

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HAZLET BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-95-20

HAZLET TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Hazlet Teachers Association against the Hazlet Board of Education. The grievance asserts that the employer did not have just cause to withhold a teacher's salary increments. The Commission holds that the withholding of the teacher's increments was predominately based on the evaluation of his teaching performance. The reasons for the withholding center on his alleged "intimidation and fear techniques" in seeking to control students in class and his alleged inappropriate touching of students during gym exercises.

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.

P.E.R.C. NO. 95-59

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Appearances:

For the Petitioner, Kenney, Gross, McDonough & Stevens,
attorneys (Mark S. Tabenkin, of counsel)

For the Respondent, Chamlin, Rosen, Cavanagh & Uliano,
attorneys (Thomas W. Cavanagh, of counsel)

DECISION AND ORDER

On August 25, 1994, the Hazlet Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by a physical education teacher represented by the Hazlet Teachers Association. The grievance asserts that the employer did not have just cause to withhold the teacher's salary increments.

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

The Association represents the employer's physical education teachers and certain other certificated personnel. The parties entered into a collective negotiations agreement effective

from July 1, 1991 through June 30, 1994. Article 4 is entitled Employee Rights. Section C provides:

No teacher shall be disciplined, reprimanded, reduced in rank or compensation, without just cause. Any such action by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth.

Article 14 is entitled Teacher Evaluation. Sections B, C, and D provide:

- B. Teachers shall be evaluated only by persons certified by the New Jersey State Board of Examiners to supervise instruction.
 - 1. The observation sheet which constitutes the major factor upon which final evaluations are based, should be completed for non-tenure teachers at least three (3) times a year.
- C. An evaluation sheet for every teacher is to be forwarded to the Superintendent by the respective Principal. A request for an extension of time regarding an individual's evaluation may be made by the Superintendent. Each Principal shall discuss the evaluation sheet with the individual teacher after the evaluation of an individual is completed. Every effort will be made to notify individual teachers of their employee status by the end of February. The status may be one of the following:
 - Recommended for employment with or without increment
 - Recommended not to be rehired
 - More time is needed for consideration before final decision will be made.

In most cases teachers should be notified of their final evaluation by April 1st. The observation sheet, which constitutes the major factor upon which final evaluations are based, should be completed for

non-tenure teachers at least three (3) times a year. The evaluation sheet to be completed for tenure teachers shall be at the discretion of the school Principals, within the scope of the Administration Rules and Regulations.

- D. The Board of Education reserves unto itself the right to withhold for inefficiency, or other good cause, in the performance of any assignment, the employment increment or the adjustment increment of any person listed on any salary guide in any year of employment by a recorded roll call majority vote of the full membership of the Board of Education....

The grievance procedure ends in binding arbitration.

Donald Mayer is a tenured teacher of physical education. He teaches at the Beers Street Middle School.

In April 1985, Mayer was reprimanded for the manner in which he tried to control a student. The former superintendent wrote in the memorandum:

I refer specifically to the placing of your hands on his shoulders, placing him across your knee and taking him to the ground. While I can appreciate that you acted to prevent an injury to him and/or other students, it remains that another less intimidating method could and should have been used.

In February 1993, Mayer was accused of threatening a student with a baseball bat to stop the student from fooling around. Mayer was suspended with pay for six days pending an investigation and was ultimately reprimanded for unprofessional conduct. The reprimand cautioned him to "avoid touching students in any manner unless it is necessary for the student's welfare or the safety of others" and to "properly supervise your class without

using other students to do your job." The Division of Youth and Family Services ("DYFS"), a government agency, also investigated this incident and concluded that Mayer had placed the student at "unnecessary and undue risk of harm."

Mayer's Evaluation Record for the 1992-1993 school year rated Mayer as "Effective" in all areas except "Punctuality" and "Control and Discipline." These comments were made about the latter category:

Although class management skills are generally satisfactory, Mr. Mayer must exercise good judgment and self-control in order to avoid the slightest physical incident or verbal remark.

On October 18, 1993, five students in the seventh grade complained about Mayer. Some students claimed, according to the current superintendent, that Mayer would "get very close to them, raise [his] voice, point [his] finger, and threaten to make them stay after school with [him] when there is no means of transportation available to take the student home." Other students claimed, again according to the superintendent, that Mayer would touch their backs, hips, and arms during physical education classes. Mayer denies these allegations and asserts that his only physical contact with students was during "spotting" exercises in his physical education classes.

Mayer was suspended with pay for one week pending an investigation. The superintendent ultimately issued a formal letter of reprimand. He found that Mayer had violated directives prohibiting him from touching students unless necessary for student

welfare or safety (the 1993 reprimand) and warning him to use less intimidating methods to discipline or control students (1985 reprimand). The superintendent specifically found that Mayer's form of intimidation -- getting close to students, raising his voice, pointing his finger, and threatening to make them stay after school along with him -- was "not an effective teaching or disciplinary technique." In addition, the superintendent specifically found that the touching of hips while spotting students was justified, but his touching students on other less sensitive body areas at other times was not. The superintendent cited an incident in which Mayer allegedly put his arm around the shoulders of two students, patted their shoulders, and encouraged them to run an extra lap during class; according to the superintendent, these actions "caused tension and fear in these students." The superintendent wrote:

Your touching of students, other than for safety purposes, is not acceptable behavior and in direct violation of my most recent direction to you of May 11, 1993. I find your touching of students on their arms, shoulders and backs, (although not overly offensive) under these circumstances, to be an act of insubordination.

