

P.E.R.C. NO. 95-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

READINGTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-95-17

READINGTON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Readington Education Association against the Readington Township Board of Education. The grievance contests the withholding of a school psychologist's salary increments. Under all the circumstances of this case, the Commission holds that the reasons for the withholding relate predominately to an evaluation of the employee's teaching performance as a school psychologist.

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Appearances:

For the Petitioner, Martin R. Pachman, P.A., attorneys
(Robin T. McMahon, of counsel)

For the Respondent, Balk, Oxfeld, Mandell & Cohen,
attorneys (Gail Oxfeld Kanef, of counsel)

DECISION AND ORDER

On August 18, 1994, the Readington 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 Readington Education Association. The grievance contests the withholding of a school psychologist's salary increments.

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

The Association represents the Board's certificated personnel, including its school psychologists. The parties entered into a collective negotiations agreement with a grievance procedure ending in binding arbitration. Article IV, entitled Employee Rights, requires just cause for any disciplinary action.

Kenneth Heaphy has been employed by the Board as a school psychologist for 25 years. For the last two years, Heaphy has been supervised by Dr. James Gillock, the Director of Pupil Personnel Services.

In June 1992, Gillock completed an annual evaluation form critiquing Heaphy's performance during the 1991-1992 school year. Heaphy received ratings of "satisfactory" in six categories and "needs improvement" in three categories--"Ability to organize special area routines"; "Ability to foster good staff morale"; and "Ability to cooperate with other staff members." Heaphy appears to have received a rating between "satisfactory" and "needs improvement" in a fourth category--"Ability to maintain positive pupil relationships." Heaphy's pupil reports were not faulted. In the "Comments" portion of the evaluation, Gillock wrote:

Mr. Heaphy is an experienced Child Study Team member who nevertheless has a number of weaknesses which require continued professional growth. These include a lack of organization which has a deleterious effect on staff morale, inappropriate parent/teacher conferencing behaviors (verbatim reading of reports) which serves to alienate parents and staff as well as shut off a valuable source of parent feedback (body language and other nonverbal clues), and occasional lapses in judgment (giving middle school student large pocket knife). On the positive side Mr. Heaphy has sincerely attempted to make some changes in his report writing this year.

A Professional Improvement Plan was designed to address these problems. That plan stated in part:

Mr. Heaphy will follow all office procedures and procedures mandated by the Special Education Law for child study teams, including giving teachers

advance notice of his intent to test or observe students, communicating with colleagues regarding the use of testing rooms, writing all appointments on the office calendar before the scheduled date, refiling all files, scheduling all mandated appointments after consulting with other child study team members as necessary.

In June 1993, Gillock completed an annual evaluation form critiquing Heaphy's performance during the 1992-1993 school year. Heaphy again received ratings of "satisfactory" in six categories. His ratings in the four other categories were between "satisfactory" and "needs improvement." In the "Comments" attached to the evaluation, Gillock wrote that Heaphy had grown professionally but needed to make more progress. He specifically wrote that the inconsistencies and lapses in Heaphy's professional organization continued to diminish staff respect and morale; Heaphy did not always notify teachers of testing/observation appointments, write his own appointments on the office calendar, schedule conferences and appointments, monitor students, give the team secretary complete IEP data, or consult with other professionals before scheduling conferences; and Heaphy's conferencing skills needed to be used more consistently.

A Professional Improvement Plan was designed to address these problems. Heaphy was directed to follow up on telephone calls and LAT referrals, schedule all appointments on the office calendar, and consult with co-workers before scheduling appointments.

On April 14, 1994, Gillock called Heaphy into his office to discuss a case. It appears that Heaphy had not completed a

functional assessment on a student and that one of the student's parents had called the day before to ask about the report. According to a memorandum prepared by Heaphy, Gillock told Heaphy that this incident illustrated Heaphy's lack of organization. Heaphy responded that the problem was not a lack of organization, but an excessive caseload. According to the memorandum, Gillock also complained that Heaphy did not take him seriously. Heaphy's memorandum does not state that Gillock was angry or that Heaphy and Gillock argued.

On April 18, 1994, Gillock wrote an eight page memorandum to the Superintendent recommending that Heaphy's employment and adjustment increments be withheld for the next school year. The memorandum cited the problems discussed in Heaphy's annual evaluations and improvement plans; these documents were attached. The memorandum then stated that Heaphy had not improved his organizational skills or followed suggestions and that his organizational weaknesses weakened morale on the child study team and jeopardized the district's compliance with administrative regulations and due process obligations. The memorandum described six incidents in which Heaphy allegedly failed to carry out assignments, respond to a memorandum, apprise a teacher of a conference requiring the teacher's presence, make telephone calls, consult with a speech therapist before including her services in a behavioral plan, schedule meetings and conferences, and protect the confidentiality of a pupil record. The memorandum also responded to memoranda that Heaphy had written concerning some of these incidents.

The Superintendent and the Board accepted Gillock's recommendation. The Board's Secretary wrote Heaphy a letter stating that the withholding was based on his deficiencies in organizational skills and scheduling responsibilities.

The Association filed a grievance asserting that the withholding of Heaphy's increments violated Article IV of the parties' agreement. Gillock denied the grievance, asserting that the withholding was not grievable or arbitrable because it was based on Heaphy's poor performance. The Association demanded arbitration and this petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

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, increment withholdings of teaching staff members for predominately disciplinary reasons are to 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, we must make that determination. N.J.S.A. 34:13A-27(a). 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]

Under all the circumstances of this case, we hold that the reasons for the withholding of Heaphy's increments relate predominately to an evaluation of his teaching performance as a

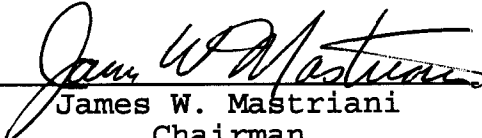
school psychologist. Like a principal, a psychologist does not teach in a classroom, but is a teaching staff member who must carry out professional duties involving students and staff and the educational program. Compare Middletown Tp. Bd. of Ed. P.E.R.C. No. 92-54, 18 NJPER 32 (¶23010 1991) (principal evaluated as educational leader and manager). This withholding was based on Gillock's perception that Heaphy's alleged lack of organization was hurting the morale and effectiveness of his child study team.^{1/} A psychologist who is unorganized in scheduling appointments and working with colleagues may impair the delivery of psychological services to students and jeopardize a school district's compliance with school policies and education law mandates. We express no opinion about the merits of the charges of disorganization. We simply conclude that these charges center on an evaluation of Heaphy's teaching performance as a psychologist and must be reviewed by the Commissioner of Education. We therefore restrain arbitration.

^{1/} The evidence does not support the Association's assertion that the withholding was a disciplinary response to Gillock's alleged anger at Heaphy's conduct at the April 14 meeting.

ORDER

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Bertolino abstained from consideration. Commissioner Wenzler was not present.

DATED: December 16, 1994
Trenton, New Jersey
ISSUED: December 19, 1994