

P.E.R.C. NO. 96-28

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-95-61

WILLINGBORO EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Willingboro Education Association against the Willingboro Board of Education. The grievance contests the withholding of a special education teacher's salary increment for the 1994-1995 school year. Under all the circumstances, the Commission concludes that this withholding is related predominately to an evaluation of teaching performance. The withholding is largely based on allegations that the teacher used inappropriate disciplinary techniques such as excluding students from classes required by their IEP's and directing parents to take students home; the teacher did not cooperate with the case manager and other child study team members in implementing IEP's; and the teacher unilaterally altered IEP's and implemented his own disciplinary techniques.

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, James P. Granello, attorney  
(James P. Granello, of counsel); Hill Wallack, attorneys  
(Joan Kane Josephson, on the brief)

For the Respondent, Selikoff & Cohen, attorneys  
(Keith Waldman, of counsel)

DECISION AND ORDER

On January 3, 1995, the Willingboro Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Willingboro Education Association. The grievance contests the withholding of a special education teacher's salary increment for the 1994-1995 school year.

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

The Association represents the Board's teachers and clerical staff. The parties have entered into a collective negotiations agreement effective from July 1, 1993 to June 30, 1996. Article IV, Section B provides that no employee shall be

disciplined without just cause, but excludes increment withholdings from its coverage. N.J.S.A. 34:13A-26 and 29 permit binding arbitration of an increment withholding for predominately disciplinary reasons.

Paul Bracy is a tenured teacher who has taught in the Willingboro school district for almost 14 years. During the 1993-1994 school year, Bracy taught a class of emotionally disturbed students from ages six to nine. As a special education teacher, Bracy must work with child study teams, case managers of those teams, and parents to plan and implement an individualized education program ("IEP") for each student.

On July 25, 1994, the Board approved several agenda items listed as "disciplinary action," including the withholding of Bracy's salary increment for the 1994-1995 school year.<sup>1/</sup> On July 28, 1994, the Director of Personnel wrote Bracy a letter notifying him of this action. On August 4, 1994, the Board's attorney sent Bracy a letter enclosing a report that was given to the Board. The report states:

Evaluations - Both his 1992-1993 and 1993-1994 evaluations point out his problems. 1992-93:

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<sup>1/</sup> A motion to withhold Bracy's increment had also been moved at the Board's June 27, 1994 meeting, but did not pass since four of seven Board members abstained. One member who abstained did so because she had represented Bracy in some legal matters. One Board member who voted for the withholding at that meeting explained that she believed it necessary to uphold the administration in its efforts to hold teachers "accountable."

"Your actions compromise the responsibilities of other professionals charged with an equal role in developing and monitoring students' education programs." 1993-94: "[You must] utilize the proper 'chain of command' in requesting things as suspensions from school...student scheduling and transportation."

November 10, 1993 - Sent unattended child out of class and expected school secretary to supervise child and refused to speak to the secretary when she requested to discuss it. After investigation of the incident by his Supervisor, Bracy agreed to use proper procedure and follow appropriate chain of command, provided no record of incident was placed in his personnel folder.

March 11, 1994 - Bracy received a formal letter of reprimand for "causing a student to remain out of school and interfering in the transportation arrangements...in violation of state code" and ignoring the authority of the principal. The letter from the Assistant Superintendent noted that "any recurrence of actions of the nature of those herein outlined will result in an immediate recommendation to the Board for a withholding of increment."

March 22, 1994 - Early in the morning Bracy sent two students out of the classroom and would not accept them back. He refused to accept recommendation of Case Manager.

March 23, 1994 - The Director of Education directed the Director of Pupil Personnel Services meet with her to resolve the problem of Bracy's continued actions in "sending children to the principal's office for behavior." She noted "this type of conflict resolution is inappropriate."

March 28, 1994 - Bracy initially refused to meet with the principal as she requested to discuss a report to DYFS that he had abused a student. When he did meet he was confrontational and would not discuss the matter. The principal memorialized this in a memorandum to Bracy.

March 28, 1994 - Bracy was informed by the principal in writing that he did not have the

authority to exclude a child from art, music, health and physical education which was required by the child's IEP.

