

P.E.R.C. NO. 2004-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2004-20

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Matawan-Aberdeen Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Matawan Regional Teachers Association. The grievance contests the withholding of a computer science teacher's salary increment for the 2003-2004 school year. The Commission concludes that this withholding was triggered by the conclusion that hacking by students into school computers and other student misconduct occurred during the teacher's class. The Commission finds that these reasons predominately involve an evaluation of teaching performance. Any appeal 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, Kenney, Gross, Kovats, Campbell &
Pruchnik, attorneys (Michael J. Gross, of counsel;
Ari G. Burd, on the brief)

For the Respondent, Klausner & Hunter, attorneys
(Stephen B. Hunter, on the brief)

DECISION

On October 16, 2003, the Matawan-Aberdeen Regional Board of Education petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by the Matawan Regional Teachers Association. The grievance contests the withholding of a computer science teacher's salary increment for the 2003-2004 school year.

The parties have filed briefs and exhibits. The Association has filed the affidavit of the computer science teacher, Jan Niemira. These facts appear.

The Association represents classroom teachers. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

Jan Niemira is a tenured teacher. The Board has employed him for 31 years as a math and computer science teacher. Before the 2002-2003 school year, Niemira had consistently received positive evaluations.

During the 2002-2003 school year, Niemira taught AP Computer Science I and II and other computer science courses. That year, a criminal investigation began concerning allegations that high school students had hacked into the district's computer network and changed data, including information about personnel files and budget issues. According to the Board, the hacking lasted at least several weeks and some of it occurred during Niemira's 6th period AP Computer Science class. Some of Niemira's students allegedly downloaded over 800 files, played games, downloaded software designed to penetrate network security, and obtained private files of teachers and payroll records.

On May 22, 2003, Niemira met with District representatives and the Board's labor attorney. When asked how the students could have engaged in hacking during his class, he responded that the nature of the AP course and the different levels of student capabilities required him to spend most of his time working "one-

to-one" with students who needed more assistance than others. The alleged hackers were the better students who could complete their class work during the period. He explained that hacking could take place without attracting any attention.

On June 6, 2003, the principal observed Niemira's class for the first time that year. Niemira received a "Needs Improvement" in three out of the 15 categories under "Implementation of the Lesson"; one "Needs Improvement" in the four categories under "Classroom Management"; and one "Needs Improvement" under the six areas of "Interpersonal Skills/Learning Climate." This comment appeared under "Suggestions for Enhancement": "All students need to be more actively involved. In this way you would increase participation, stimulate learning and minimize potential behavioral matters." Niemira did not receive this observation report until June 22. He states that he had not previously received more than one "Needs Improvement" rating in a classroom observation. He filed a rebuttal objecting to the Needs Improvement ratings.

In August 2003, Niemira received his annual summary evaluation. He received a Needs Improvement in three of six categories. The principal commented:

As indicated in the classroom observation report, Mr. Niemira needs to engage all the students to have them involved in the lesson/material being covered. By addressing a small group within the class, the teacher is not able to verify if his material is

being understood by the other students, nor is he able to clearly define that he is offering them instruction. All students in the class must be actively focused and participating on the subject matter material. Mr. Niemira needs to supervise all activities in his classroom.

On August 20, 2003, the assistant superintendent advised Niemira that the Board would discuss his performance as an AP computer science teacher at its August 26 meeting. On August 27, the assistant superintendent wrote a letter informing Niemira that the Board had voted to withhold his 2003-2004 school year salary adjustments and employment increments. The letter did not state any reason for the decision.^{1/}

The Board has policies governing faculty and student use of the Internet and other computer networks. Niemira contends that his increment was withheld because of the Board's incorrect determination that he failed to properly monitor certain students for strict compliance with the prescriptions of the Board's policies relating to computer use.

On August 27, 2003, the Association filed a grievance alleging that Niemira's increment was withheld without just

^{1/} Niemira has filed a Petition of Appeal with the Commissioner of Education contesting the Board's failure to provide a statement of reasons as required by N.J.S.A. 18A:29-14 and seeking reinstatement of the increments and back pay. The Board's Answer states that even though it did not technically comply with N.J.S.A. 18A:29-14, it provided Niemira enough information to know the reasons for the withholding.

cause. The grievance was denied. On October 1, 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]

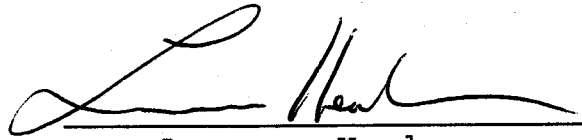
The Board has not supplied the statement of reasons customarily given a teaching staff member at the time of a

withholding, but there is no real dispute over what triggered this withholding: it was the conclusion that some of the hacking and other student misconduct occurred during a class supervised by Niemira. According to the Board, that conclusion shows that Niemira's classroom management was inadequate, a reason that we have consistently characterized as one based on teaching performance. See, e.g., Wayne Tp. Bd. of Ed., P.E.R.C. No. 93-107, 19 NJPER 272 (¶24137 1993); Bergen Cty. Voc. Schools, 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). Contrast Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-72, 18 NJPER 64 (¶23028 1991) (arbitration not restrained where teacher accused of allowing students to leave study hall and sleep in her unattended classroom; no class in session). Even if we accept the Association's characterization of the withholding as involving Niemira's alleged failure to monitor compliance with the computer use policy during his classes, we still conclude that the basis for the withholding predominately involves an evaluation of teaching performance. Accordingly, we must restrain arbitration. We repeat that we do not consider whether the assessment of Niemira's classroom management is accurate or whether it justified the withholding.

ORDER

The request of the Matawan-Aberdeen Regional Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "L Henderson", is written over a horizontal line.

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Mastriani and Sandman voted in favor of this decision. None opposed. Commissioner Katz was not present.

DATED: January 29, 2004
Trenton, New Jersey
ISSUED: January 29, 2004