

P.E.R.C. NO. 2004-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY VOCATIONAL AND
TECHNICAL SCHOOLS DISTRICT
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2004-33

BERGEN COUNTY VOCATIONAL TECHNICAL
SCHOOLS EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Bergen County Vocational and Technical Schools District Board of Education for a restraint of binding arbitration of a grievance filed by the Bergen County Vocational Technical Schools Education Association. The grievance contests the withholding of a culinary arts teacher's salary increment. The alleged actions which resulted in the teacher's increment withholding occurred during a stipended extracurricular assignment chaperoning a cruise to the Bahamas. The Commission concludes that this withholding does not involve any aspect of teaching or classroom conduct and is not based on an evaluation of teaching performance.

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, Nowell, Amoroso, Klein, Bierman,
P.A., attorneys (William C. Soukas, on the brief)

For the Respondent, Bucceri & Pincus, attorneys
(Louis P. Bucceri, on the brief)

DECISION

On January 5, 2004, the Bergen County Vocational and Technical Schools District Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Bergen County Vocational Technical Schools Education Association. The grievance contests the withholding of a culinary arts teacher's salary increment.

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

The Association represents teachers and certain other professional employees. The parties' collective negotiations agreement is effective from July 1, 2002 through June 30, 2005. The grievance procedure ends in binding arbitration.

The culinary arts teacher has been employed by the Board since 1996 and is tenured. His evaluations have rated his teaching as effective and deserving of praise.

The teacher is assigned to the Bergen Academy Campus in Hackensack. He has coordinated numerous field trips to competitions, exhibitions, and demonstrations, many of which require overnight stays. On these trips, he acted as a chaperone and was paid a stipend. He did so on a cruise to the Bahamas from June 20 through June 23, 2002.

On February 26, 2003, the Board certified tenure charges against the teacher and suspended him without pay for 120 days. The charges alleged these instances of unbecoming conduct on the cruise:

- 1) Various incidents occurring in or around June 20 - 23, 2002, in which [the teacher] exercised poor judgment manifesting itself in unprofessional, unbecoming conduct which placed the well-being of students and school staff in immediate harm during an overnight school-sponsored trip;
- 2) On the aforesaid date, while laying flat on his bed in his cabin, in the presence of students positioning a rolled up paper towel

vertically between his legs in a manner suggestive of a phallus;

3) On the aforesaid date, permitting a female student, while in his presence, to simulate a sex act with a rolled up bath towel;

4) On the aforesaid date, consuming alcoholic beverages in the presence of students and staff; and

5) On the aforesaid date, engaging in improper physical contact with a student by permitting a male student to assume a crouching position on the floor and positioning himself in a seated position on the student's shoulders.

An Administrative Law Judge (ALJ) held four days of hearing.

We summarize the ALJ's factual findings.

Approximately 23 to 25 students went on the cruise. There were three chaperones: the culinary arts teacher, a culinary pastry art teacher who organized the trip and was in charge, and a fine arts teacher. The rooms were along one hallway of the ship with the culinary art teacher's room being adjacent to and in the vicinity of the students' rooms and the other teachers' rooms being in the hallway through another set of hallway doors.

Students were required to be in their rooms for the night by 11:00 p.m. To monitor the students before then, the culinary arts teacher kept his door open, except when he was changing clothes or using his bathroom.

On the night of the alleged incident involving the towel between his legs, the teacher was alone and lying on his bed. Some students came by. Two students took photographs of the teacher from the doorway for not more than a minute and probably less. Seven students observed him from the hall or doorway. They found his position to be funny and some believed he posed as a joke. The teacher made no sexual acts or gestures. When shown the pictures in an interview with the principal later that summer, the teacher was shocked and upset because he did not realize what he had looked like while lying on the bed. During his testimony, he expressed embarrassment and regret. The incident was unintentional.

The students did not lose respect for him as a teacher because of what they saw. They view him as a superlative teacher because of his rapport with them and his expertise.

During the cruise, the three chaperones shared a single 750 ml bottle of wine at dinner, pouring from the same bottle on each of the three nights. The culinary arts teacher drank a single glass of wine or less each night; he also volunteered that he drank two cans of beer on each of the two nights when he was alone in his room. The Board policy on field trips does not forbid the consumption of alcohol by chaperones. At no time was the teacher intoxicated or impaired in performing his duties.

On August 26, 2003, the Board closed its case and the Association moved to dismiss the charges. With the Board's consent, the ALJ dismissed paragraphs 3 and 5 of the allegations of unbecoming conduct. The ALJ sealed the record as well.

The next day, the Board approved a resolution to withhold the teacher's increment for the 2003-2004 school year. The resolution alleged the same misconduct as was being litigated in the tenure proceeding.

On September 1, 2003, the Board reinstated the teacher, but suspended him with pay, with his salary frozen at the level paid the previous year.

On October 21, 2003, the Association filed a grievance asserting that the withholding was for disciplinary reasons and without just cause. The grievance also alleged that the withholding constituted double punishment since tenure charges had been filed on the same issues.

On November 5, 2003, the Director of Human Resources denied the grievance. He wrote:

[The teacher] did not sufficiently or satisfactorily discharge his duties or responsibilities of "in loco parentis." He did not provide the leadership role model or display the behavior that is required in his position as a Teacher. His conduct jeopardized the District's responsibility to the students.

