P.E.R.C. NO. 2004-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2003-58

OLD BRIDGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Old Bridge Board of Education for a restraint of binding arbitration of a grievance filed by the Old Bridge Education Association. The Association asserts that the Board withheld a teacher's increment for the 2002-2003 school year without just cause. The Commission concludes that this increment withholding involves allegations of allegedly inappropriate in-class comments or conduct and is predominately related to the 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, Sills Cummis Epstein & Gross, attorneys (Philip E. Stern, of counsel); Riker, Danzig, Scherer, Hyland & Perretti, LLP, attorneys (Anthony J. Murphy, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Gail Oxfeld Kanef, on the brief)

DECISION

On April 16, 2003, the Old Bridge Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Old Bridge Education Association. The Association asserts that the Board withheld a teacher's increment for the 2002-2003 school year without just cause. We conclude that the reasons for the withholding were based predominately on an evaluation of teaching performance. Accordingly, any appeal of the withholding must be filed with the Commissioner of Education.

The parties have filed briefs and exhibits.[1/] These facts appear.

The Association represents teachers and certain other employees. The parties' collective negotiations agreement is effective from July 1, 2000 through June 30, 2003. The grievance procedure ends in binding arbitration.

The withholding involves a tenured middle school teacher. On May 14, 2002, the teacher received a Professional Staff Evaluation Report indicating that he had fulfilled all duties and responsibilities and had been recommended for re-employment with all appropriate salary guide adjustments.

On May 29, 2002, the teacher was directed to meet with the principal to discuss student-related matters. On May 31, the principal notified the teacher that a hostile school environment complaint had been filed against him alleging harassment toward students and unwelcome touching of students. That same day, letters were sent to certain parents and guardians informing them that their children would be interviewed concerning the affirmative action complaint.

The principal and an affirmative action officer investigated the allegations of improper conduct and statements from June 4 through June 20, 2002. They interviewed the teacher, nine

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1/ This case was held in abeyance pending settlement discussions. On January 8, 2004, we were notified that the matter had not settled and that processing should continue.

students, and five staff members. The interview summaries included in the record indicate that the alleged incidents took place during the teacher's classes, although some students indicated that similar incidents had also occurred during lunch or in the hallways.

The teacher acknowledged to the principal and affirmative action officer that he made one comment, but asserted that it was not meant to be demeaning. He also admitted to pinching a student's cheeks in a friendly way after she pinched his cheeks first. He denied all other accusations.

On June 20, 2002, the principal and affirmative action officer concluded that the teacher's behavior was at times inappropriate, but was not done maliciously or with the intent of sexual harassment. They recommended counseling and a transfer to another school.

On July 11, 2002, the principal and the affirmative action officer sent a letter to the teacher. It stated:

> Please be advised that we have concluded a thorough investigation into the above-referenced student allegations of harassment and misconduct. Our investigation included a review of all relevant documentation and the interviews of the complainants and several witnesses.
>
> We have determined that many of the allegations contained in the complaints have been substantiated. Specifically, we find that you have engaged in repeated inappropriate physical touching and sexist and racist commentary directed toward

> students. These actions are wholly unacceptable and will not be tolerated. You are directed to immediately refrain from any unnecessary physical contact with your students, and from expressing sexist or racist remarks in the workplace.
>
> You are directed to participate in counseling and sensitivity training to be arranged through the Building Principal. Likewise, you will be reassigned in a sixth grade math class. In addition, this letter shall serve as a formal letter of reprimand which will be placed in your personnel file. If it comes to the attention of the administration that you are persisting with this or similar behavior, immediate and appropriate disciplinary measures will be taken. Potential measures may include the withholding of an increment or dismissal.
>
> As a final matter, please be advised that the District will not tolerate any retaliatory action against the students for filing the complaints.

On July 22, 2002, the superintendent notified the teacher that the Board would be discussing his performance as a teaching staff member at its August 20 meeting.

On August 30, 2002, the assistant superintendent for business notified the teacher that the Board had voted to withhold his salary increment for the 2002-2003 school year based on gross misconduct during the 2001-2002 school year.

On the same day, the assistant superintendent for personnel wrote the teacher a letter ordering him to undergo a psychological examination to determine his fitness for duty. The letter asserted that the teacher's gross misconduct raised

serious questions about the teacher's behavior, interaction with students, and fitness to continue as a classroom teacher. The teacher was offered an opportunity to refute the evidence, and was told that if he failed to appear before the Board or to persuade it, he would be required to go through with the examination. The record does not indicate whether he appeared before the Board or went through with the examination. The teacher was placed on medical leave with pay until such time as a psychologist determined him fit for work.

Although a grievance appears to have been filed, the Board stated that it did not possess any grievance documents. It noted that it agreed to bypass the first two steps of the grievance procedure and that the Association proceeded directly to 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 argues that this withholding is predominately related to the teacher's classroom performance because the affirmative action officer found that the teacher had acted inappropriately in the classroom.

