

P.E.R.C. NO. 98-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UPPER SADDLE RIVER BOARD
OF EDUCATION,

Petitioner,

-and-

UPPER SADDLE RIVER EDUCATION
ASSOCIATION,

Respondent.

Docket No. SN-97-28

SYNOPSIS

The Public Employment Relations Commission grants the request of the Upper Saddle River Board of Education for a restraint of binding arbitration of a grievance filed by a teacher represented by the Upper Saddle River Education Association. The grievance contests the withholding of the teacher's salary increments for the 1995-1996 school year. The Commission finds that this case involves a determination of whether the teacher's classroom management technique fell within the parameters of N.J.S.A. 18A:6-1 and was therefore not corporal punishment. That judgment involves the appropriateness of a student-teacher interaction in class and thus centers on an evaluation of teaching performance. Review of such judgments must be made by the Commissioner of Education.

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, Fogarty and Hara, attorneys (Stephen R. Fogarty, of counsel; Janet L. Parmalee, on the brief)

For the Respondent, Balk, Oxfeld, Mandell and Cohen, attorneys (Sanford R. Oxfeld, of counsel)

DECISION

On September 30, 1996, the Upper Saddle River Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by a teacher represented by the Upper Saddle River Education Association. The grievance contests the withholding of the teacher's salary increments for the 1995-1996 school year.

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

The Association represents the Board's certified teaching personnel. The parties entered into a collective negotiations agreement effective from July 1, 1993 until June 30, 1996. The grievance procedure ends in binding arbitration of increment

withholdings for predominately disciplinary reasons. See N.J.S.A. 34:13A-26; -29.

James Giacone is a tenured music teacher. During the 1994-95 school year, he was assigned to the Cavallini Middle School. On February 14, 1995, Giacone's 5th and 6th grade trumpet class was observed by his principal, James Meisterich. The observation form allows the evaluator to rate the teacher as superior, satisfactory or unsatisfactory in 15 areas, three of which relate to classroom control or student discipline. No ratings were filled in for any of the categories on the form, but the principal graded the teacher's overall performance as "superior." He added:

The objectives for the lesson are appropriate and related well to Vision 2000 core beliefs.

You successfully achieved the lesson objectives. You were able to motivate your students to extend their range through lip slurs and scales. That was very nice to see happen.

Your performance was very good.

On February 27, 1995, Giacone and his principal had a conference regarding the observation report. He had no other classroom observations. Prior to the observation of his trumpet class, Giacone had received a congratulatory note from the superintendent on his students' holiday music program.

On May 12, 1995, in response to the principal's May 2, 1995 request to all teachers, Giacone submitted an update on his attainment of the goals in his 1994-1995 Professional Improvement Plan (PIP) and a proposed 1995-1996 PIP. Both plans referred to

workshops and other training on classroom management and discipline.^{1/}

On May 11 or 12, 1995, an incident occurred before a fifth grade band performance. Giacone tried to grab the arm of a student to prevent him from banging on a drum. Accordingly to Giacone, the student moved his body and Giacone's hand accidentally contacted the right side of his upper arm instead of catching his right hand in flight as Giacone had intended.

On May 12, 1995, the principal sent Giacone a memorandum stating that his conduct was improper, whether intentional or not. Giacone then submitted a detailed response. He maintained that he tried to prevent damage to a drum and possible injury to the student and asserted that the principal had mischaracterized the incident. Giacone also asserted he had done nothing improper and had never been accused of striking a child. He also referred to the statute prohibiting corporal punishment, N.J.S.A. 18A:6-1, and claimed that his conduct had been consistent with the portion of that statute providing:

any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary... (4) for the protection of persons or property; and such acts,

^{1/} Giacone's increment had been withheld several years earlier. The Board, at that time, asserted that the earlier withholding was based on deficiencies in classroom management and student disciplinary methods. We ruled that the Commissioner of Education, rather than an arbitrator, should review that withholding. Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (122059 1991).

or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section.
[emphasis added]

In June 1995, the principal issued an annual evaluation to Giacone on a form with 25 evaluation categories. Four rating options are listed: superior, above average, average and unsatisfactory. The rating categories were not filled in. An overall evaluation of unsatisfactory was given. Under comments, the principal wrote, "Do not touch any student." The principal's May 12, 1995 memo was attached and referenced as establishing an incident of "Improper conduct," which warranted the unsatisfactory rating.

