

P.E.R.C. NO. 99-101

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOONTON TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-99-35

BOONTON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Boonton Township Board of Education for a restraint of binding arbitration of a grievance filed by the Boonton Township Education Association. The grievance contests the withholding of a teacher's salary increment for the 1998-99 school year. The Commission concludes that the record establishes that this increment would not have been withheld absent an incident occurring during an after-school extracurricular coaching assignment. Under all the circumstances, the Commission finds that the withholding was not based predominately on teaching performance and must be reviewed in arbitration.

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, Lindabury, McCormick & Estabrook,
P.C., attorneys (Anthony P. Sciarrillo, of counsel)

For the Respondent, Ullman, Fuhman, Platt & Koy, P.C.,
attorneys (Jeffrey D. Ullman, of counsel)

DECISION

On December 3, 1998, the Boonton 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 Boonton Township Education Association. The grievance contests the withholding of Robert Fordyce's salary increment for the 1998-99 school year.

The parties have filed briefs, certifications and exhibits. The Board has submitted its superintendent's certification and amended certification. It has also submitted 90 exhibits consisting of evaluations and classroom observations of Fordyce from 1979 to 1998, complaints from parents, letters and memoranda from administrators concerning student and parental

complaints, and minutes of school board meetings. The Association has also submitted extensive exhibits including positive evaluations, correspondence leading up to and after the filing of the grievance, Board meeting minutes, and the 1998 girls' softball scorebook. These facts appear.

The Association represents the Board's teaching staff members. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1995 through June 30, 1998. The grievance procedure ends in advisory arbitration. However, the parties agree that N.J.S.A. 34:13A-22 to -29 (the 1990 amendments) require binding arbitration of increment withholdings not predominately related to the evaluation of teaching performance. See N.J.S.A. 34:13A-29; Randolph Tp. Bd. of Ed. v. Randolph Tp. Ed. Ass'n, 306 N.J. Super. 207 (App. Div. 1997), certif. denied, 153 N.J. 214 (1998).

Robert Fordyce is a tenured science teacher at the Rockaway Valley School (RVS), the only school in the district. He teaches sixth, seventh and eighth grades. He has also served as athletic director, coach of the girls' and boys' basketball teams, and coach of the girls' softball team.

In a March 6, 1998 classroom observation, Fordyce was rated as "satisfactory" in all categories. In his June 3, 1998 Evaluation Summary, Fordyce was rated "exceptional" or "successful" in all categories except:

Provides an environment in which students learn and interact

Demonstrates an understanding of child development

Provides an atmosphere where students feel free to express their views, while encouraging respect for the rights and opinions of others

Demonstrates a willingness to adjust the instructional program to changing needs and conditions of students and their environs

He received a "moderate priority for improvement" rating in these four categories. The comments section stated:

Mr. Fordyce is a tenured staff member at RVS now teaching science to students in Grades 6-8. He approaches each day and its many challenges with a dedicated spirit.

He prepares and maintains written plans to meet course objectives. His plans are appropriate for group and individual activities. His lessons are presented with awareness of the district's goals. The wide range and variety of instructional materials provides engaging lessons that encourage hands-on learning.

Mr. Fordyce confers effectively with parents and fosters a sense of connection with the home. Mr. Fordyce exercises effective classroom management. His record keeping is exact and accurate. He meets and exceeds building responsibilities.

It is recommended that a review of the concepts and principles of pre-adolescent and adolescent child development be undertaken. Further, specific actions related to a more extensive awareness of child development that contributes to improving classroom atmosphere be identified and incorporated into daily instructional practice. It is recommended that attention be directed to the verbal and non-verbal communications.

