

P.E.R.C. NO. 92-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MORRIS HILLS REGIONAL DISTRICT
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-91-79

MORRIS HILLS REGIONAL DISTRICT
EDUCATION ASSOCIATION,

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Morris Hills Regional District Education Association against the Morris Hills Regional District Board of Education. The grievance contests the withholding of a teacher's employment and adjustment increments from the 1991-1992 school year. The reasons for the withholdings solely involved allegations of misconduct in the form of corporal punishment. The Commission finds that the withholdings were based predominantly on disciplinary reasons rather than on an evaluation of teaching performance.

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MORRIS HILLS REGIONAL DISTRICT
EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Greenwood, Young, Tarshis, Dimiero &
Sayovitz, attorneys (Joanne L. Butler, of counsel)

For the Respondent, Bucceri and Pincus, attorneys (Gregory
T. Syrek, of counsel)

DECISION AND ORDER

On April 29, 1991, the Morris Hills Regional 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 Morris Hills Regional District Education Association. The grievance contests the withholding of a teacher's employment and adjustment increments for the 1991-1992 school year.

The parties have filed briefs, documents and sworn statements. These facts appear.

The Association represents certain of the Board's certificated personnel including teaching staff members. The parties entered into a collective negotiations agreement effective from July 1, 1990 to June 30, 1992. Binding arbitration is the terminal step with respect to disputes concerning the imposition of

reprimands and discipline as defined by N.J.S.A. 34:13A-22. See N.J.S.A. 34:13A-29.

Richard Scorese teaches physical education at Morris Knolls High School. He was also employed as a bus driver.

On January 15, 1991, a sophomore reported that Scorese had struck him with an open right hand on the left side of his head during a physical education class. Scorese was immediately suspended with pay. During the administration's investigation, it was alleged that Scorese had struck that student before and had struck another tenth grader with a closed fist to the rib cage. The Division of Youth and Family Services ("DYFS") was notified of the student's allegation.

On January 16, 1991, Scorese was informed that the Board would discuss the student's allegations on January 21 and that he could request that the discussion be held in open session. On January 21, the Board ratified Scorese's suspension and extended it pending further review. The next day Scorese was informed that the Board would discuss his situation again on January 28 and that he could request that the discussion be held in open session.

On January 28, 1991, the Board, in closed session, preliminarily decided to withhold Scorese's increments. Scorese did not attend either the public or private session of the Board's meeting. The next day he was informed that the Board would exercise a 14-day notice provision and terminate his employment as a bus driver.

On February 4, 1991, the chief school administrator informed Scorese of his intention to recommend that Scorese's increments as a teaching staff member be withheld. He found that Scorese had struck the complainant "without cause, provocation, or interest with regard to student safety" and that he had struck another student's rib cage with a closed fist.^{1/}

At the Board's February 25, 1991 meeting, a packet containing documentation was provided to each board member. Scorese addressed the Board. Based on the investigation by district administrators and preliminary findings from DYFS, the Board voted to withhold Scorese's increments. The Board expressed concern about Scorese's alleged corporal punishment during class against one student; his alleged corporal punishment of that student on another occasion, and his alleged striking of another student. According to the chief school administrator, the Board was also concerned that Scorese's ability to teach had been compromised and that the January 15 incident raised questions about his ability to instruct and his method of instruction. The Board expressed concern that Scorese's actions indicated an inability to supervise and discipline students. On February 27, Scorese was notified that the Board had decided to withhold his increments "for unprofessional conduct that specifically includes inappropriate physical contact with students."

^{1/} The findings do not refer to the allegation that Scorese had struck the complainant on another occasion.

On February 28, 1991, Scorese grieved the withholdings. He denies the allegations of corporal punishment. The grievance was denied.

On March 27, 1991, the Association demanded binding arbitration. It alleges that Scorese was disciplined without just cause. This petition ensued.

The Board denies that the withholding was disciplinary and claims that Scorese's striking students directly relates to his performance as a teacher. It therefore urges that the action be reviewed by the Commissioner of Education.

The Association claims that the withholding was based on allegations of corporal punishment, not on an evaluation of teaching performance. It argues that the reasons for the withholding are unrelated to subjective educational judgments.^{2/}

In 1979, the Supreme Court held that disputes over increment withholdings of teaching staff members could not validly be submitted to binding arbitration. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n., 79 N.J. 311 (1979). By enacting N.J.S.A. 18A:29-14, the Legislature had delegated to the Commissioner of Education the authority to review increment withholdings for inefficiency or other good cause.

^{2/} The Association requests an evidentiary hearing. We deny the request. The material facts are not in dispute. The Board withheld Scorese's increments because of allegations of corporal punishment. What is in dispute is the question of law which arises from those facts: is such a withholding based predominately on an evaluation of teaching performance.

