P.E.R.C. NO. 97-139

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-95-91

CHERRY HILL EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Cherry Hill Township Board of Education for a restraint of binding arbitration of a grievance filed by the Cherry Hill Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when, a year after withholding a school psychologist's employment and adjustment increments for alleged sexual harassment, it declined to place the psychologist on the step of the salary guide he would have occupied for the 1994-1995 school year if no withholding had occurred. The Commission finds that this withholding postdated the 1990 amendments to the New Jersey Employer-Employee Relations Act and appears to have been legally arbitrable under those amendments. However, nothing in the text or legislative history of the 1990 amendments suggests that the Legislature meant to go beyond addressing the forum for reviewing initial increment withholdings, to repeal the part of N.J.S.A. 18A:29-14 prohibiting the mandatory restoration of adjustment increments, or to overrule the prior case law holding mandatory restoration clauses non-negotiable. Nor do the facts of this case suggest that the refusal to restore the psychologist's "correct" place on the salary guide should be viewed as a new disciplinary action rather than the effect of the earlier, unchallenged employment decision.

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.

P.E.R.C. NO. 97-139

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-95-91

CHERRY HILL EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Schwartz Simon Edelstein Celso & Kessler, attorneys (Nicholas Celso, III, of counsel; Nicholas Celso, III and Mark A. Tabakin, on the brief)

For the Respondent, Selikoff & Cohen, attorneys (Steven R. Cohen, on the brief)

DECISION AND ORDER

On April 12, 1995, the Cherry Hill Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Cherry Hill Education Association. The Association asserts that the Board violated the parties' collective negotiations agreement when, a year after withholding a school psychologist's employment and adjustment increments for alleged sexual harassment, it declined to place the psychologist on the step of the salary guide he would have occupied for the 1994-1995 school year if no withholding had occurred.

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

The Association represents the Board's teachers, psychologists, and certain other personnel. The parties entered into a collective negotiations agreement effective from July 1, 1992 until June 30, 1995. Article IV provides, in part that "[n]o employee shall be disciplined, reduced in rank or compensation or deprived of any professional advantage without just cause." The grievance procedure ends in binding arbitration of contractual disputes.

At a special meeting on August 9, 1993, the Board voted to withhold a school psychologist's employment and adjustment increments for the 1993-1994 school year. The withholding was based upon the recommendation of the district's affirmative action officer who had investigated and accepted an educational assistant's allegations that the psychologist had made sexually suggestive comments to her in May 1993. The affirmative action officer also found that similar complaints had been made by two staff members against the psychologist in 1989, and he concluded that the psychologist had engaged in a "pattern of making remarks of a sexual nature to female staff members." The psychologist denied the allegations.

No formal grievance was filed contesting this withholding, but the parties discussed it. On December 6, 1993,

the Association presented the Board with a proposed "grievance settlement" stating that the reason for the withholding would be referred to as "inappropriate comments" and the psychologist's salary for the 1994-1995 would be an amount equal to what his salary would have been had his 1993-1994 increments not been withheld. At a January 26, 1994 meeting, the Board declined to restore the withheld increments.

On June 16, 1994, an Association representative wrote the Board a letter asking that the psychologist's salary for the 1994-1995 school year be set at the level it would have been had the withholding not occurred. The representative noted that the withholding had cost the psychologist a loss of $3,000 for the 1993-1994 school year and that the psychologist would continue to lose an extra $3,000 every year thereafter unless he was returned to the salary guide step commensurate with his years of experience. On August 22, 1994, the Board again denied restoration of the withheld increments.

On November 1, 1994, the Association filed a grievance requesting that the psychologist be returned to the "proper placement on the salary guide for the 1994-1995 school year." The Board denied the grievance as untimely because it had not been filed within 60 days of the withholding. The Board also concluded that the request for salary guide restoration was reasonably denied given the basis for the initial withholding.

The Association demanded arbitration. The demand identified the dispute as the "Board's denial of restoring [the psychologist] to his proper salary for the 1994-1995 school year without just cause." 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 the contractual merits of the Association's grievance or any contractual defenses the Board may have.

N.J.S.A. 18A:29-14 provides:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education.... The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid.... It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment. [Emphasis supplied]

Teachers cannot recover increments in future years absent a local board's affirmative action. Cordasco v. City of E. Orange Bd. of Ed., 205 N.J. Super. 407 (App. Div. 1985). A board has discretion to restore increments, but is not compelled to do so. Probst v. Haddonfield Bd. of Ed., 127 N.J. 518 (1992). While a teacher losing an employment increment will always lag one step behind other teachers with the same experience, that fact is simply the effect of an earlier employment decision. North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed., 96 N.J. 587 (1984).

In 1979, our Supreme Court held that disputes over increment withholdings of teaching staff members could not legally be submitted to binding arbitration. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979). The Court concluded that by enacting N.J.S.A. 18A:29-14, the Legislature had delegated to the Commissioner of Education the authority to review increment withholdings for inefficiency or other good cause. Given N.J.S.A. 18A:29-14 and Bernards Tp., we held that contractual provisions requiring the restoration of increments were not mandatorily negotiable. Upper Saddle River Bd. of Ed., P.E.R.C. No. 88-58, 14 NJPER 119 (¶19045 1987); Greater Egg Harbor Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987).

Effective January 4, 1990, the Legislature amended the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., to modify the holding of Bernards Tp. Under N.J.S.A. 34:13A-26, withholdings "for predominately disciplinary reasons"

may be contested through binding arbitration. But under N.J.S.A. 34:13A-27, withholdings related "predominately to a teaching staff member's teaching performance" must still be appealed to the Commissioner of Education. In the event of a dispute, it is up to us to determine whether a withholding is predominately disciplinary or related to an evaluation of teaching performance.

The Association did not seek to arbitrate this withholding initially and does not contest its propriety now. The question before us is whether the 1990 amendments permit arbitration of a claim that a school board that has withheld an increment without challenge must restore the increment in a future year.

In Rockaway Tp. Bd. of Ed., P.E.R.C. No. 94-46, 19 NJPER 581 (¶24276 1993), we restrained arbitration over a claim that a school board was contractually obligated to restore a teacher's increments withheld for excessive absenteeism. Rockaway is factually distinguishable in that the withholding there preceded the 1990 amendments and thus was never legally arbitrable while the withholding here postdated the 1990 amendments and appears to have been legally arbitrable under those amendments. Nevertheless, nothing in the text or legislative history of the 1990 amendments suggests that the Legislature meant to go beyond addressing the forum for reviewing initial increment withholdings, to repeal the part of N.J.S.A. 18A:29-14 prohibiting the mandatory restoration of adjustment increments, or to overrule the prior

case law holding mandatory restoration clauses non-negotiable. See Fieseler v. South River Bd. of Ed., 93 N.J.A.R. (EDU) 415 (St. Bd. 1993). Nor do the facts of this case suggest that the refusal to restore the psychologist's "correct" place on the salary guide should be viewed as a new disciplinary action rather than the effect of the earlier, unchallenged employment decision. We accordingly restrain arbitration.

ORDER

The request of the Cherry Hill Township 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, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration. Commissioner Klagholz was not present.

DATED: May 29, 1997
Trenton, New Jersey
ISSUED: May 30, 1997