

P.E.R.C. NO. 2003-8

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PHILLIPSBURG BOARD OF  
EDUCATION,

Petitioner,

-and-

Docket No. SN-2002-45

PHILLIPSBURG ADMINISTRATORS  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Phillipsburg Board of Education for a restraint of binding arbitration of a grievance filed by the Phillipsburg Administrators Association. The grievance contests the withholding of an assistant principal's salary increment. The Commission concludes that, under all the circumstances, the reasons for this withholding predominately involved the evaluation of the assistant principal's performance as an educational leader and manager. The reasons for the withholding involve the assistant principal's alleged failure to perform his duties to ensure student safety on various occasions throughout the school year. Any appeal of this withholding must be filed with 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, Schenck, Price, Smith & King, LLP,  
attorneys (Richard H. Bauch, of counsel and on the brief;  
Mariann Crincoli, on the brief)

For the Respondent, Robert M. Schwartz, attorney, on the  
brief

DECISION

On March 26, 2002, the Phillipsburg Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Phillipsburg Administrators Association. The grievance contests the withholding of an assistant principal's salary increment.

The parties have filed briefs and exhibits. The Board has submitted a certification and an amended certification of H. Gordon Pethick, the superintendent. The Association has submitted a certification of William Nixon, the assistant principal. These facts appear.

The Association represents administrators, including assistant principals. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1999 through June 30, 2001. The grievance procedure ends in advisory arbitration. N.J.S.A. 34:13A-29 requires binding arbitration as the terminal step with respect to disputes concerning the imposition of reprimands and other forms of discipline as defined by N.J.S.A. 34:13A-22.

William Nixon is an assistant principal at the high school. Nixon was hired by the Board in 1983 as an industrial arts teacher at the high school; he obtained tenure in 1986. Nixon served as assistant principal from December 1994 until August 1997 when he became acting principal. On February 2, 1999, he was appointed principal of the middle school where he served until July 2000 when he became an assistant principal at the high school. Approximately 1,400 students attend the high school. Since February 2001, an assistant principal has been assigned to each grade. Nixon is assigned to the 11th grade.

Nixon's assignments include responsibility for ensuring the safety of students under his supervision. Specifically, he is responsible for communicating with security; coordinating the duty assignments of teaching staff members to posts in the high school parking lot; and supervising teachers performing these assignments.

Nixon states that he never received formal evaluations or observation reports after being assigned to the high school. He

received one observation/evaluation report when he was an assistant principal in the middle school. The Board states that Nixon has been evaluated and has provided copies of a satisfactory observation report from 1996 and three job performance evaluations from the 1999-2000 school year when Nixon was principal of the middle school.

On May 9, 2001, two students fought in the high school parking lot. One student was seriously injured and had to be airlifted to a hospital. The police were called and school officials and police conducted several investigations and interviewed several student witnesses. Nixon asserts that he was out of school on a personal day on May 9. He states that on May 8, his secretary made an announcement that the student parking lot would be closed on May 9 and May 10 to be used for a local event called "Barn Yard Day." Nixon also states that when he returned to school on May 10, he did not ask about the May 9 incident because it involved seniors and another assistant principal was assigned to seniors.

The Board asserts that the student parking lot was not closed on May 9, as Nixon states, and that only the first two rows of parking spaces were unavailable on May 9 and 10. The Board further states that the teachers were not at their posts on May 9 because they were unaware of their duty assignment or were unable to get there, not because they thought the lot was closed.

The superintendent investigated and prepared a report. He found that the father of one of the students had reported to the guidance counselor in February that his son was being harassed by other students. The guidance counselor stated that she reported the harassment to Nixon on February 2 and that she also reported another incident involving the same student on February 8. The report stated that Nixon did not recall either conversation with the guidance counselor. The report also stated that there were five teachers assigned parking lot duty on May 9, but none reported to their assigned posts that day. All of the teachers except one knew that they had parking lot duty on May 9, but all were involved in other school activities that prevented them from getting to the parking lot. None of the teachers reported to their supervisor that they would be unable to cover their parking lot duty that day.

The report also stated that there were four security guards assigned to the high school on May 9. One was on family illness leave; one was covering the footbridge area; another was in the shop area; and one was on regular assignment at the flag pole in front of the school. No security guard was regularly assigned to the parking lot.

The report also stated that Nixon indicated that there was no clear and ongoing line of communication between him and the director of security about the deployment of security guards and parking lot coverage; and that Nixon checked on teachers' duty

coverage almost every day from September to January, but that from February on he did so on a random basis.

Under "comments on professional responsibility" the investigation report stated, in part:

Mr. Nixon failed to recall any communication from Mrs. Wynn. He stated that he didn't remember meeting to discuss KS and the harassment issue with Mrs. Wynn. However, Mrs. Wynn has documentation indicating that she did discuss harassment issues regarding KS with him on two occasions. Mrs. Wynn had a specific and clear recollection of her actions and communications. That recollection is corroborated by clear documentation maintained by her in the ordinary course of her duties. In contrast, Mr. Nixon's memory was hazy and he failed to maintain any record documenting his communication with staff on these critical issues. I therefore must credit Ms. Wynn's testimony on this subject.