The superintendent informed Mayer that he would be observed and counselled to ensure that he conformed with proper teaching techniques for disciplining and controlling students; he would be again directed not to touch students or come in physical contact with them unless for safety; and the superintendent was prepared to recommend that his salary increments for the next school year be withheld.

Mayer filed a grievance seeking the removal of this reprimand from his personnel file. The Board denied the grievance and the Association demanded arbitration. That arbitration proceeding is pending and is not at issue now.

DYFS investigated sexual abuse allegations raised by six students whose complaints had triggered the reprimand. DYFS concluded that these allegations were unfounded.

In December 1993, Mayer's third grade class was observed. Mayer was rated as "Effective" and the comments were all laudatory, including such statements as Mayer "was very positive and pleasant to his students" and "exhibited good patience."

On April 18, 1994, the principal completed Mayer's Evaluation Record for the 1993-1994 school year. Mayer received ratings of "Effective" in all categories except "Control and Discipline" -- there he received a rating of "Needs Improvement." The accompanying comments stated that Mayer "must be certain to establish classroom rules and consequences that are appropriate for middle school students and enforce these procedures on a routine basis." The principal recommended that Mayer be reappointed, but that his increments be withheld for the next school year. However, Mayer asserts (and the Board does not dispute) that the principal originally recommended that Mayer receive his increments and that this recommendation was changed sometime after the principal and Mayer conferred about the evaluation. Mayer also asserts (again without dispute) that during this same conference, he questioned the

"Needs Improvement" rating and the principal responded by mentioning some "logistical improvements," but not the November 1993 reprimand.

On April 18, 1994, the Board voted to withhold Mayer's salary and adjustment increments for the next school year. The next day, the Business Administrator/Board Secretary wrote Mayer a letter stating these reasons for withholding the increment:

The Board's determination to withhold your increment and salary adjustment is due to the dissatisfaction with your work performance through use of intimidation and fear tactics toward students. This is in violation of previous directives requiring you to utilize less intimidating methods to reprimand or control student's behavior. See letter dated April 25, 1985. In addition, your touching of students on their shoulders, back and arms [is] inappropriate and in [direct] violation of the Superintendent's previous directive to you on May 11, 1993. Your poor performance is fully set forth in the letter from the Superintendent of Schools on November 22, 1993.

On May 27, 1994, Mayer filed a grievance asserting that the withholding of his salary increments violated Articles 4 and 14 and certain other contractual articles. The grievance alleged that teacher evaluation policies had been unequally applied and asked that Mayer be placed on the correct step of the salary guide, the teaching evaluation procedure be used, and the notification of withholding be removed from his personnel file. The Board denied the grievance, asserting that the increments were withheld because of Mayer's unsatisfactory teaching techniques. 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 withholding of Mayer's increments was predominately based upon an evaluation of his teaching performance. The reasons for the withholding center on Mayer's alleged "intimidation and fear techniques" in seeking to control students in class and Mayer's alleged inappropriate touching of students during gym exercises. We have restrained arbitration in similar cases involving allegations of improper teaching techniques for disciplining students in a physical education class or classroom and improper touching of students in a physical education class or classroom. See Roxbury Bd. of Ed., P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994); Ramsey Bd. of Ed., P.E.R.C. No. 93-47, 19 NJPER 44 (¶24020 1992); Wayne Tp. Bd. of Ed., P.E.R.C. No. 93-107, 19 NJPER 272 (¶24137 1993); Upper Saddle River Tp. Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148

(¶22059 1991); Tenafly Bd. of Ed., P.E.R.C. No. 91-68, 17 NJPER 147 (¶22058 1991). These precedents control this case.

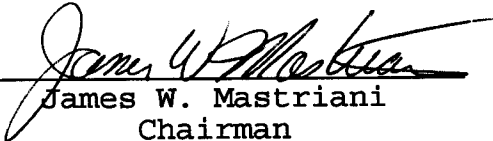
We recognize that the Board has also accused Mayer of insubordination. Such a reason may be disciplinary in nature and unrelated to teaching performance. See, e.g., Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992). But the allegation of insubordination here is tied to Mayer's alleged refusal to change his teaching techniques despite instructions to do so and the Board's concern that Mayer adopt new teaching techniques. In addition, the allegation of improper disciplinary techniques here does not center on a true or false fact concerning an indisputably illegal act, but rather an evaluative judgment about whether Mayer is using educationally sound techniques in seeking to control his students. Contrast Morris School Dist. Bd. of Ed., P.E.R.C. No. 93-50, 19 NJPER 50 (¶24023 1992). That judgment must be reviewed by the Commissioner of Education.

For these reasons, we grant the Board's request for a restraint of binding arbitration.

ORDER

The request of the Hazlet Board of Education for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

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