

P.E.R.C. NO. 99-102

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-99-49

EAST ORANGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the East Orange Board of Education for a restraint of binding arbitration of a grievance filed by the East Orange Education Association. The grievance alleges that the Board disciplined a teacher without just cause when it withheld his salary increments for the 1998-1999 school year. The Board's stated reasons for the withholding were based on unsatisfactory evaluations, several memoranda concerning performance deficiencies, and classroom observations. The Commission concludes that the reasons cited by the Board for this withholding predominately relate to the evaluation of teaching performance and review must be before 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, Love & Randall, attorneys
(Marvin L. Comick, on the brief)

For the Respondent, Bucceri & Pincus, attorneys
(Gregory T. Syrek, on the brief)

DECISION

On January 13, 1999, the East Orange Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the East Orange Education Association. The grievance alleges that the Board disciplined a teacher without just cause when it withheld his salary increments for the 1998-1999 school year.

The parties have filed briefs and exhibits. The Association has filed the certification of the teacher whose increments were withheld. These facts appear.

The Association represents teaching staff members. The Board and the Association are parties to a collective negotiations agreement effective from September 1, 1997 through August 31, 2000. The grievance procedure ends in binding arbitration.

Article V is entitled Protection of Teachers. Section D provides:

Neither the Board nor the Association shall discriminate against, discipline, reprimand, reduce in rank or compensation or deprive of any professional advantage any teacher without just cause. Any such action taken by the Board or the Association, or any agent or representative thereof, shall be subject to the grievance procedure.

Article XV is entitled Teacher Evaluation. It mandates at least three written evaluations for nontenured teachers and at least one for tenured staff. Article II entitles teachers to Association representation during grievance processing and bars reprisals for having participated in the grievance process.

Hillburn Sparrow has been employed by the Board as a teacher for 17 years. During the 1997-98 school year, he taught science at the East Orange High School.

On November 26, 1997, Sparrow was evaluated by Assistant Principal Sally McGrath for the period from September 2 through November 26, 1997. The evaluation form has eight sections: (A) Teaching Strategies or Techniques, (B) Classroom Management, (C) Professional/Personal Qualities, (D) Knowledge of Content, (E) Planning and Preparation, (F) School/Community Relations, (G) Development of Student Attitude, and (H) Attendance/Punctuality. Each section lists criteria pertaining to that topic. Sparrow received a "Satisfactory" rating in all areas under each section. The comments section states that "Mr. Sparrow is an experienced teacher, able to focus the students and to involve them in class

discussions and activities. Supportive of all school and departmental policies, Mr. Sparrow maintains a productive classroom environment."

Sparrow is the assistant coach of the girls' basketball team. On February 6, 1998, he asked the athletic director why he was denied a pair of sneakers, since all other coaches had received sneakers. Sparrow states that when he did not receive a satisfactory response, he contacted the Association and on February 24, it filed a grievance which was resolved in his favor.

During the next twelve days after the filing of the grievance, Sparrow was observed or met with McGrath about his teaching performance seven times. On March 3, 1998, McGrath observed Sparrow's science class and followed up with a memorandum. It states that his lesson plans were unsatisfactory and that he did not teach a new lesson as planned, spent too much time going over a homework assignment, assigned homework on untaught concepts and did not bring the class to closure. The memorandum contains detailed recommendations for improvement and suggests that Sparrow observe his colleagues or invite them to his class to assist in a self-evaluation.

On March 4, 1998, Sparrow submitted a detailed five-page response. Appended to it are new lesson plans with information not contained in his original plans.

On March 6, 1998, Sparrow submitted forms requesting payment for classes he had covered for other teachers while they

were assigned to team teaching. McGrath observed and evaluated Sparrow during team teaching assignments he performed on the next four school days. Sparrow contacted the Association which succeeded in getting him compensation for the assignments.

On March 12, 1998, McGrath sent a memorandum to Sparrow concerning observations of his performance on March 9, 10 and 11 in team-teaching assignments. The memorandum states that Sparrow's performance was unsatisfactory and concludes with a Professional Improvement Plan.

