

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2003-28

ELIZABETH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Elizabeth Board of Education for a restraint of binding arbitration of a grievance filed by the Elizabeth Education Association. The grievance asserts that the Board disciplined a teacher without just cause by withholding her salary increment. The Board's reasons for the withholding stated that the teacher had failed to complete required Paideia training and that she acted in an unprofessional manner causing an adverse effect on learning and quality of instruction. The Commission concludes that given the generally positive annual performance evaluation issued after the incidents involved in the withholding and giving primary weight to the reasons specified in the Board's resolution, this withholding was not based predominately on the evaluation of teaching performance, but instead was based predominately on issues of alleged insubordination and poor attitude towards students and staff that did not directly impact on students.

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. 2003-86

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Appearances:

For the Petitioner, The Murray Law Firm, attorneys  
(Laurette Asante, on the brief)

For the Respondent, Bergman & Barrett, attorneys  
(Michael T. Barrett, on the brief)

DECISION

On November 25, 2002, the Elizabeth Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Elizabeth Education Association. The grievance asserts that the Board disciplined a teacher without just cause by withholding her salary increment.

The parties have filed briefs and exhibits. The Board has filed the certifications of the high school principal and the mathematics supervisor. The Association has submitted the teachers' certification. At our request, the Board has submitted the teacher's 2001-2002 annual professional performance report. These facts appear.

The Association represents teachers and certain other employees. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

This case involves a tenured math teacher at Elizabeth High School. She has been employed in the District for almost 15 years. She has a Master's degree in mathematics and has earned credits toward a Ph.D. All of her evaluations rated her satisfactory or better.

In April 2001, the math supervisor told the teacher that she had been recommended to teach an A.P. Calculus class and that the balance of her 2001-2002 schedule would be Algebra II classes. In June, the supervisor revised the tentative schedule by assigning the teacher two Geometry classes and three Algebra I classes.<sup>1/</sup>

The teacher met with the principal on July 10, 2001. She questioned why she was not assigned the AP Calculus class. The principal cited "the needs of the students" and said he would discuss the schedule with the math supervisor after the

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<sup>1/</sup> The District follows the Equity 2000 math program which means that general math courses have been dropped and all students are required to take Algebra I, Geometry and Algebra II as their three years of math.

supervisor returned from a vacation. The teacher described the change in her schedule as "complete garbage."

On August 13, 2001, the principal met with the supervisor and the teacher and the supervisor met the following day.<sup>2/</sup> Before her meeting with the supervisor, the teacher had learned that the AP Calculus class had been assigned to a non-tenured teacher. The supervisor offered no reason for the schedule change except to state that she was trying to help the teacher. The teacher was upset by the schedule change and accused the supervisor of lying to her.

On August 15, 2001, the supervisor wrote to the teacher asserting that she had referred to her students as garbage and referred to the supervisor as a liar. The supervisor urged the teacher to adopt a suitable attitude and warned her to refrain from making derogatory comments about her students and supervisors or disciplinary action would be initiated.

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<sup>2/</sup> The principal's certification, executed in December 2002, asserts that he met with the supervisor on August 15, 2001, after the teacher met with the supervisor. However a formal reprimand dated August 16, 2001 stated that the principal and supervisor met on August 13, prior to the teacher's August 14 meeting with the supervisor. Because the August 16, 2001 document was written within a few days of the two meetings, we find that the meeting between the principal and supervisor preceded the meeting between the teacher and the supervisor. Moreover, the supervisor's certification does not mention any meeting with the principal the day before or the day after she met with the teacher.

On August 16, 2001, the principal issued a formal reprimand to the teacher making similar allegations. He referred to his July 10 meeting with the teacher and the August 14 teacher-supervisor meeting. The reprimand recited that at the meeting the teacher had referred to the students as garbage and repeaters and that she had warned that the schedule would result in a high failure rate among her assigned students. The reprimand also stated that the teacher had indicated that she would give less than her best effort if her schedule were not changed and that if the teacher continued to act unprofessionally, disciplinary action would be taken in the future.