Mr. Nixon is responsible for AM/PM duties. He should have checked on a regular basis to determine if the teachers were on their duty-posts. His statements indicate that the checking process was hit and miss and that he did not do it on a regular basis. Mr. Piancone's statement that he was not on duty during the second semester is of great concern.

Mr. Nixon's lack of recall regarding communication from Mrs. Wynn would warrant the initiation of a written communication procedure between guidance counselors and Mr. Nixon.

Potential action: Reprimand Mr. Nixon for neglect of duties - increment withholding.

On June 28, 2001, the Board voted to withhold Nixon's salary increment for the 2001-2002 school year. On August 21, Nixon filed a level two grievance contesting the withholding. On August 27, the principal denied the grievance. On September 14, the superintendent denied the grievance.

On July 9, 2001, the Board provided Nixon with a statement of reasons for the withholding. It stated, in part:

You are advised that the Board took this action based upon the findings of the superintendent in his internal investigation report regarding the incident that resulted in the fight in the Phillipsburg High School parking lot on the afternoon of May 9, 2001. Specifically, the Superintendent found that you failed to adequately perform your administrative duties in overseeing the duty assignments of teaching staff and your failure to perform your administrative duties by failing to follow through on charges of harassment brought by KS's father to the attention of Guidance Counselor Kathy Wynn who, in turn, notified you on or about February 2, 2001. Despite being placed on notice of these charges, you failed to take any action to determine whether those charges had merit or to take any action to ensure the safety of the students under your supervision. Based upon these failures to perform your administrative duties, both individually and collectively, the Superintendent recommended and the Board determined to withhold your increments.

Further, as set forth in the attached resolution, the Superintendent has been directed to determine whether further action should be taken against you.

On October 16, 2001, 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]

In Middletown Tp. Bd of Ed., P.E.R.C. No. 92-54, 18 NJPER 32 (¶23010 1991), we applied the tests of N.J.S.A. 34:13A-27 and Scotch Plains-Fanwood to an increment withholding involving a principal. We recognized that principals are teaching staff members, although they do not teach classes. We stated:

[Principals] have broad responsibility for managing and supervising students, staff, facilities and community relations. When determining whether withholding a principal's increments relates predominately to an evaluation of that "teaching staff member's teaching performance" we must therefore ask whether the withholding relates predominately to an evaluation of the quality of the principal's performance as an educational leader and manager. 18 NJPER at 34.

In that case, we held that the withholding was predominately based on an evaluation of the principal's leadership, judgment and

management and thus the appropriate forum for reviewing its propriety was before the Commissioner of Education. See also Butler Bd. of Ed., P.E.R.C. No. 96-24, 21 NJPER 358 (¶26222 1995); Brigantine Bd. of Ed., P.E.R.C. No. 95-54, 21 NJPER 110 (¶26067 1995); Paterson School Dist., P.E.R.C. No. 95-39, 21 NJPER 36 (¶26023 1994).

The Board argues that, under Middletown, Nixon's performance as an educational leader and manager is the basis for this withholding and that his failure to perform his duties and failure to follow up on a parental complaint that a student was being harassed represented a disregard for the safety of students.

The Association contends that this withholding is disciplinary and is based solely on Nixon's alleged failure to take appropriate action on May 9, despite the fact that he was not in school that day. It asserts that he was not evaluated or observed and that the investigation which led to his withholding also resulted in his receiving a written reprimand seven months later for his alleged "wrongdoing." The Association states that nothing in the resolution or the written reprimand discusses performance in the context of an evaluation or an improvement plan.

The Board responds that Nixon has previously been evaluated in other assignments and has provided copies of those evaluations. It states that Nixon was assigned as assistant principal in the high school in July of 2000, and would not have been evaluated for the 2000-2001 school year until the end of the year, after the May 9 incident occurred.

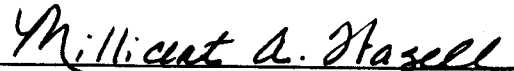
The Board also responds that Nixon is responsible for the safety of all students in the school not just the 11th grade students and that he should have acted on a complaint of harassment, even if it involved a senior not assigned to him. The Board denies that Nixon was the target of an investigation, but that the investigation showed that no teachers were present at their posts because he failed to check the posts on a regular basis and failed to communicate with teachers assigned to those posts. The Board states that by not ensuring that teachers were covering their duty assignments and not following up on a charge of harassment, Nixon failed to ensure the safety of students on various occasions through the school year, including May 9.

Under all the circumstances, we hold that the reasons for this withholding predominately involved the evaluation of the assistant principal's performance as an educational leader and manager. This case involves allegations that Nixon failed to perform his duties to ensure student safety on various occasions throughout the school year, including May 9. Those allegations involve the "teaching performance" of a school administrator. That the allegations did not appear in a formal evaluation document does not change our conclusion. Similarly, the fact that Nixon also received a reprimand for the same alleged misconduct does not mean that the basis for the withholding is not "teaching performance." It simply means that the Board has decided to mete out more than one form of discipline for the same alleged misconduct.

ORDER

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

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Katz, McGlynn, Muscato and Ricci voted in favor of this decisions. Commissioner Buchanan voted against this decision. Commissioner Sandman was not present.

DATED: July 25, 2002  
Trenton, New Jersey  
ISSUED: July 26, 2002