

P.E.R.C. NO. 95-58

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-94-100

OAKCREST-ABSEGAMI TEACHERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Oakcrest-Absegami Teachers' Association against the Greater Egg Harbor Regional High School District Board of Education. The grievance contests the withholding of a teacher's salary increment. The Commission holds that the reasons for this withholding predominately involve an evaluation of teaching performance and must be reviewed by the Commissioner of Education. The reasons involve alleged statements about intellectual abilities addressed to students during classes and alleged grading criteria based on inappropriate considerations.

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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Respondent.

Appearances:

For the Petitioner, Louis J. Greco, attorney

For the Respondent, Selikoff & Cohen, attorneys
(Steven R. Cohen and Keith Waldman, on the brief)

DECISION AND ORDER

On May 24, 1994, the Greater Egg Harbor Regional High School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Oakcrest-Absegami Teachers' Association. The grievance contests the withholding of a teacher's salary increment.

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

The Association represents the Board's certified personnel, including classroom teachers. The parties entered into a collective negotiations agreement effective from July 1, 1993 to June 30,

1994. Section C of Article 4, entitled Teacher Rights, provides that "[n]o teacher shall be disciplined without just cause." The grievance procedure ends in binding arbitration of contractual disputes.

The Board has a policy prohibiting sexual harassment of pupils. The policy defines sexual harassment as including "all ... verbal or physical contacts of a sexual nature whenever such conduct has the purpose or effect of intimidation or tends to create an intimidating, hostile, or offensive educational environment." The policy provides that "[a]n employee who engages in the sexual harassment of a pupil will be subject to stringent discipline and may be terminated."

Louis Emonds is a tenured English teacher. He has taught at Oakcrest High School since 1968.

On March 24, 1994, Emonds' supervisor gave him draft copies of his annual evaluation and professional improvement plan. The evaluation rated Emonds satisfactory in every category and did not point out any problems. The draft did not make a recommendation concerning whether or not Emonds should receive his salary increment for the next school year. Emonds had also received favorable observation reports throughout the year.

During the 1993-1994 school year, female students complained that Emonds had made offensive comments during classes. The Board's affirmative action officer conducted an investigation which lead to the principal and superintendent recommending that

Emonds' salary increment for the 1994-1995 school year be withheld. On April 14 and 28, 1994, the Board held a hearing. Witnesses were sequestered; cross examination was permitted; and testimony was transcribed.

On April 20, 1994, the hearing ended and the Board voted to withhold Emonds' salary increment for the 1994-1995 school year.

The Board's resolution stated, in part:

WHEREAS, the Board finds, as a fact, that Louis Emonds maintained a hostile environment in his English class for female, blonde, students by making repeated negative remarks about their intelligence and capabilities, and that he held such students up to ridicule by making such remarks to the class as a whole; that he repeated such conduct after being clearly notified by students that they objected to his conduct and that he inappropriately offered to grant academic credit for physical characteristics not related to academic performance.

Sometime after the Board voted to withhold the increment, Emonds' draft evaluation was changed in some respects and converted into a formal evaluation. Emonds was rated "needs improvement" in three categories: (1) "Communicates effectively with people, parents, co-workers, supervisors, etc."; (2) "Maintains an atmosphere of mutual respect in relationship with pupils"; and (3) "Provides fair, firm, and consistent discipline." His supervisor added that he could not recommend that Emonds receive a salary increment for the next year given "the events that occurred in the 1993-1994 school year in which the Board of Education approved a recommendation to withhold your salary increment."

The Association demanded arbitration. It asserts that the Board violated the contract by withholding Emonds' salary increment without just cause. 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 this grievance or the truth of the allegations against Emonds.

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 this withholding predominately involved an evaluation of Emonds' teaching performance and must be reviewed by the Commissioner of Education. We agree with the Association that the withholding was a disciplinary action punishing Emonds for allegedly violating the Board's sexual harassment policy. But the issue is not whether a withholding is a disciplinary action (it invariably is); the issue is whether or not the withholding was based predominately on an evaluation of teaching performance. The reasons


here involve alleged statements about intellectual abilities addressed to students during classes and alleged grading criteria based on inappropriate considerations. Whether Emonds maintained an appropriate educational environment is a question predominately involving an evaluation of teaching performance, subject to review by the Commissioner of Education. See, e.g, Florham Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 125 (¶24060 1993); Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991); Tenafly Bd. of Ed., P.E.R.C. No. 91-63, 17 NJPER 147 (¶22058 1991).

The Association stresses that Emonds' supervisor did not mention Emonds' alleged problems in the draft evaluation and did not testify against Emonds at the hearing. These concerns may be addressed to the Commissioner of Education.

ORDER

The request of the Greater Egg Harbor Regional District Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Finn, Klagholz and Ricci voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioner Boose abstained from consideration. Commissioner Wenzler was not present.

DATED: February 28, 1995
Trenton, New Jersey
ISSUED: March 1, 1995