On August 21, 1995, the superintendent wrote to Giacone advising him that he intended to recommend to the Board that Giacone's salary increments be withheld. He cited this reason:

[A]s a result of your improper physical contact with one of your students...on May 11, 1995. The report of this incident is contained in the letter of reprimand which was served on upon you by Mr. Meisterich on May 12, 1995, a copy of which is enclosed.

The letter set August 30, 1995 as the date for the Board's contemplated action and advised the teacher of his right to an informal appearance.

Giacone declined to exercise that right, but enclosed his narrative and requested that each Board member be given a copy.

On August 30, 1995, the Board voted to withhold Giacone's increment from the next school year. The next day the

superintendent wrote Giacone a letter advising him that the Board had voted to withhold his increment based on "1. Poor classroom management-failure to properly supervise and control students and 2. Utilizing inappropriate method of disciplining student."

On September 15, 1995, the Association filed a grievance asserting that the increment was withheld for disciplinary reasons and seeking its restoration. The superintendent and the Board denied the grievance. On March 12, 1996, 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, 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.

Thus, we do not consider whether the Board had cause to withhold Giacone's increments.

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]

Some of our increment withholding cases have involved alleged instances or patterns of inappropriate classroom disciplinary techniques. We have determined that the Commissioner of Education was the proper forum to hear these increment withholding disputes. See, e.g., Hazlet Bd. of Ed., P.E.R.C. No. 95-59, 21 NJPER 118 (¶26072 1995) (gym teachers techniques in classes which allegedly involved improper touching); Roxbury Bd. of Ed., P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994) (alleged inappropriate touching of students by gym teacher, nasty and degrading comments to students); Ramsey Bd. of Ed., P.E.R.C. No. 93-47, 19 NJPER 44 (¶24020 1992) (inappropriate comments to students, repeated use of inappropriate gym activities); Wayne Tp. Bd. of Ed., P.E.R.C. No. 93-107, 19 NJPER 272 (¶24137 1993) (teacher kissing students allegedly as disciplinary technique); Upper Saddle River Tp. Bd. of Ed.;^{2/} Tenafly Bd. of Ed., P.E.R.C. No. 91-68, 17 NJPER 147 (¶22058 1991) (alleged corporal discipline of a student, retaliation by lowering student's grade, yelling as a disciplinary technique); River Edge (inappropriate, but non-corporal, discipline methods).

However, in Morris Hills Req. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991), we allowed arbitration of a withholding based on alleged acts of corporal punishment. We explained that:

^{2/} Giacone was not alleged to have hit a student in that case.

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. [Tenafly Bd. of Ed., P.E.R.C. No. 91-68, 17 NJPER 147, 148 n.1 (¶22058 1991)]

We hold, therefore, that the withholding of...[the teacher'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...[the teacher] engaged in what is indisputably improper conduct. [18 NJPER at 60 and 62]

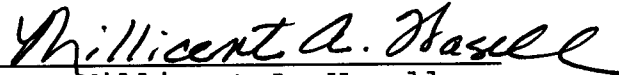
See also South River Bd. of Ed., P.E.R.C. No. 92-70, 18 NJPER 61 (¶23026 1991).

While part of the arbitrator's task in this dispute would be to determine what happened during the incident, this case presents an additional issue not present in Morris Hills and South River. The Association's assertion that the physical contact had been initiated "for the protection of persons or property," as allowed by N.J.S.A. 18A:6-1, would require the trier of fact to determine whether the teacher's classroom management technique fell within the parameters of the statute and was therefore not corporal punishment. That judgment involves the appropriateness of a student-teacher interaction in class and thus centers on an evaluation of teaching performance. Such judgments must be made by the Commissioner of Education.

ORDER

The request of the Upper Saddle River 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, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose was not present.

DATED: December 18, 1997
Trenton, New Jersey
ISSUED: December 19, 1997