

P.E.R.C. NO. 99-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

KINNELON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-99-25

KINNELON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Kinnelon Board of Education for a restraint of binding arbitration of a grievance filed by the Kinnelon Education Association. The grievance contests the withholding of a tenured teacher's increment for the 1998-1999 school year. The Board asserts that the increment was withheld for three reasons -- inappropriate comments in the classroom, inappropriate classroom discussions, and failure to follow administrators' recommendations concerning those comments. The Commission concludes that, under all the circumstances, the reasons for this withholding relate predominately to the evaluation of teaching performance.

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, Apruzzese, McDermott, Maestro & Murphy, P.C., attorneys (Robert J. Merryman, on the brief)

For the Respondent, Bucceri & Pincus, attorneys (Gregory T. Syrek, of counsel; Linda Ganz Ott, on the brief)

DECISION

On October 29, 1998, the Kinnelon Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Kinnelon Education Association. The grievance contests the withholding of a tenured teacher's increment for the 1998-1999 school year.

The parties have filed briefs and exhibits. The Board's superintendent has filed a certification. These facts appear.

The Association represents the Board's teaching staff members. The Board and the Association entered into a collective negotiations agreement effective from July 1, 1996 through June 30, 1999. The grievance procedure ends in binding arbitration.

Charles Francis is a tenured teacher. He teaches various subjects, including physical education and health.

On October 29, 1997, his principal sent Francis a memorandum concerning reports she had received about inappropriate comments made to students. The memorandum stated:

This memo serves as a follow up to our October 24, 1997 meeting. In our meeting, which was also attended by Patrick Derrot, I shared with you the findings of my investigation related to an incident that occurred in your health class.

A student had informed me that you had used profanity when describing how you eat your eggs. I interviewed three students who sat in the vicinity of that student. Two of the three confirmed that this had occurred.

In our conversation, you denied that this had happened. My conclusion is that the incident did occur. As we discussed, you have a tendency to joke with students which sometimes has led to inappropriate comments. This has been and continues to be an ongoing problem. Please be advised that inappropriate language will not be tolerated at Pearl R. Miller School. If this continues, further disciplinary action will be taken.

On March 5, 1998, the superintendent met with Francis after he had received complaints about comments made to students in health class. On March 6, the superintendent summarized that meeting in a memorandum. The memorandum stated:

This memo serves to summarize our conference held on Thursday, March 5, 1998. Principal Ethel Minchello and KEA President, Judy Dolan were also in attendance. I explained to you that we were meeting today because Ethel Minchello informed me of allegations regarding remarks you made in health class.

Mrs. Minchello met with you on Tuesday, March 3, 1998. She informed you that she received a telephone call from a parent who stated that you had shared with your 6th grade health class different ways a person could commit suicide. The parent stated that you had described how a person could kill himself by turning a car motor on and shutting the garage door. It was stated that you also said if you really want to do it fast, you could put your mouth on the exhaust pipe. The parent was very upset about this conversation. When questioned by Mrs. Minchello, you denied ever discussing anything to do with suicide. You told her that if you had, it would only be in relation to tobacco and how people, who know that prolonged smoking can be dangerous, may have a death wish or unconscious suicidal thought. You told her again that you did not discuss ways to commit suicide with your class. Mrs. Minchello told you she would be investigating the incident.

On March 3 [and] 4, 1998, Mrs. Minchello met with six students individually. They all [corroborated] the following remarks.

- . If you want to commit suicide you can lock yourself in the garage, turn on the key and close the garage door.
- . If you really want to do it fast, put your mouth to the muffler and suck in the fumes. When your parents are not home, you can open their parents' cabinet, take the alcohol and have yourself a party.
- . When a student asked. "But your parents will know because the alcohol is missing?" You responded by saying, "you can add water to the bottle so your parents won't know."
- . When discussing different ways people get high, you, in a joking manner, told them they can find items around the house such as sniffing fumes of Mr. Clean, paint thinner or paint.

I asked you to comment about the allegations and you stated that you have no comment at this time.

