

P.E.R.C. NO. 2008-26

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY VOCATIONAL/TECHNICAL  
SCHOOLS BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2008-002

MERCER COUNTY VOCATIONAL EDUCATION  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Mercer County Vocational/Technical School Board of Education for a restraint of binding arbitration of a grievance filed by the Mercer County Vocational Education Association. The grievance contests the withholding of an increment from a teaching staff member. The Commission concludes that the reasons for the withholding predominately relate to an evaluation of teaching performance and any challenge to the withholding must be filed with 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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Respondent.

Appearances:

For the Petitioner, Herbert, Van Ness, Cayci & Goodell,  
P.C., attorneys (Michael J. Herbert, on the brief)

For the Respondent, Wills, O'Neill & Mellk, attorneys  
(Arnold M. Mellk, on the brief)

DECISION

On July 19, 2007, the Mercer County Vocational/Technical Schools Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Mercer County Vocational Education Association. The grievance contests the withholding of an increment from a teaching staff member. Because the reasons for the withholding predominately relate to an evaluation of teaching performance, any challenge to the withholding must be filed with the Commissioner of Education. We therefore restrain binding arbitration.

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

The Association represents educational staff employees. The parties' collective negotiations agreement is effective from July 1, 2005 through June 30, 2008. The grievance procedure ends in binding arbitration.

Sam Bell, Jr. is a tenured electrical construction instructor. On March 19, 2007, Bell was placed on a 30-day Professional Improvement Plan ("PIP"). That plan set forth three areas needing improvement:

1. Student Learning, Evaluation/Assessment

There continues to exist a need for a clear well-defined grading system that is consistent and allows for individual achievement abilities.

2. Record Keeping/Reporting

Record keeping and reporting is often late and incomplete.

3. Classroom Management

There is a need for consistency and fairness in students classroom/shop management procedures.

Each area set forth strategies, time frames and results. The PIP stated:

Your performance and response will be observed and monitored weekly with an evaluation completed at the end of the 30 day improvement period. The observation conducted at the end of the 30 day period will focus on the three areas needing

improvement. A recommendation to the Superintendent will be rendered at the conclusion of the 30 day period.

On March 30, 2007, the principal wrote to Bell concerning the Second Marking Period Revised Grade Summary. She stated that his marking period procedures conflicted with the original calculation of marking period grades. Bell was given until the end of the day to submit a revised printout to Student Services and a copy to the principal.

On April 20, 2007, the principal wrote to Bell concerning the Second Marking Period Revised Grade Summary. She advised him that parents were calling for the AM electrical students' grades. She advised him to provide revised grades for the second and third marking period for his AM class by 11:00 a.m. on April 23.

On April 30, 2007, the National Occupancy Competency Testing Institute (NOCTI) notified the district of a breach of security related to an Electrical Construction assessment. The letter stated in part:

The fact that an instructor possessed items from this test and potentially provided those items to students either as a practice test or as part of a classroom test is a serious violation of our security policy. It is the responsibility of the Test Coordinator to ensure security which includes restricting instructor access to testing materials. When a copy of a test is compromised, is used for practice or incorporated into classroom tests, students have the opportunity to review items answered incorrectly and/or practice multiple times. As NOCTI assessments are administered across the

county and the normative data collected is used for important local, state and federal reporting, it is vital that security be a top priority of our customers.

Our policy requires the extent of damages to be determined, as well as the steps needed to remedy the breach. The NOCTI management team has carefully considered the circumstances of your security breach and determined the extent to which the integrity of our assessment and data systems has been affected. . . .

The company had to revise the Electrical Construction assessment and create a new assessment as well as pilot testing and item analyses. The Board was fined \$5,000 and placed on probation to ensure close monitoring.

On May 8, 2007, the principal wrote to the superintendent recommending that Bell's increment be withheld for the 2007-2008 school year. The letter stated:

On March 19th Sam Bell Jr., Electrical Construction instructor, was presented with a 30-Day Professional Improvement Plan effective March 19, 2007 up to and including May 7, 2007. A more serious breach of security correspondence was received on April 30th concerning the NOCTI Electrical Construction Assessment. The results of the 30-day Professional Improvement Plan are:

There is still a need to maintain a well-defined grading system that is fair, consistently applied, understood by parents and students and allows for individual student achievement abilities.

Request for re-calculated marking period grades for the AM class per February 12, 2007 memo. Revised grades were submitted, after third request to Student Personnel Services

Coordinator for recording and submission to home schools after April 20, 2007.