Fordyce did not receive any "high priority for improvement" ratings.^{1/}

On June 4, David Gidich, RVS principal and also superintendent, received a handwritten, signed note from a student on the girls' softball team concerning an incident at a May 27 game. The note stated:

Last Tuesday at our game against Mendam Boro my coach Mr. Fordyce gave me a steal sign but I didn't want to steal because the catcher caught the ball and was ready to throw to 3rd base so I didn't go. Mr. Fordyce came out running to 2nd base and starting yelling at me and then he punched my head really hard. I was wearing my batting helmet and it felt hard because my head went down.

On June 10, the superintendent met with Fordyce and followed up with a letter dated June 11. The letter stated, in part:

At our meeting yesterday we discussed an incident that occurred at a Rockaway Valley Schools girls' softball game last week. It appears that you verbally berated ...[the student] as she stood at second base before her teammates and the attending spectators. You then struck her with a closed fist on her helmet. These actions occurred after ...[the student] apparently missed a steal signal and failed to attempt to take third base.

Of course, we recognize that these actions were, and are, unacceptable. Your apologizing to the team for your behavior a few days after the game confirmed our perception that the behavior was out of line. This apology may

^{1/} This evaluation confusingly included comments rating an unnamed female teacher. Fordyce pointed out this confusion so the superintendent issued a revised evaluation on June 22 deleting the extraneous comments.

have been both appropriate and helpful for the girls' softball team to hear. Since I was not there to witness the apology nor the team's reaction, I can only hope that it was accepted in the spirit that it was offered.

I am deeply concerned that a pattern of behavior is emerging that involves inappropriate physical contact with students. Last year, the Boonton Township Board of Education took disciplinary action to withhold your increment as a result of an event of a somewhat similar nature.^{2/} Despite formal disciplinary action, attendance at an anger management workshop and a seminar with the Morris County Prosecutor's Multidisciplinary Team, it appears that the unacceptable behavior persists.

Students under our supervision and their parents must be confident that the pupils will be cared for as the law dictates and common sense demands. Discussion of this incident will be conducted at the next Board of Education meeting to be held Thursday, June 18, 1998. What disciplinary action, if any, will be determined after a complete review of the incident.

At the request of Fordyce's attorney, the Board rescheduled discussion of the matter for June 25 in a closed session.

^{2/} That withholding was based on a May 1997 incident where Fordyce allegedly stopped a student in the hall to speak to him about a warning notice that Fordyce had sent to his mother. When the student walked away, Fordyce allegedly pulled on the student's bookbag strap, spun him around and placed him against a wall. Fordyce then admonished him about forging his mother's name on the notice. Another teacher who saw part of the incident stated that the student cursed Fordyce and showed little respect. The Association demanded arbitration, but the matter was settled when the Association withdrew its demand and the Board restored the employment increment, but not the adjustment increment.

On June 18, the Board voted to approve employment and adjustment increments for Fordyce, as well as other tenured teachers, for the next school year. This decision was apparently based on Fordyce's annual evaluation, without consideration of the softball incident.

On June 19, Fordyce's attorney wrote a letter to the Board detailing Fordyce's account of the softball game. The letter stated:

On the day in question, he did call time and go onto the field to talk to a player who, it appears, had missed a "steal sign." Bob's purpose in calling time and talking to her directly was to encourage her to focus on the task at hand, to be aware of the game situation around her and to listen to signals from her coach. As a reminder to her of Yogi Berra's famous baseball aphorism that "ninety percent of this game is half mental," he tapped her on her batting helmet with his knuckles and told her to "use her head." Witnesses have told us that from their vantage point in the stands, they could not hear anything which Bob said to the player; indeed, Bob's purpose in calling time and walking out to talk to the girl as she stood at second base was to avoid having to yell at her from across the diamond in the coach's box. The entire episode was of such an inconsequential nature that several persons who were at the game do not recall that anything unusual or untoward occurred at all.

