

P.E.R.C. NO. 99-85

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MORRIS SCHOOL DISTRICT BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-99-41

THE EDUCATION ASSOCIATION
OF MORRIS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Morris School District Board of Education for a restraint of binding arbitration of a grievance filed by The Education Association of Morris. The grievance contests the withholding of a teacher's salary increment for the 1998-99 school year. The Commission concludes that the predominate reasons for this withholding were based on an unsatisfactory evaluation of teaching performance in the areas of Professional Characteristics, and Class Management. Any appeal of this withholding shall 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, Wiley, Malehorn & Sirota, attorneys
(John Geppert Jr., of counsel and on the brief; Christina
L. Davis, on the brief)

For the Respondent, Bucceri & Pincus, attorneys
(Sheldon H. Pincus, on the brief)

DECISION

On December 15, 1998, the Morris School 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 Education Association of Morris. The grievance contests the withholding of a teacher's salary increment for the 1998-99 school year.

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

The Association represents the Board's certified personnel. The Board and the Association are parties to a

collective negotiations agreement effective from July 1, 1995 through June 30, 1999. The grievance procedure ends in binding arbitration.

John Kurbel is a tenured teacher employed by the Board. He teaches physical education and is a team coach at the Frelinghuysen Middle School. On May 29, 1998, Kurbel received his Annual Teacher Performance Evaluation. Kurbel was rated as unacceptable in the areas of "Professional Characteristics" and "Class Management" and as acceptable in the area of "Teaching Procedures."

Under Professional Characteristics, the evaluator indicated that Kurbel was placed on a Professional Improvement Plan for the 1997-98 school year. The reasons given for the PIP were that his grading system was found to be discriminatory and he used group punishment and inappropriate language directed at students. The evaluator noted that Kurbel's February interim evaluation showed satisfactory progress, but that two negative incidents occurred after the interim evaluation. On March 17, 1998, supposedly as a disciplinary measure, Kurbel allegedly sent a group of students unsupervised outside to run laps during most of the class period. A fight broke out between two students and suspensions resulted. In another incident, Kurbel, while coaching, allegedly slammed a bat on bleachers where the team and students were sitting.

Under Class Management, the evaluator commented that "Effective teachers use a repertoire of interventions to deal with inappropriate behavior. They don't resort to unadult like and unprofessional behavior which results in the health and safety of children being seriously compromised."

Under Teaching Procedures, the evaluator noted that Kurbel demonstrated organized and well-planned lessons. He also noted that the lesson observed demonstrated student enthusiasm and offered a wide variety of teaching strategies and activities.

Under Performance Areas Needing Improvement Based Upon Job Description, the evaluator noted that Kurbel needs to address the problems outlined in the Professional Characteristics and Class Management areas. He also noted that a PIP would be developed for the 1998-99 school year.

Under Professional Improvement Plan, the evaluator noted:

Based on the teachers unacceptable rating in the areas of Professional Characteristics and Classroom Management, it is recommended that the teacher's increment and salary adjustment are withheld. The incidents described herein and in other written reprimands, the teacher's failure to meet two of the goals of his Professional Improvement Plan are the basis for the recommendation. The teacher clearly has failed to use systematic interventions related to appropriately motivating students who are experiencing problems. Moreover, the teacher has failed again to demonstrate professional behavior.

Kurbel submitted a rebuttal to the 1998 Annual Evaluation. Kurbel objected to the reference to his grading system being labeled discriminatory. He also objected to the

March 17 incident as being almost the entire class period. He referred to the incidents mentioned as exaggerated and containing many inaccuracies.

On June 29, 1998, the Board voted to withhold Kurbel's salary increment for the 1998-99 school year. On July 2, the Association filed a grievance contesting the withholding. On November 11, the Board voted to uphold its June 29 decision. Its grievance response states:

The decision to withhold Mr. Kurbel's increment, as indicated previously was based upon his performance which resulted in "unacceptable" ratings in the areas of Professional Characteristics and Class Management. Thus, the Board has determined that it will not rescind its June 28, 1998 decision to withhold the increment of John Kurbel for school year 1998-1999.

On November 17, 1998, the Association demanded arbitration. This petition ensued.

The Board asserts that this withholding was based predominately on the evaluation of Kurbel's teaching performance and any appeal should be to the Commissioner of Education.

The Association responds that one of the incidents in the Annual Evaluation for which Kurbel was rated unsatisfactory merely reiterated criticism about an incident of corporal punishment and the other was for an incident that allegedly occurred while Kurbel was coaching and should not have been included in his teaching evaluation.

The Association argues that making an increment withholding decision part of an evaluation does not automatically convert it into a performance-based withholding. The Association asserts that Kurbel's evaluation was a reiteration of a previous disciplinary reprimand and that this withholding is disciplinary and should proceed to arbitration.

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 the grievance 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]


Applying these standards, we conclude this withholding was predominately based on the evaluation of Kurbel's teaching

performance. The concerns raised in his annual evaluation relate to teaching performance matters such as classroom management and his professional judgment as a teacher. We have restrained arbitration in cases predominately involving allegations of poor classroom management of students and do so again here. See, e.g., Dennis Tp. Bd. of Ed., P.E.R.C. No. 98-73, 24 NJPER 17 (¶29012 1997); Hillside Bd. of Ed., P.E.R.C. NO. 97-39, 22 NJPER 389 (¶27210 1996); Wayne Tp. Bd. of Ed., P.E.R.C. No. 93-107, 19 NJPER 272 (¶24137 1993); Bergen Cty. Voc. Schools Bd. of Ed., P.E.R.C. No. 91-70, 17 NJPER 150 (¶22060 1991); Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991). That the Board may have already issued a disciplinary reprimand for the May 17 incident does not require a conclusion that the increment withholding was not based on the evaluation of teaching performance. All increment withholdings are inherently disciplinary. Edison Tp. Bd. of Ed., 304 N.J. Super. 459 (App. Div. 1997). Some, however, are based on the evaluation of teaching performance and therefore not subject to arbitral review. We note that the annual evaluation refers to the coaching incident but states that an additional coach's evaluation will detail that incident. Should the Board rely on that incident as a basis for this withholding, the Association may raise any objections to the Commissioner of Education.

ORDER

The request of the Morris School District 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 and Ricci voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: March 25, 1999
Trenton, New Jersey
ISSUED: March 26, 1999