There is still a need to communicate with parents in a timely manner regarding student performance/progress/behavior via phone call, email and weekly reports.

There is still a need to be consistent in how students are disciplined. Established rules must be consistently applied to all students. Parent contact before Unsatisfactory Conduct Report. Note parent contact/confirm on Unsatisfactory Conduct Report.

There is still a need to implement weekly/bi-weekly assessment and note in lesson plans and grade book.

There is still a need to maintain accurate student records and submit required reports on time including grades, interim reports student tardiness.

There is still a need to create a positive classroom environment that fosters mutual respect and accountability. Unsatisfactory Conduct Report must reflect student, counselor, and parent contact before administrator. Re-focus off-task behavior, speak with students apart from peers, and maintain confidentiality at all times. Be consistent (PIP 06-07). Recommended reference. Discipline in the Secondary Classroom by R. S. Sprick.

The National Occupational Competency Institute correspondence stating that NOCTI Electrical Construction assessment had been compromised and the District was charged with a breach of security.

On May 17, 2007, the superintendent notified Bell that the Board had approved the withholding of his employment and adjustment increment effective July 1, 2007. Her letter stated:

At its meeting on Tuesday, May 15, 2007, the Board of Education approved the withholding of your employment and adjustment increment effective July 1, 2007.

As a result of the withholding of your employment and adjustment increment, you have been approved for re-employment for the 2007-2008 school year in the capacity of Teacher of Electrical Construction, at an annual salary of \$72,250 (which is the same salary as the 2006-07 school year), effective July 1, 2007 through June 30, 2008.

As you are aware, your increment was withheld for the 2003-2004 school year because of deficient performance. Your conduct this time was not only deficient but you compromised the integrity of a test prepared by the National Occupational Competency Testing Institute ("NOCTI"), which is imposing a \$5,000 penalty on the District because of your actions. The Board of Education directed me to inform you that any further infractions by you will result in the filing of tenure charges to discharge you and to remove your certification as a teacher.

It is recommended that you meet with your Principal in order to establish a professional plan designed to meet the deficiencies described in your 2007 Annual Performance Report.

On June 15, 2007, the Association filed a grievance asserting that Bell's increment was withheld without just cause and was predominately disciplinary. The grievance alleges that the reasons given for the withholding were pretextual and that the "most serious" allegation against Bell concerning the NOCTI is false. The grievance was denied at all levels. The Association demanded arbitration and this petition ensued.

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.<sup>1/</sup> 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.,<sup>2/</sup> 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

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1/ 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).

2/ P.E.R.C. No. 91-67, 17 NJPER 144, 146 (¶22057 1991).

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.

The allegation that Bell's actions compromised the security of a standardized test is a mixed reason, involving allegations that he inappropriately provided students with test questions and breached administrative procedures.<sup>3/</sup> However, all of the other stated reasons for the withholding indisputably relate to Bell's teaching performance.<sup>4/</sup> In selecting a forum under N.J.S.A.

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3/ Cf. Willingboro Bd. of Ed., P.E.R.C. No. 98-51, 23 NJPER 607 (¶28298 1997) (arbitration of increment withholdings not restrained where teachers, acting as administrators and proctors, allegedly did not follow directive concerning security procedures required in administering State-mandated test).

4/ See Woodbury Bd. of Ed., P.E.R.C. No. 2006-81, 32 NJPER 128 (¶59 2006) (arbitration restrained where teacher allegedly failed to prepare adequate assessment strategies and record student grades); Englewood Bd. of Ed., P.E.R.C. No. 2006-33, 31 NJPER 353 (¶140 2005) (arbitration restrained where teacher allegedly lacked lesson plans and class register book and had poor instructional practices); Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 2000-28, 25 NJPER 442 (¶30194 1999) (arbitration restrained where withholding centered on classroom management, organization and preparation of lesson plans, instruction, and communication with students); Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER (continued...)

34:13A-27, we accept that statement of reasons and do not consider contentions that those reasons are pretextual or valid.<sup>5/</sup> As the reasons given for the withholding predominately relate to an evaluation of teaching performance, we restrain arbitration.

ORDER

The request of the Mercer County Vocational/Technical School Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: October 25, 2007

Trenton, New Jersey

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4/ (...continued)

179 (¶73 2005) (arbitration restrained where teacher allegedly failed to communicate with parents about academic performance, timely return graded weekly homework, advise students of after-school help, handle disciplinary issues tactfully and keep communication lines open with students, and confront students about cheating on a test).

5/ See Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003).