P.E.R.C. NO. 2002-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PLEASANTVILLE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2001-56

PLEASANTVILLE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Pleasantville Board of Education for a restraint of binding arbitration of a grievance filed by the Pleasantville Education Association. The grievance contests the withholding of a teaching staff member's increments for the 2000-2001 school year. The Commission concludes that one unscheduled parent meeting and the teacher's response triggered the withholding and that the discipline for this alleged misconduct did not predominately involve 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, Schwartz Simon Edelstein Celso & Kessler, LLP, attorneys (Joan M. Damora, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys Keith Waldman, on the brief)

DECISION

On May 8, 2001, the City of Pleasantville Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Pleasantville Education Association. The grievance contests the withholding of a teaching staff member's increments for the 2000-2001 school year.

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

The Association represents teachers and certain other staff. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1998 through June

30, 2001. Article IV, Section B provides that no teacher shall be disciplined or reduced in rank or compensation without just cause. The parties' grievance procedure ends in binding arbitration.

On September 28, 2000, the principal of the middle school met with a fifth grade teacher. The meeting was precipitated by an allegation that the teacher struck a child. After the meeting, the teacher was issued a written reprimand. The reprimand is not in the record.

On October 14, 2000, the teacher sent the following response to the principal:

> It is not good policy to allow an upset parent to walk in the school building to see a teacher without a prior request. Observing that the parent was clearly troubled and irate I feel that the principal exercising good administrative judgment should have scheduled an appointment with all parties at a later time in the day. This would have given the parent a little time to settle down. Also, the academic welfare of my students was compromised when the principal called me out of the room during the time I was giving the Stanford 9 test.
>
> I deem this written reprimand strong and excessive. It is strong because of the administrator comments. The reprimand states that the teacher was aggressive and derogatory and threatening. These terms are opinions formed in the mind of the administrator, Mrs. Barksdale. The reprimand legally should be based on fact and not on tenuous, airy terms of opinion.
>
> FACT: I told the parent that her child was a liar. This can be proven, consequently, I should not be sanctioned for speaking the truth, and this should not be considered an act of derogation by me since the child derogated herself.

FACT: I waved my hands in the air in a no-no stop the negative verbiage manner in response to the parent comments. This gesture was considered in the mind of the administrator to be too aggressive, again, this is the administrator's opinion and opinion cannot be used as a measure when issuing concrete evidence.

FACT: The administrator comments that the teacher ignored her request to leave the conference room. I did leave the conference room, however while leaving continued to verbalize to the parent. It is not true that the teacher resisted or ignored the request to leave; I simply talked as I walked out, again, creating an opinionated effort in the mind of the administrator.

FACT: The administrator is not a doctor, therefore, she cannot legally or officially recommend that the teacher seek assistance in dealing with her behavior.

FACT: For every action, there is an equal and opposite reaction.

FACT: The principal violated her responsibility to the teacher by permitting a parent to confront the teacher in an irate state of mind. Further reprimand and sanctions are totally based on opinion, not fact.

FACT: The principal comments that I called the mother a "bitch" within hearing distance of those in the administrative office suite, although the door was partially closed.

FACT: There was no direct comment to the mother or specific name about whom I was talking.

FACT: The principal cannot assume that the parent heard the "B" word since I was across the hall in another office.

> FACT: The door was not partially closed; it was completely closed.
>
> I was sent home for a day and 1/2 and a very strong letter placed in my file. Any additional disciplinary actions are unwarranted.

On October 24, 2000, based on the superintendent's recommendation, the Board voted to withhold the teacher's salary and adjustment increments. The Board has submitted a certified copy of the resolution from the minutes of the meeting where it voted to withhold the teacher's increment. No other written reason was provided. The Board states that the teacher grieved the increment withholding prior to the expiration of the ten-day period, "thus making the statement of reasons immaterial to the Parties at this time."

On November 3, 2000, the teacher filed a level one grievance. The grievance reads:

> I have been unfairly disciplined by the Middle School Principal and the Board of Education. The punishment does not fit the infraction. I was not afforded due process before information was published in the Board Briefs. According to the PEA contract this is Arbitrary, Capricious - Article IV, section B.

On November 15, 2000, the teacher filed a level 2 grievance. On November 21, the superintendent denied the grievance. On December 20, the Association demanded arbitration. This petition ensued.