The Association responds that the teacher was notified that his increment was being withheld for "gross misconduct during the 2001-2002 school year," and that the notice does not state that the withholding was related to classroom performance. It further responds that the teacher has received satisfactory performance evaluations at all times. Finally, it argues that while some of the alleged incidents occurred in the classroom, nothing in the affirmative action officer's conclusions indicates that his conduct affected his classroom performance.

In similar cases centering on allegations of inappropriate in-class comments or conduct, we have held that the withholdings were predominately related to the evaluation of teaching performance. See Northern Highlands Reg. Bd. of Ed., P.E.R.C. No. 2003-49, 29 NJPER 24 (¶7 2003) (inappropriate remarks); Willingboro Bd. of Ed., P.E.R.C. No. 2001-68, 27 NJPER 236 (¶32082 2001) (inappropriate sexual comments); Hazlet Bd. of Ed., P.E.R.C. No. 95-59, 21 NJPER 118 (¶26072 1995) (inappropriate touching); Greater Egg Harbor Reg. H.S. Bd. of Ed., P.E.R.C. No. 95-58, 21 NJPER 116 (¶26071 1995), recon. den., P.E.R.C. No. 95-84, 21 NJPER 175 (¶26110 1995) (negative remarks); Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) (off-color jokes and demeaning comments); Roxbury Bd. of Ed., P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994) (improper remarks and inappropriate contact). We restrained arbitration in those cases because the board's evaluation of teaching performance included its educational assessment of the appropriateness of a teacher's interactions with students during classroom instruction.

We have permitted binding arbitration in one case involving a student-teacher interaction in the classroom. It involved an allegation that a teacher illegally used corporal punishment. Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991); see N.J.S.A. 18A:6-1. The teacher denied that

he had struck any students and we reasoned that it took no educational expertise to know that hitting a student was wrong, and that an arbitrator could determine whether the teacher hit the students. However, we have restrained arbitration where allegations of corporal punishment were intertwined with allegations that the teacher used other inappropriate classroom techniques, or where the teacher asserted that the contact was necessary to prevent harm to students or property. See Upper Saddle River Bd. of Ed., P.E.R.C. No. 98-81, 24 NJPER 54 (¶29034 1997); Tenafly Bd. of Ed., P.E.R.C. No. 91-68, 17 NJPER 147 (¶22058 1991). Contrast Vernon Bd. of Ed., P.E.R.C. No. 2002-36, 28 NJPER 78 (¶33027 2001) (hallway incident with student not assigned to teacher's class). Unlike the single corporal punishment case, the question here is not simply whether or not the teacher engaged in illegal conduct. In this case, the evaluation of this teacher's teaching performance includes educational judgments about where to draw the line between appropriate and inappropriate comments and conduct toward his students in the classroom.

Our conclusion is not altered by the fact that the teacher's annual evaluation did not describe the conduct referred to in the statement of reasons and the July 11, 2002 letter. The allegations came to the Board's attention through student complaints, not the regular evaluation process, but nevertheless

involved the in-classroom interactions of the teacher with his students. See Northern Highlands; Roxbury Bd. of Ed.

Mansfield Tp. Ed. Ass'n 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), a case cited by the Association, is distinguishable. There, the Court concluded that the withholding did not arise out of a problem with teaching performance because the teacher's regular evaluation was completely satisfactory, and it was only by virtue of something outside the evaluation process that the teacher lost her increment. The grounds for the Mansfield withholding were the teacher's: (1) alleged failure to tell special education personnel about her concerns about one of her special education students -- concerns which the teacher later testified about in a lawsuit brought by the student's parents against the district and (2) alleged disobeying of an administrative directive not to talk to the student's parents without another district employee as a witness. Here, the Board's concerns about student-teacher interactions arose after issuance of the teacher's annual performance evaluation and were handled through an appropriate mechanism for investigating and judging allegations of inappropriate conduct and comments toward students in the classroom.

Nor are we persuaded that the reasons for the withholding are predominantly disciplinary because the statement of reasons refers to "gross misconduct" rather than the "inappropriate classroom behavior" or "inappropriate instructional methodology" cited in Northern Highlands. We focus on the type of alleged misconduct or deficiency described or referenced in the statement of reasons; the terminology used by the board is not determinative.

Finally, the withholding is not arbitrable simply because the July 11, 2002 letter threatened disciplinary action, such as an increment withholding. All increment withholdings are a form of discipline in the generic sense, although not necessarily discipline that may be submitted to binding arbitration. Thus, in deciding whether an increment withholding may be submitted to binding arbitration, the focus is not on whether the action is "discipline," but on whether the reasons for the discipline are predominately related to the evaluation of teaching performance. We hold that in this case, they are.

ORDER

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

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani and Sandman voted in favor of this decision. None opposed.

DATED: February 26, 2004
Trenton, New Jersey
ISSUED: February 27, 2004