Except to acknowledge that she had accused the supervisor of lying to her and that she had described the schedule change, not the students who would be in her classes, as "garbage", the teacher denied the assertions made in the August 2001 reprimands. She denied threatening that she would not use her best efforts in teaching her classes.

On September 10, 2001, the principal wrote to the teacher stating that she had not completed Paideia<sup>3/</sup> training as

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3/ Paideia is a Whole School Reform model that has been adopted for the Elizabeth High School. The Paideia model addresses curriculum standards, assessment, teacher professional development and other areas aimed at student achievement. The Elizabeth school district is an Abbott District under Abbott v. Burke, 153 N.J. 480 (1998). Abbott districts must implement Whole School Reform models aligned with New Jersey Core Curriculum Standards.

required. He advised her that she could complete her training on September 11 and September 13, 2001. The teacher apparently completed the training during the 2001-2002 school year.

On March 8, 2002, the principal issued a reprimand to the teacher. The teacher claims that she did not see the reprimand until June 2002 when she reviewed her personnel file after learning that her increment was being withheld. The reprimand accused the teacher of continuing to fail to carry out her responsibilities, and of not meeting the minimum standards for acceptable performance. It complained that the teacher did not establish a Homeroom Hotline as directed; failed to attend Paideia training after being issued a reprimand during the 2000-2001 school year for sleeping through and failing to participate in the required session; threatened high failure rates and then had failure rates in her geometry classes for the first two marking periods that far exceeded the average departmental failure rate; and referred to students in a derogatory manner. The reprimand concluded: "[I]n addition to this reprimand I will be recommending that your increment be withheld for the 2002-2003 school year."

On March 22, 2002, the principal wrote to the Director of Human Resources and recommended that the teacher's 2002-2003 increment be withheld. This letter was not copied to the teacher who did not see it until her June review of her personnel file.

He attached copies of his August 15 and September 10, 2001, and March 8, 2002 letters; the August 16, 2001 reprimand; and a March 18, 2002 email the relevance of which is unclear. The principal asserted that the teacher had continued to fail to complete her professional responsibilities to her students and the school.

On April 23, 2002, the teacher received her Annual Professional Improvement Plan and Outcome and her Annual Professional Performance Report. The only "Area of Concern" was professional growth. The "Performance Outcome" indicated that she completed her goal of attending all Paideia seminars and attended professional development workshops. The teacher was rated "Satisfactory" in all areas except "Record Keeping" and "Teacher/Student Relations." "Areas of Strength" listed "Implementation of Paideia Seminars." "Areas of Weakness" recommended that she be less argumentative with students to create a positive learning environment, and that she keep an accurate record of her follow-up for discipline referrals, tardiness and cuts.

On June 25, 2002, the Board voted to withhold the teacher's increment. The resolution stated that the teacher had failed to complete required Paideia training during the 2001-2002 school year, and that she acted in an unprofessional manner causing an adverse effect on learning and quality of instruction.

On June 27, 2002, the superintendent notified the teacher that the Board had voted to withhold her increment "as a result of your failure to complete required training and your unprofessional demeanor towards students and supervisors."

On August 7, 2002, the Association filed a grievance alleging that the increment withholding was discipline without just cause in violation of Article IV, Section A. Article IV is entitled Employee Rights and provides that no employee shall be disciplined without just cause. The superintendent denied the grievance. On September 23, 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]

Based on the principal's recommendation, the Board's resolution, and the superintendent's notification, we conclude that the Board withheld the teacher's increment because she allegedly: (1) failed to attend required training during the school year; (2) accused her supervisor of lying to her during a meeting in which they discussed the teacher's schedule; (3) referred to the students who would be in her classes for the coming year as "garbage" and/or "repeaters"; (4) threatened that there would be a lot of failing students in her classes and then had high failure rates during the first two marking periods; and (5) failed to establish a Homework Hotline.<sup>4/</sup> Yet the teacher was issued a generally positive annual performance evaluation.