On June 25, the Board heard from both Fordyce and his attorney concerning the softball incident. The superintendent's certification indicates that after Fordyce and his attorney left the meeting, he described the incident to the Board and explained that he had spoken with the student and her parents and that the student told him she had hurt her neck when she was hit on the

helmet. He also "explained the procedure taken in obtaining such information."^{3/} The superintendent has certified that, when asked about Fordyce's employment history, he discussed the contents of his personnel file. The superintendent's amended certification continues:

Specifically, I advised the Board of Mr. Fordyce's prior problems with students, previous discipline referred to in his past evaluations and classroom observations which indicated that Mr. Fordyce's performance was marred by incidents of poor student rapport, discipline, and classroom management. Following this discussion and the consideration of Mr. Fordyce's prior employment history, as evidenced by the letters, memoranda, evaluations and observations contained in his employment file, the Board closed its private session.^{4/} Upon reconvening in public session, the Board unanimously voted in full roll call to withhold Mr. Fordyce's salary increment for the 1998-99 school year. The Board's consensus, as demonstrated by its unanimous vote, was that Mr. Fordyce's action must not be allowed to continue and that some action would have to be taken.

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- ^{3/} The Board does not dispute the Association's statement that the student wrote the note after Gidich interviewed her and others while investigating the incident at the request of the Board president, who had heard rumors about it. The Association also maintains that the investigation began after a "raucous" Board meeting during which several parents protested the Board's approval of Gidich's recommendation to reassign Fordyce from teaching sixth, seventh and eighth grade science to teaching fifth grade math. However, it appears that the reassignment was approved at the June 4 meeting, the date of the student's note.
- ^{4/} The superintendent has not specified what incidents were discussed or provided any basis for finding or inferring what weight any one or more incidents may have been given individually or collectively. We will therefore not itemize the contents of Fordyce's personnel file.

The minutes of the June 25 meeting registered the votes, but not the reasons for the withholding. This vote overturned the vote the week before to grant increments to Fordyce.

On June 26, the Board advised Fordyce that it had resolved to withhold his increments for the 1998-99 school year. It did not provide the statement of reasons required by N.J.S.A. 18A:29-14.

On June 30, the Association filed a grievance alleging that the Board unjustly disciplined Fordyce when it withheld his increments.

On September 25, the Board heard the grievance. After Fordyce and his attorney made their presentation, the Board denied the grievance.^{5/} On October 27, the Association demanded arbitration. This petition ensued.

The Board maintains that Fordyce's increments were withheld for predominately evaluative reasons. It maintains that the 1998 softball incident precipitated its June 25 meeting, at which time the superintendent summarized evaluations, observations and administrative and parent complaint letters concerning Fordyce. The Board further maintains that this material "indicated

^{5/} Gidich's initial certification states that at this meeting, the Board reviewed Fordyce's personnel file, including the evaluations, memoranda, letters and observations that the Board has submitted with its scope petition. The Association maintains that any such review violated the parties' agreement, which requires one week notice before board members can review an employee's personnel file. In his amended certification, Gidich states that "[n]o new information was presented, and there was no private session discussion or deliberation at the September meeting.

a progression of problems with student rapport and discipline culminating in the June softball incident" and that these problems were directly related to Fordyce's primary job responsibilities as a science teacher, athletic director and athletic coach. It acknowledges, however, that every alleged incident might not relate to his job performance.

The Association counters that all Board communications indicate that it viewed the withholding as disciplinary; the softball incident was the sole basis for the Board's action; and there was no teaching-performance basis for the withholding since his most recent evaluation was satisfactory in all areas, including student rapport, classroom management and student discipline. It asserts that an arbitrator would not be required to review the Board's educational judgments and would determine only which of two versions of the softball game incident was accurate. It also maintains that the withholding could not have been based on Fordyce's performance as a softball coach because Fordyce was not evaluated in that role during 1997-1998. Finally, the Association notes that the Board voted on June 18, 1998 to approve Fordyce's employment and adjustment increments, thus supporting its position that the withholding was based solely on the softball game incident and not on actual teaching performance.

The Board responds that it afforded Fordyce due process by delaying the withholding decision until June 25 and that it was not until then that it was determined that the softball game incident was part of a behavior pattern that warranted action.

