 class taught by Weston. The report stated:

Following an inquiry and investigation by the Crockett administration, the Hamilton Police and the N.J. Department of Institutional Abuse, it appears that an incident involving inappropriate behavior of multiply disabled students occurred on September 26, 2000 during Period 8 in room B3 while some students were supervised by Ms. Dawn Weston, special education teacher. The incident took place behind a mobile blackboard partition within the classroom. Seven students were in the room at the time of the incident. The four students who sat at a table on one side of the partition are regularly supervised by an educational assistant. On September 26, 2000, no educational assistant was in the room between approximately 2:35 p.m. and 2:50 p.m., and four students were permitted by Ms. Weston to sit and work in their regular seats behind the partition. One assistant left early due to illness and the other assistant left the room to make copies. Ms. Weston worked with three students on the other side of the partition. Ms. Weston exercised negligence in terms of poor judgment by allowing the students to remain out of her range of vision while she worked with other students across the room. By permitting students to remain behind a

partition which blocked her view, Ms. Weston created an environment where inappropriate behavior might happen. It was also poor judgment to authorize the assistant to leave the room, thus leaving four students alone in a setting which is regularly supervised by the assistant.

Ms. Weston needs to supervise in a setting where she can see all of the students all of the time. She has been directed to remove the partition from the room. She has also been instructed that under no circumstances should students be permitted out of her range of vision while under her direct supervision.

On October 4, 2000, the personnel administrator advised Weston that she would be suspended for five days based on "poor judgment during eighth period on Tuesday, September 26, 2000." The letter also stated that the administration was continuing to review the incident. On October 5, the personnel administrator advised Weston that her suspension would be extended through October 18 and that the review of the incident was ongoing. A DYFS probe of the September 26 incident found that Weston had placed two students in unnecessary and undue risk of harm which resulted in sexual/genital contact between them.

Weston's March 30, 2001 annual performance report stated, in part, that she had delivered her academic and functional skills curriculum in a satisfactory manner. It also recited two incidents of alleged bad judgment. One involved allowing students to remain unsupervised behind a partition where sexual/genital contact occurred between two mentally handicapped students. The other involved a February 2001 incident where Weston sent parents

allegedly inaccurate information via hand delivery by students without the principal's knowledge or consent. The report recommended the withholding of Weston's increment.

On June 22, 2001, the Board's attorney advised Weston that the Board had withheld her employment and adjustment increments for the 2001-2002 school year. He wrote:

The reason for this increment withholding is set forth in your Annual Performance Report dated March 30, 2001 and more specifically is as follows:

- (1) Improper supervision of children in your class that resulted in peer-to-peer sexual/genital contact between students during class time.

The Association filed a grievance alleging that the withholding was without just cause. The grievance was denied and the Association demanded binding arbitration. Weston also filed a petition with the Commissioner of Education contesting the withholding. 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. It

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 under Article 3:3-5, this dispute may not be submitted to arbitration because review by the Commissioner is provided under education laws. The Board also

argues that this withholding relates to an evaluation of teaching performance in that Weston was negligent in supervising students. The Board states that the withholdig was necessary to ensure the safety of students.

The Association rejects the Board's reliance on Article 3:3-5, arguing that N.J.S.A. 34:13A-27(a) preempts any agreement to refer all disputes over withholdings to the Commissioner. The Association also argues that the Board's reaction to the incident, including its suspension of Weston and the punitive terms in which her actions are described in the exhibits, establishes that the increment was withheld for disciplinary reasons. It notes that her annual performance report states that she taught the curriculum in a satisfactory manner.

Article 3:3-5 cannot supersede the statutory right of teaching staff to seek binding arbitration over withholdings that were not based predominately on the evaluation of teaching performance. Randolph Tp. Bd. of Ed. v. Randolph Ed. Ass'n, 306 N.J. Super. 207, 213 (App. Div. 1997). We now determine whether Weston's increment was withheld for such reasons.

We have decided several cases where teaching staff members have been sanctioned for alleged transgressions related to classroom management and the supervision of students and we have held that the withholdings were based predominately on the evaluation of teaching performance. See, e.g., Somerset Cty. Vocational and Technical Schools, P.E.R.C. No. 95-55, 21 NJPER 112 (¶26068 1995); Bergen Cty. Voc. Schools Bd. of Ed., P.E.R.C. No.

91-70, 17 NJPER 150 (¶22060 1991); Union Cty. Vo-Tech Bd. of Ed., P.E.R.C. No. 94-86, 20 NJPER 87 (¶25040 1994); contrast Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001) (withholding for failure to follow directive on leaving students unattended was not based on evaluation of teaching performance); Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-72, 18 NJPER 64 (¶23028 1991) (disciplinary withholding based on a number of incidents; hardly any occurred while teaching and none related to teaching).

Under these cases, we conclude that this withholding was based predominately on the evaluation of Weston's teaching performance. The withholding addresses Weston's judgment in allowing the assistant to leave the room and in not reconfiguring the class so she could see all her students. This classroom management/supervision issue must be addressed by the Commissioner of Education.

ORDER

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

BY ORDER OF THE COMMISSION

Millicent A. Wasell
 Millicent A. Wasell
 Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Buchanan voted against this decision.

DATED: December 20, 2001
 Trenton, New Jersey
 ISSUED: December 21, 2001