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<sup>4/</sup> The Board's resolution does not refer to the failure to establish a Homework Hotline, so we cannot be sure that it was one of the Board's reasons for acting. The other four reasons arguably fit within the resolution's description of the basis for the withholding.

Under the circumstances, we believe that the teacher's alleged failure to attend training should be characterized as a disciplinary reason rather than an evaluation of teaching performance. The March 22 reprimand accuses the teacher of failing to attend Paideia training and notes that she had been reprimanded the previous year for sleeping through and failing to participate in the required session. Her annual performance evaluation draws no connection between these alleged failures and teaching performance. See Mansfield Tp. Bd. of Ed. v. Mansfield Ed. Ass'n, 23 NJPER 209 (¶28101 App. Div. 1997), rev'g and remanding P.E.R.C. No. 96-65, 22 NJPER 134 (¶27065 1996) (regular evaluation process of teaching performance was completely satisfactory; something outside parameter of evaluation process triggered withholding); Clifton Bd. of Ed. P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992) (arbitrator may consider whether Board had just cause to withhold increment of teacher who repeatedly missed back to school nights). Compare and contrast Trenton Bd. of Ed., P.E.R.C. No. 2002-67, 28 NJPER 239 (¶33089 2002) (Commissioner should review whether teacher's refusal to attend training for reading program and implement it in her classes justified withholding of increment). In fact, the evaluation cites "Implementation of Paideia Seminars" as an Area of Strength.

With respect to the derogatory references to students made during pre-school year discussions with her supervisor and principal, it is undisputed that no students or parents were present when the teacher allegedly made these comments. Nor is there any showing that the teacher repeated these statements to parents or students after the school year began.

The precedents cited to us by the Board all involved derogatory or inappropriate statements made directly by teachers to students. See, e.g., Roxbury Tp. Bd. of Ed. P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994). Here, the teacher made her comments in a meeting where she asked the principal to give her specific reasons why an advanced math class was given to another teacher. No one other than the teacher and principal was present. When the teacher reacted to the principal's statement that the change was made "to meet the needs of the students" by saying, according to the Board, that the students were "garbage," or, according to the teacher, that the schedule change was "complete garbage," the principal issued a formal reprimand and later cited the reprimand in recommending that her increment be withheld.

The context is also important with respect to the punitive response to the teacher's accusation that her supervisor had lied to her while they were discussing the change in her schedule. In Florham Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 159

(¶24081 1993), we restrained arbitration over a grievance seeking restoration of an increment withheld because, while teaching his class, a teacher had criticized a principal and alleged that the principal was sexually harassing teachers. Here the accusation was made in a one-on-one meeting between a teacher and her supervisor, convened to discuss a workplace complaint.

We conclude that these reasons for the withholding are not based on an evaluation of teaching performance. See Clifton Bd. of Ed. (increment withheld because teacher was extremely insubordinate to a superior was not based on the evaluation of teaching performance). None of her comments were made to students and no nexus between those comments and teaching performance was identified by the Board when it withheld the increment.

Given the comments concerning failing students allegedly made during the meetings held prior to the 2001-2002 school year, any concern about failure rates would involve issues of teaching performance. Similarly, the failure to implement a Homework Hotline for students, if that was a factor in the Board's consideration, involves an issue of teaching performance. See Trenton Bd. of Ed.

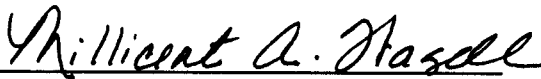
Even if the Board relied in part on the alleged failure to implement the Homework Hotline, this withholding only partially involves issues of teaching performance. Given the generally

positive annual performance evaluation issued after the incidents involved in the withholding and giving primary weight to the reasons specified in the Board's resolution, we conclude that the withholding was not based predominately on the evaluation of teaching performance, but instead was based predominately on issues of alleged insubordination and poor attitude toward students and staff that did not directly impact on students. Under all these circumstances, we decline to restrain binding arbitration.

ORDER

The request of the Elizabeth Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. Commissioner Katz was not present.

DATED: May 29, 2003  
Trenton, New Jersey  
ISSUED: May 30, 2003