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 this dispute 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]

The Board asserts that this increment withholding is based predominantly on teaching performance. It contends that the September incident was not the first time the teacher had had difficulty communicating with students and parents. It points to a June 1997 conversation in which the teacher told her principal that she had told a staff member that "she would not kiss her ass to participate" in the DARE program. This was allegedly said in the presence of students. The Board also points to the teacher's 1997 performance report and cites a section that states:

> Rethink your approach to disciplinary practices (physical and verbal) by utilizing techniques

> that are humanistic and non-threatening with your students. Contribute to a cohesiveness among your co-workers by using discretion in verbal and written actions that might promote undermining, dissension and conflict.

The Board also mentions a 1989 incident where the teacher was reprimanded for using force in disciplining a student. The Board relies on Southern Gloucester Cty. Reg. Bd. of Ed., P.E.R.C. No. 93-26, 18 NJPER 479 (¶23218 1992) and Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) in asserting that a teacher's interactions with parents and students relate to teaching performance.

The Association asserts that this withholding is predominately disciplinary. It contends that the withholding occurred after the single incident in September. It points out that the Board has cited only three incidents over an eleven year period. The Association distinguishes Southern Gloucester where the withholding was based on many incidents that took place in the classroom and in parent-teacher conferences over a two-year period. The Association asserts that this case is disciplinary because it involves a single incident on a single day and that no special expertise is needed to decide whether the teacher behaved inappropriately in a meeting with an administrator and a parent. The Association relies on Demarest Bd. of Ed., P.E.R.C. No. 99-36, 24 NJPER 514 (¶29239 1998), aff'd 26 NJPER 113 (¶31046 App. Div. 2000).

The Board responds that it can consider incidents in previous school years establishing a pattern of conduct warranting an increment withholding. It cites Borelli v. Borough of Rutherford Bd. of Ed., 1985 S.L.D. 1848. The Board states that it appropriately considered these incidents and determined that these actions have cumulatively impaired the delivery of education.

Under all the circumstances of this case, we conclude that this withholding was not predominately based on the evaluation of teaching performance. The Board has not provided us with a written statement of reasons for the withholding. See N.J.S.A. 18A:29-14. Nor has it provided any other document or certification explaining the basis of the withholding. See Boonton Tp. Bd. of Ed., P.E.R.C. No. 99-101, 25 NJPER 288 (¶30121 1999) (board did not provide statement of reasons or specify what incidents the board considered in withholding increment). Instead, the Board's briefs argue that the withholding was based on the September 28, 2000 incident involving an unscheduled meeting with a parent; a June 1997 incident where the teacher allegedly used foul language with the principal and another staff member in front of students; a 1997 performance evaluation noting the teacher's need to rethink her approach to interactions with students and co-workers; and a 1989 incident involving the use of force in disciplining a student.

On this record, we have little basis for weighing the factors the Board may have considered in withholding the teacher's

increment. Given the timing of the withholding, it is clear to us that the September 2000 meeting with the parent, and perhaps the teacher's response, triggered the withholding. Given the unplanned nature of that encounter, outside any regular parent-teacher meeting, and the absence of any student or curricular involvement, we cannot find that the discipline for this alleged misconduct involved an evaluation of teaching performance. Southern Gloucester Cty. and Red Bank Reg. Bd. of Ed. are distinguishable. Southern Gloucester Cty. predominately involved repeated difficulties in the teacher's interactions with students in class and parents in conferences. Red Bank also involved interactions with students in class as well as with parents and staff.

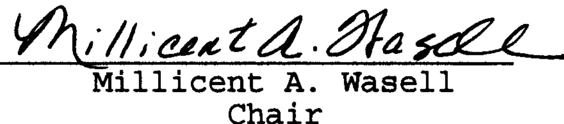
Even if we were to accept the assertion in the Board's briefs that the three earlier incidents played a role in this withholding, we still cannot conclude that the withholding was predominately based on the evaluation of teaching performance. Any discipline that might flow from the incident three years earlier where the teacher allegedly used foul language to the principal did not involve an evaluation of teaching performance. One of the two sentences submitted to us from the teacher's 1997 performance evaluation likely is related to teaching performance and the 1989 incident involving the use of force in disciplining a student may well have involved teaching performance. None of these incidents, however, has been presented to us in a way that

shows that their importance rivals or outweighs the September 2000 incident as the predominate factor in this withholding. Accordingly, review of the withholding may proceed before an arbitrator. The Board is, of course, free to offer all of its reasons to the arbitrator, just as it could have offered them to the Commissioner of Education had we found that the withholding was based predominately on the evaluation of teaching performance.

ORDER

The request of the City of Pleasantville Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: October 25, 2001
Trenton, New Jersey
ISSUED: October 26, 2001