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 jurisdiction 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]

When we are called upon to examine an increment withholding, the school board ordinarily provides us with the same statement of reasons it was required to give the teacher under N.J.S.A 18A:29-14. For purposes of discharging our forum-selection function, we accept that statement of reasons and do not consider any assertion that it was pretextual or unsupported. See, e.g., Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996). The board is then presumably bound by that statement in subsequent proceedings on the merits.

Here, the Board did not provide a statement of reasons. However, we can be sure that the withholding would not have occurred if the softball incident had not occurred. Fordyce's evaluation for the 1997-1998 school year rated him "exceptional" or "successful" in nearly all categories and the accompanying narrative praised his teaching. Moreover, the Board initially voted, given that evaluation, to approve his employment and adjustment increments for the next school year. Compare Mansfield Tp. Bd. of Ed. and Mansfield Tp. Ed. Ass'n, 23 NJPER 209 (¶28101 App. Div. 1997), rev'g and remanding P.E.R.C. No. 96-65, 22 NJPER 134 (¶27065 1996) (given that regular evaluation process of teaching performance was completely satisfactory, withholding tied to incident outside parameters of evaluation process was not based on teaching performance). The major focus of litigation over this withholding will likely be upon the coaching incident, not Fordyce's teaching performance during the 1997-1998 school year, and the arbitrator will be called upon to determine which version of the disputed incident is more accurate. Compare Morris Hills Reg. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991).

The incident that triggered that withholding occurred during an extracurricular assignment. When the Legislature enacted N.J.S.A. 34:13A-27 permitting teachers to arbitrate withholdings not predominately based on teaching performance, it simultaneously enacted N.J.S.A. 34:13A-23 making negotiable all aspects of assignment to, retention in, dismissal from and any

terms and conditions of employment concerning extracurricular activities, except the establishment of qualifications. The Legislature thus distinguished extracurricular assignments from regular teachers assignments; the latter remain non-negotiable under Ridgefield Park.^{6/} Given the Legislature's differentiation between extracurricular assignments and teaching assignments, we would ordinarily expect that a coaching incident would not be equated with teaching performance concerns under N.J.S.A. 34:13A-27.^{7/}

We appreciate the Board's argument that it has a continuing concern, both in and out of the classroom, about Fordyce's relationships with students and his temper. But the record does not demonstrate that it was this concern about Fordyce's future teaching relationship rather than the past

^{6/} At the Senate committee hearing preceding the adoption of the 1990 amendments, an NJEA spokesperson recounted an alleged incident in which a teacher was forced to accept an extracurricular assignment building stage sets for a \$300 stipend and then had a \$3,000 increment withheld because of set construction problems. She also noted the unfairness of requiring a teacher to coach a sport and then withholding a teaching increment based on coaching performance. These comments are not authoritative, but they shed some light on the perceived problems that led to the amendments.

^{7/} School districts may hire out-of-district teaching staff members to coach and presumably could not withhold an increment. N.J.A.C. 6:29-3.3. Discipline would be limited to terms and conditions of employment affecting the coaching position. In-district coaches may also be disciplined by suspending, terminating or not renewing a coaching assignment.


coaching incident that predominately led the Board to withhold the increment. Again, the record establishes that Fordyce would have received his increment absent the coaching incident and there is no statement of reasons under N.J.S.A. 18A:29-14 asserting a teaching performance basis for the withholding. Further, while the superintendent's certification states that he told the Board about Fordyce's employment history, there is no basis on this record for finding that the Board predominately relied upon any reasons besides the coaching incident in voting to withhold his increments.

Under all these circumstances, we conclude that the withholding was not based predominately on teaching performance and must be reviewed in arbitration.

ORDER

The request of the Boonton Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. Commissioner Boose abstained from consideration.

DATED: May 27, 1999
Trenton, New Jersey
ISSUED: May 28, 1999