

P.E.R.C. NO. 94-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MAHWAH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-62

MAHWAH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Mahwah Education Association against the Mahwah Board of Education. The grievance contests the withholding of a physical education teacher's increment. Some of the Board's reasons for the withholding involve teaching performance. Some do not. Considering all of the reasons asserted in this case, the Commission concludes, on balance, that the Board's reasons for withholding the increment predominately involve an evaluation of teaching performance.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MAHWAH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-62

MAHWAH EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Sullivan & Sullivan, attorneys
(Mark G. Sullivan, of counsel)

For the Respondent, Balk, Oxfeld, Mandell & Cohen, P.C.,
attorneys (Nancy I. Oxfeld, of counsel)

DECISION AND ORDER

On January 21, 1993, the Mahwah Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Mahwah Education Association. The grievance contests the withholding of a physical education teacher's increment.

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

The Association represents the Board's teachers. The parties have entered into a collective negotiations agreement effective from July 1, 1990 to June 30, 1992. Binding arbitration is the terminal step of the grievance procedure with respect to

increment withholdings that are predominately disciplinary.

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

Frank Filardo is a high school physical education teacher. He also teaches driver education. On June 17, 1992, the Board voted to withhold Filardo's employment and/or adjustment increment for the 1992-1993 school year. A June 19, 1992 letter from the Superintendent to Filardo gives these reasons for the withholding:

1. After requesting a student to meet with you after the regular school day for 8th period on January 10, 1992, you yourself failed to attend or advise the student that you would not be there.
2. In conjunction with the foregoing, in response to a question posed by Mr. Segall, Mahwah High School Principal, you advised him that at such time you were at a meeting with the Superintendent of Schools, for 10 or 15 minutes, which I personally know to be a false statement.
3. Your failure to cooperate with Mr. Segall regarding your annual performance report, goals and objectives for the 1991-92 school year.
4. Your refusal to admit a tardy student...to class on one occasion, which is a violation of high school policy.
5. Your statements to the effect that grade points would be reduced because of tardiness, even with a pass, despite specific direction from Mr. Segall that tardiness and all matters of discipline must be kept separate from a student's grade.
6. Your failure to follow procedure while using the Xerox machine.
7. Your calling in sick on February 3, 1992, yet attending a hearing at the office of EEOC at Newark on such date while I was present.
8. And, more recently, the incident between you and [a student] in your driver's education

class on April 30, 1992, in which you refused to allow [the student] leave to attend guidance for which she had a pass, then removed from her possession school property, a paperback novel entitled Heart of Darkness and Secret Sharer, which you then tore in two and threw into the garbage container. I also understand that you threatened her with a lower grade.

9. Your apparent inability to behave in an appropriate fashion in situations which you find difficult.

The Association filed a grievance contesting the withholding. The Board denied the grievance and the Association demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

We thus do not consider the contractual merits of the grievance or any defenses the Board may have.

Under N.J.S.A. 34:13A-26, disputes involving the withholding of a teacher's increment for predominately disciplinary reasons shall be subject to binding arbitration. But not all withholdings can go to arbitration. Under N.J.S.A. 34:13A-27(a), if

the reason for a withholding is related predominately to an evaluation of teaching performance, any appeal shall be filed with the Commissioner of Education. Under N.J.S.A. 34:13A-27(a), we must resolve disputes over whether the reason for a withholding is predominately disciplinary. 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 explained the analysis we will follow in determining the appropriate forum for resolving an increment withholding dispute. 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 App. Div. Dkt. No. A-2053-86T8 (10/23/87), 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 maintains that its reasons involve an evaluation of teaching performance, with the exception of number six. The

Association responds that the Board's reasons are disciplinary, with the exceptions of numbers five and eight.

We emphasize that there is no mechanical formula that we can apply in determining whether a withholding is predominately based on an evaluation of teaching performance. In many cases, a board asserts a number of reasons for a withholding; some of them based on an evaluation of teaching performance and some of them not.

We have carefully examined each of the Board's reasons for the withholding. Some of the reasons involve teaching performance. Some do not. The Board claims that reason eight was the one it considered most. Considering all of the reasons asserted in this case, we conclude, on balance, that the Board's reasons for withholding Filardo's increment predominately involve an evaluation of teaching performance.

We simply determine which forum will review the withholding. Both the Commissioner and an arbitrator are capable of determining whether Filardo committed the alleged infractions and whether those infractions warrant an increment withholding. In either forum, both parties would have the opportunity to present evidence on all the allegations, regardless of whether they were disciplinary in nature or based on teaching performance. In this case, an examination of the Board's eight independent reasons reveals that, on balance, the withholding was predominately based on an evaluation of teaching performance. Thus, the Legislature has determined that the appropriate forum is the Commissioner of

Education. Accordingly, we grant the Board's request for a restraint of arbitration.

ORDER

The request of the Mahwah Board of Education for a restraint of binding arbitration of the grievance contesting the withholding of Frank Filardo's increment for the 1992-1993 school year is granted.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioner Regan abstained from consideration. Commissioner Bertolino was not present.

DATED: March 29, 1994
Trenton, New Jersey
ISSUED: March 30, 1994