In my opinion, you have placed your students in jeopardy. In the past, there have been students at Pearl Miller School who have indicated to an adult that they were contemplating suicide. These "at risk" students are in need of support and assistance, not examples of how they can accomplish the deed. Your inappropriate comments to students have been an ongoing problem in my four years in Kinnelon. This is not the first time that we have met to discuss this issue.

Please be advised that I will be discussing this incident at the Board of Education meeting on March 9, 1998 and at a minimum will be recommending that your salary increment be withheld for the 1998-99 school year.

On May 15, 1998, the superintendent advised Francis by letter that the Board had approved the withholding of his increment for the 1998-99 school year.^{1/} The letter stated:

The reasons for the withholding of your increment are inappropriate comments in the classroom, inappropriate classroom discussions, and failure to follow the recommendations of the Principal and Superintendent.

Within the past three years, you have had two increments withheld, both for similar deficiencies. Therefore, I am putting you on notice that if your performance does not improve, I will have no choice but to consider more stringent actions, up to and including tenure charges.

On May 18, 1998, Francis received his annual staff evaluation for the 1997-1998 school year. Under the section on

^{1/} Francis' increment had previously been withheld for the 1996-1997 school year for poor lesson plans, poor planning, performance deficiencies and inappropriate comments to and treatment of students.

Interaction/Preparation, a serious concern was noted about Francis' perceived inability to draw the line between appropriate and inappropriate comments. It was stated that Francis needed to enforce his rules and not argue with students. The summary statement of the evaluation indicated that Francis must refrain from joking with students and making inappropriate comments.

On June 4 1998, the Association filed a grievance contesting the withholding. The Board denied the grievance at the third step of the grievance procedure. The Association then demanded arbitration and this petition ensued.

The Board asserts that Francis' increment was withheld based on an evaluation of his teaching performance. It argues that its three reasons -- inappropriate comments in the classroom, inappropriate classroom discussions, and failure to follow administrators' recommendations concerning those comments -- all involve an assessment of his teaching performance. The Board asserts that assessing the appropriateness of comments and discussions and the impact of the comments on the learning environment requires knowledge of the educational process.

The Association asserts that this withholding was not designed to enhance Francis' teaching performance, but to discipline him for inappropriate comments to students. It asserts that the superintendent's comment on October 29, 1997 that "further disciplinary action will be taken" indicates that the Board saw this as a disciplinary matter. The Association further

asserts that inclusion of the reference to inappropriate comments in an annual evaluation does not make the increment withholding evaluative. The Association asserts that this matter is appropriate for arbitration as disciplinary and that an arbitrator needs to examine whether the assertions are accurate.

The Board responds that withholdings are invariably disciplinary so the issue is not whether the withholding is a disciplinary action, but whether or not the withholding was based predominately on an evaluation of teaching performance. The Board further argues that Francis' judgment about what is appropriate discussion in the classroom cannot be separated from his performance as a teacher.

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 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, we conclude that the reasons for this withholding relate predominately to the evaluation of Francis' teaching performance. The Legislature considered all increment withholdings to be disciplinary, Randolph Tp. Bd. of Ed., P.E.R.C. No. 99-45, 25 NJPER 14 (¶30005 1998), app. pending App. Div. Dkt. No. _____. We do not look to whether a particular withholding was intended to be punitive, but whether the reasons cited are based on teaching performance assessments. Edison; Greater Egg Harbor Reg. H.S. Dist. Bd. of Ed., P.E.R.C. NO. 95-58, 21 NJPER 116 (¶26071 1995). The reasons cited here are based on such an assessment. As our cases consistently reflect, the appropriateness of curricular conversations between teachers and students in a classroom setting centers on the educational relationship between teacher and student. Washington Bor. Bd. of Ed., P.E.R.C. No. 98-49, 23 NJPER 603 (¶28296 1997); Roxbury Bd. of Ed., P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994); Wayne Tp. Bd. of Ed., P.E.R.C. NO. 93-107, 19 NJPER 272 (¶24137 1993); Florham Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 159 (¶24081 1993); Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991). We accordingly restrain arbitration.

ORDER

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

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: January 28, 1999
Trenton, New Jersey
ISSUED: January 29, 1999