On March 30, 1998, Sparrow received an evaluation for the period from September 2, 1997 through March 30, 1998. Sparrow was rated "Unsatisfactory" for all the areas under "Teaching Strategies or Techniques," except one in which he received a "Needs Improvement." Under "Classroom Management," he was evaluated as "Unsatisfactory" in five out of eleven areas. Under "Professional/Personal Qualities," he was rated as "Satisfactory" in six areas, "Needs Improvement" in six areas, and "Unsatisfactory" in three areas. Under "Knowledge of Content," he received "Needs Improvement" under two areas and "Unsatisfactory" in three areas. Under "Planning and Preparation," he received a "Satisfactory" rating in four areas, a "Needs Improvement" in one area and "Unsatisfactory" in six areas. Under "School/Community Relations," he received a "Needs Improvement" rating in one area and a "Satisfactory" rating in two areas. Under "Development of Student Attitude," he received a "Needs Improvement" in all five areas.

Under "Attendance/Punctuality," he received a "Satisfactory" rating. After each section, comments were made under Professional Improvement Plan. The memorandum stated in summary:

Mr. Sparrow's performance is unsatisfactory; it has deteriorated significantly since the first evaluation. Failure to comply with the professional improvement plan as outlined in the attached memos may result in adverse personnel action.

Another evaluation of your performance will be done on or before May 30, 1998 to determine whether or not adverse personnel action will be recommended.

On April 2, 1998, Sparrow submitted a rebuttal to each of the evaluation categories. It was prefaced by a memorandum which questioned why he was the only member of his teaching team to be criticized.

On May 15, 1998, Sparrow received a year-end evaluation nearly identical to the March 30 evaluation, except to add the recommendation that Sparrow's salary increment be withheld.

On July 1, 1998, the superintendent notified Sparrow that the Board had reappointed him for the 1998-99 school year without employment and adjustment increments and had placed him on probation. His letter stated:

Your May 15, 1998 performance evaluation (copy enclosed) outlines the causes upon which this decision is based. It is expected that you will address those areas of your performance that have been determined to be less than satisfactory and elevate them to a satisfactory level during the next evaluation period.

On July 27, 1998, the Association grieved the withholding of Sparrow's increments as constituting discipline without just cause in violation of Article V, Section D. On November 6, the Board denied the grievance, stating that the reasons for the withholding were evaluative, not disciplinary, and were based on observations and evaluations of his classroom performance. On November 30, the Association demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

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]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Board may have.

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. 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 authority 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 asserts that this withholding was based on an evaluation of Sparrow's teaching performance. It points out that of the 42 subsections on his evaluation, Sparrow was rated as unsatisfactory in 12 areas, needing improvement in 14 areas, and satisfactory in 14 areas. It also asserts that Sparrow was advised of his deficiencies in memoranda dated March 2, March 3 and March 12, 1998. It further asserts that the evaluation of March 30 put him on notice that the administration was concerned with his performance and that references were made to his professional improvement plan in that evaluation. The Board contends that its actions were based solely on observations and evaluations of classroom performance.

The Association asserts that given Sparrow's history of satisfactory performance and lack of discipline, it should be found that his increments were withheld to punish him for his grievances concerning the sneakers and compensation for class coverage. It notes that Sparrow received an initial satisfactory evaluation and began receiving evaluations and memoranda criticizing his performance immediately after the Association intervened on his behalf.


The reasons cited by the Board for the withholding predominately relate to the evaluation of teaching performance. In Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996), we held that our limited gatekeeping function did not warrant an investigation into whether a school board's cited reasons for a withholding were pretextual. We determined that the

Commissioner of Education could evaluate the veracity of the Board's claims of deficient teaching performance. See Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 296-297 (App. Div. 1960) (in reviewing increment withholding, Commissioner should determine whether facts were as asserted by evaluator and whether withholding was reasonable in light of the facts). The Kopera standard of review assumes the absence of any bias or animosity toward the teacher, id. at 292, 297, and recognizes the Commissioner's power to set aside a withholding "induced by improper motives." Id. at 294. Cf. North Bergen Fed. Teachers v. North Bergen Bd. of Ed., 141 N.J. Super. 97, 101 (App. Div. 1976) (arbitrary personnel action bearing no relationship to educational goals will not be tolerated). The Commissioner can consider the questions raised by the Association concerning the timing, number and frequency of the Board's observations of this tenured teacher in determining whether the withholding should be sustained.

ORDER

The request of the East Orange Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. Commissioner Boose abstained from consideration.

DATED: May 27, 1999
Trenton, New Jersey
ISSUED: May 28, 1999