In 1982, the Legislature enacted "disciplinary" amendments to the New Jersey Employer-Employee Relations Act. These amendments authorized binding arbitration of disciplinary disputes. N.J.S.A. 34:3A-5.3. The legislative history of those amendments reveals that the Legislature recognized that the denial of an increment constitutes discipline. See East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Dkt. No. 5596-83T6 (3/19/85), certif. den. 101 N.J. 280 (1985); State of New Jersey, P.E.R.C. No. 87-130, 13 NJPER 347 (¶18141 1987), aff'd App. Div. Dkt. No. A-4573-86T8 (4/7/88). It initially passed a bill that would have allowed withholdings to be reviewed through binding arbitration, despite N.J.S.A. 18A:29-14's statutory review procedures. The Governor vetoed that bill and suggested that it be revised to preclude binding arbitration when an alternate statutory appeal procedure existed. A bill incorporating that suggestion was passed and signed. We therefore continued to restrain binding arbitration of disputes over increment withholdings of teaching staff members. See, e.g., Jersey City Bd. of Ed., P.E.R.C. No. 89-117, 15 NJPER 286 (¶20126 1989).

Against this backdrop, new amendments went into effect on January 4, 1990. The Legislature addressed the arbitrability of increment withholdings and decided that teaching staff withholdings that are for predominately disciplinary reasons should be reviewed

through binding arbitration. N.J.S.A. 34:13A-26.^{3/} But not all withholdings can go to arbitration. If the reason for a withholding is related predominately to the evaluation of a teaching staff member's teaching performance, any appeal must be filed with the Commissioner of Education. N.J.S.A. 34:13A-27(d).^{4/}

^{3/} N.J.S.A. 34:13A-26 provides:

Disputes involving the withholding of an employee's increment by an employer for predominately disciplinary reasons shall be subject to the grievance procedures established pursuant to law and shall be subject to the provisions of section 8 of this act [34:13A-29].

N.J.S.A. 34:13A-29 provides:

a. The grievance procedures that employers covered by this act are required to negotiate pursuant to section 7 of P.L.1968, c. 303 (C.34:13A-5.3) shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act.

b. In any grievance procedure negotiated pursuant to this act, the burden of proof shall be on the employer covered by this act seeking to impose discipline as that term is defined in this act.

^{4/} N.J.S.A. 34:13A-27(d) provides:

If a dispute involving the reason for the withholding of a teaching staff member's increment is submitted to the commission pursuant to subsection a. of this section, and the commission determines that the reason for the increment withholding relates predominately to the evaluation of a teaching staff member's teaching performance, the teaching staff member may file a petition of appeal pursuant to N.J.S. 18A:6-9 and N.J.S. 18A:29-14....

If there is a dispute over whether a withholding is predominately disciplinary, we must make that determination. N.J.S.A. 34:13A-27(a).^{5/} Our power is limited to determining the appropriate forum for resolving an increment withholding dispute. We do not and cannot consider whether an increment 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 set forth the standards for determining which withholdings may be submitted to binding arbitration and which must be submitted to the Commissioner of Education.

The fact that an increment withholding is disciplinary does not guarantee arbitral review. Nor does the fact that a teacher's action may have involved 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 App. Div. Dkt. No. A-2053-86T8 (10/23/87), we will review the facts

5/ N.J.S.A. 34:13A-27(a) provides:

If there is a dispute as to whether a transfer of an employee between work sites or withholding of an increment of a teaching staff member is disciplinary, the commission shall determine whether the basis for the transfer or withholding is predominately disciplinary.

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]

See also Tenafly Bd. of Ed., P.E.R.C. No. 91-68, 17 NJPER 147 (¶22058 1991); Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991); Bergen Cty. Voc. Schools Bd. of Ed., P.E.R.C. No. 91-70, 17 NJPER 150 (¶22060 1991).^{6/}

In Tenafly, we restrained arbitration of a grievance contesting a withholding based on alleged corporal punishment of a student, retaliation against the student by lowering his grade, and inappropriate disciplinary techniques. Unlike Tenafly, this case does not involve an allegation of improper grading or a subjective evaluation of other aspects of the teacher's techniques in supervising students and maintaining order. Whether, for example, the teacher in Tenafly was appropriately raising her voice or inappropriately yelling as a means of disciplining students involved educational judgments that could not be reviewed by an arbitrator. Upper Saddle River is similarly distinguishable because reviewing the reasons given required reviewing subjective educational judgments.

^{6/} Contrary to the Association's assertion, we will not "blindly accept" an employer's assertion, at any point in the process, that its actions were performance-related. As in Holland, we will not be bound by the label placed on an action. 12 NJPER at 826. In Scotch Plains and Greater Egg Harbor Reg. H.S. Bd. of Ed., P.E.R.C. No. 92-9, 17 NJPER 384 (¶22181 1991), for example, the employers asserted that the withholdings were based predominately on evaluations of teaching performance. After reviewing the record, we disagreed.

Here, the reasons for the withholdings solely involved allegations of misconduct in the form of corporal punishment. As we noted in Tenafly:

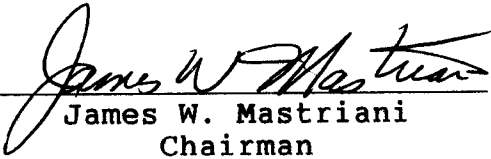
No educational expertise is needed to decide that if a teacher hit a child, it would be improper conduct. N.J.S.A. 18A:6-1 prohibits corporal punishment of students except in very limited circumstances not applicable here.

We hold, therefore, that the withholding of Scorese's increments was based predominately on disciplinary reasons rather than on an evaluation of teaching performance. An arbitrator can properly make an objective determination whether or not Scorese engaged in what is indisputably improper conduct.

ORDER

The request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: Trenton, New Jersey
December 19, 1991
ISSUED: December 20, 1991