On November 25, 2003, the ALJ issued an Initial Decision ordering the teacher reinstated with full back pay. She

concluded that the incident with the towel was inadvertent rather than staged. Her opinion stated:

Although as I have noted above, Respondent may have exercised questionable judgment, this charge is couched in terms of placing students and school staff in immediate harm, thus the inquiry must be as to what "harm" to students and staff has been proven.

The simple fact is that no conduct attributable to the actions or inactions of Respondent was shown to have caused any harm. All of the testimony from the District's witnesses, including the only adult . . . reflects nothing Respondent did put the students or chaperones at risk or resulted in harm to anyone. I find, therefore, that Respondent failed to sustain the burden of proof on this charge as well.

On January 8, 2004, the Commissioner of Education adopted the ALJ's findings of fact and conclusions of law. He accepted the credibility determination that the teacher's conduct was inadvertent. The Commissioner's dismissal of the tenure charges was not appealed.

The Association demanded arbitration concerning the withholding. 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 whether the Board had cause to withhold the teacher's increment.

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 relates predominantly to an evaluation of the teacher's performance as a faculty chaperone. It also asserts that even though the conduct took place outside the classroom and even though the ALJ and the Commissioner concluded that there was no intent to pose or stage the scene with the towel, the alleged misconduct involved the teacher's behavior in the dual capacity of teacher and in loco parentis so he should be held to the same standards of propriety expected of any other teaching staff member.

The Association responds that the withholding was not based on any evaluation of teaching performance or any instructional or other educational function. Instead, it was solely a punishment for alleged misconduct unrelated to teaching and already determined by the Commissioner to have been inadvertent. It adds that the merits of the dispute have already been decided in the teacher's favor and no purpose can be served by perpetuating it except punishing the teacher.

The Board responds that the Commissioner made no specific finding as to the withholding so the Board is not barred from pursuing it.

The reasons for this withholding are not based on an evaluation of teaching performance. Not all interactions between teachers and students require an evaluation of teaching performance. See, e.g., Vernon Tp. Bd. of Ed., P.E.R.C. No. 2002-36, 28 NJPER 78 (¶33027 2001) (allegedly inappropriate rebuking of student in hallway); Morris Hill Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991) (disputed allegation of corporal punishment). Compare Ramsey Bd. of Ed., P.E.R.C. No. 2000-59, 26 NJPER 94 (¶31038 2000) (alleged difficulties in relating to students hurt ability to teach successfully and led parents to complain and request that their children be assigned to another Spanish teacher for the next year); Washington Bor. Bd. of Ed., P.E.R.C. No. 98-49, 23 NJPER

603 (¶28296 1997) (teacher allegedly used a loud tone of voice and inappropriate language when dealing with young children in class). This case does not involve any aspect of teaching or classroom conduct. The alleged failure to model the behavior expected of teaching staff members may warrant concern, but that alleged failure in this case is not a question of teaching performance that must be assessed by the Commissioner of Education but an allegation of professional misconduct that can be reviewed by an arbitrator. See, e.g., Demarest Bd. of Ed., P.E.R.C. No. 99-36, 24 NJPER 514 (¶29239 1998), aff'd 26 NJPER 113 (¶31046 App. Div. 2000) (teacher's alleged false or misleading statements to students about why their classroom had been changed was not related to curriculum or teaching).

We add that the incident that triggered this withholding occurred during a stipended extracurricular assignment. Chaperoning a cruise to the Bahamas was extracurricular because it was not part of the teaching and duty assignments scheduled during the regular work day, work week or work year. See N.J.S.A. 34:13A-22. In Boonton Bd. of Ed., P.E.R.C. No. 99-101, 25 NJPER 288 (¶30121 1999), we explained that:

When the Legislature enacted N.J.S.A. 34:13A-27 permitting teachers to arbitrate withholdings not predominately based on teaching performance, it simultaneously enacted N.J.S.A. 34:13A-23 making negotiable all aspects of assignment to, retention in, dismissal from and any terms and conditions of employment concerning extracurricular

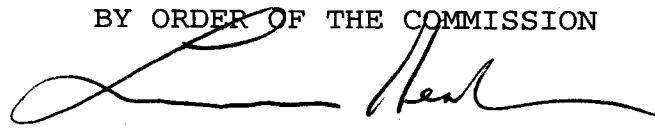
activities, except the establishment of qualifications. The Legislature thus distinguished extracurricular assignments from regular teachers assignments; the latter remain non-negotiable under Ridgefield Park. Given the Legislature's differentiation between extracurricular assignments and teaching assignments, we would ordinarily expect that a coaching incident would not be equated with teaching performance concerns under N.J.S.A. 34:13A-27. [Id. at 291; footnotes omitted]

Applying Boonton's view of extracurricular assignments to the facts of this case comports with our independent conclusion that this withholding was not based on an evaluation of teaching performance. Under either mode of analysis, we decline to restrain binding arbitration.

ORDER

The request of the Board of Education of the Bergen County Vocational and Technical Schools District for a restraint of binding arbitration is denied.

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: April 29, 2004
Trenton, New Jersey
ISSUED: April 30, 2004