April 8, 1994 - Bracy could not control a student who ran into the principal's office. When the principal told Bracy she had the matter under control he responded to her in a hostile manner. A fifth grade student then appeared at the office crying hysterically stating that Mr. Bracy frightened her. In a statement by the school nurse she quoted the child as having said "Mr. Bracy grabbed me and said he needed a witness as he was dragging a boy around. The child was so upset it was necessary to call her mother."

April 12, 1994 - Bracy called a parent to school to tell the parent the child had attacked him. The parent was ill but came to school and after she arrived Bracy refused to discuss the matter with her. The parent was very upset and Bracy told the parent he would do everything he could to have the child removed from his class. On April 15, 1994 the parent advised the Director of Pupil Personnel Services that they intended to take action against Bracy because of what Bracy was doing in his classroom.

April 18, 1994 - Parent of student in Bracy's class met with the principal to ascertain why Bracy called his home every day. Bracy would ask the parent to come to school and take the child home. Furthermore, he would refuse to talk to the parent when the parent arrived. (Note that this issue was discussed with Bracy and he was told he was not to send children home. Bracy responded that he was not suspending the children, but that the parents were taking the children home. It was pointed out that the result was the same and that he was not to suggest that children be taken home.) The parent noted that the first day his child was in Bracy's room he received a call about the child staying after school and when the parent disagreed, he was told by Bracy that the child would be considered as not fit for his program and would have to be placed elsewhere. The case manager noted in an April 18 memorandum that the child study team decided not to place any additional children in Bracy's room. The memo pointed out

that Bracy was uncooperative and that he has: "bullied, lied and perverted the very tenets of special education that are in the Code and has turned on the children when he has not gotten his way."

April 27, 1994 - Child again sent to principal's outer office and left there.

May 2, 1994 - Case Manager called to remove a child from the room and upon arrival Bracy refused to discuss the problem with the Case Manager.

May 16, 1994 - Bracy directed in writing by Director of Pupil Personnel to work cooperatively with the Case Manager and to refrain from having parents take children out of school. He was directed not to alter students IEP's. The teacher does not have the authority to unilaterally alter an IEP.

May 23, 1994 - Bracy again directed to operate as part of the team. Specifically directed not to contact parents and discuss changes in student placements for 1994-95.

The Association demanded arbitration. The demand asserted that the Board lacked just cause to withhold Bracy's increment and sought to have the increment restored. 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 cannot consider the contractual merits of this dispute or any contractual defenses the Board may have.

Under N.J.S.A. 34:13A-26, increment withholdings of teaching staff members for predominately disciplinary reasons are to be reviewed through binding arbitration. But not all withholdings can go to arbitration. Under N.J.S.A. 34:13A-27(d), 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. If there is a dispute over whether the reason for a withholding is predominately disciplinary, we must make that determination. N.J.S.A. 34:13A-27(a). 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]

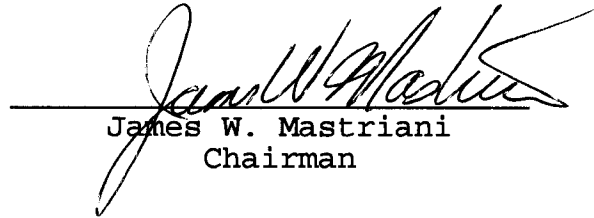
The Association contends that the increment withholding was a disciplinary action, as evidenced by the Board's agenda listings, and thus may be contested through binding arbitration. But the issue in N.J.S.A. 34:13A-27 is not whether an increment withholding is a disciplinary action. By its nature a withholding is a disciplinary action in the form of a substantial monetary penalty. The issue instead is whether the basis for an increment withholding relates predominately to an evaluation of teaching performance. Under all the circumstances, we conclude that this withholding is related predominately to an evaluation of Bracy's teaching performance as a special education teacher charged with implementing IEPs and working with child study teams, case managers, and parents to accomplish that goal. This withholding is largely based on allegations that Bracy used inappropriate disciplinary techniques such as excluding students from classes required by their IEPs and directing parents to take students home; Bracy did not cooperate with the case manager and other child study team members in implementing IEPs; and Bracy unilaterally altered IEPs and implemented his own disciplinary techniques. Any review of these allegations must be before the Commissioner of Education. We therefore restrain arbitration.



ORDER

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

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: October 31, 1995  
Trenton, New Jersey  
ISSUED: November 1, 1995