

P.E.R.C. NO. 2000-68

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO TOWNSHIP BOARD  
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2000-54

WILLINGBORO EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Willingboro Township Board of Education for a restraint of binding arbitration of a grievance filed by the Willingboro Education Association. The grievance contests the withholding of a teacher's salary increment. The Board's reasons for the withholding include allegations about inappropriate statements during class, which center on teaching performance, and must be reviewed by the Commissioner of Education. The Commission determines that an arbitrator may review the separate procedural issues associated with the rights to be notified of and to respond to complaints.

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, Carroll, Weiss & Josephson, L.L.P.,  
attorneys (James F. Schwerin, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys  
(Steven R. Cohen, on the brief)

DECISION

On November 19, 1999, the Willingboro 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 Willingboro Education Association. The grievance contests the withholding of a teacher's salary increment.

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

The Association represents teachers and certain other employees of the Board. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1997 through June 30, 2000. The parties' grievance procedure ends in binding arbitration.

Evelyn DiMartino is a tenured sixth grade teacher. On April 22, 1999, the principal sent a memorandum to the personnel administrator recommending that DiMartino's increment for the 1999-2000 school year be withheld. She listed the reasons as:

- (1) not implementing the improvement recommendations made in the 1997-98 annual performance report and classroom observation report;
- (2) not completing an assignment given to teachers enrolled in the "Martin Luther King, Jr. Do Something" contest;
- (3) discussing students' needs and performance and personnel matters in hallways and classrooms;
- (4) engaging in unprofessional behavior and dialogue during parent-teacher conferences and abruptly leaving a conference;
- (5) failing to implement a preferential intervention plan and to assist a parent in monitoring the student's progress;
- (6) not notifying the office when some students remained unsupervised in the classroom during recess;
- (7) receiving a poor observation report in February 1999;
- (8) offering a mediocre instructional program for 50% of her sixth graders and having students complain that she would not give them extra help; and
- (9) having parents request that their children be placed in another sixth grade class.

On April 29, 1999, DiMartino received her annual performance report. She was rated as unsatisfactory in two areas under Pupil Progress Indicators. The principal urged DiMartino to develop students' writing and cooperative learning skills, to prepare questions for higher order thinking skills pursuant to

Bloom's Taxonomy, and to use certain books on integrative teaching, reading/language arts skills, and positive behaviors. The principal recommended withholding DiMartino's increments and stated that she "has shown no improvement in implementing recommendations from observations and Annual Performance Reports for 1996-97; 1997-98."

On May 26, 1999, the Business Administrator/Board Secretary advised DiMartino that her increments were being withheld. He wrote:

Your unprofessional behavior associated with comments you made to your class and individuals in your class, leaving students without supervision, and observation of your teaching does not reflect the caliber of professionalism the district requires from its teaching staff.

On June 30, 1999, the Association requested clarification of the reasons for the withholding. It asked what comments were allegedly made and when.

On July 22, 1999, the Board's attorney responded that: "DiMartino told a student in her class a very inappropriate racial matter which included inappropriate language, which she categorized as a 'joke.' This incident was brought to the attention of the principal by a parent of a child in the class."

The Association filed a grievance. The grievance asserts that DiMartino was not apprised of the nature of a parental complaint, was not told who was the complaining party, and did not have an opportunity to meet her accuser or respond to the accusations. The Association asserts that the principal's failure

to notify her of the accusations and meet with her and the complaining party gave rise to false accusations and caused her increments to be withheld. The grievance cited two contract clauses. Article IV is entitled Employee Rights. Section B provides:

No employee shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth. This section shall not apply to the withholding of any increment, the non-renewal of any non-tenured teacher or any proceeding brought subject to the Tenured Employees Hearing Act.

Article XV is entitled Teachers' and Support Staff Personnel Files. Section A.6 provides:

No complaint made by an individual shall be retained in the file or otherwise used against the teacher charged unless on reasonable notice to the teacher and to the Association, opportunity is given to the teacher and to his or her representative to meet the accuser in the presence of the principal....

The grievance seeks restoration of the 1999-2000 salary increments.

The superintendent denied the grievance and the Association demanded arbitration. This petition ensued.

The Board asserts that its reasons for this withholding are based on teaching performance. It further asserts that even if the withholding was based solely on inappropriate comments in class, such comments arose during the educational process and do not make a withholding arbitrable. The Board relies on Kinnelon

Bd. of Ed., P.E.R.C. No. 99-64, 25 NJPER 90 (¶30039 1999) and Randolph Tp. Bd. of Ed., P.E.R.C. No. 99-94, 25 NJPER 238 (¶30100 1999).

The Association asserts that the withholding resulted from the failure to follow negotiated procedures concerning parental complaints and to ask DiMartino about the accusations before crediting them. It relies on Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), *aff'd per curiam* 130 N.J. 312 (1992), arguing that this withholding should proceed to arbitration given the alleged procedural violations.

The Board responds that the Association does not dispute that this withholding was predominately for reasons related to teaching performance. It asserts that Lacey Tp. did not involve a withholding and that if the Association wishes to contest the substance of the Board's reasons, it must do so before the Commissioner.

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 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]

We hold that the substantive decision to withhold DiMartino's increments must be reviewed by the Commissioner of Education. The reasons cited by the Board, including the allegation about inappropriate statements during class, center on teaching performance. We will restrain arbitration accordingly.


An arbitrator may, however, determine the separate issue of whether the Board violated contractual clauses governing procedural issues. The Board does not contend that Article XV, Section A.6 is not mandatorily negotiable. See, e.g., Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997); Greater Egg Harbor Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987). Alleged violations of such procedural guarantees were legally arbitrable before the 1990 amendments and remain arbitrable after the 1990 amendments. Washington Bor. Bd. of Ed., P.E.R.C. No. 98-49, 23 NJPER 603 (¶28296 1997); Fair Lawn Bd. of Ed., P.E.R.C. No. 80-52, 5 NJPER 487 (¶10249 1979). We need not address any remedial issue at this juncture.



ORDER

The request of the Willingboro Township Board of Education for a restraint of arbitration is granted to the extent the grievance contests the substantive decision to withhold an increment from Evelyn DiMartino. The request is denied to the extent the grievance contests alleged procedural violations associated with the rights to be notified of and respond to complaints.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: February 24, 2000  
Trenton, New Jersey  
ISSUED: February 25, 2000