

P.E.R.C. NO. 2005-80

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2005-064

MIDDLESEX EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Middlesex Board of Education for a restraint of binding arbitration of a grievance filed by the Middlesex Education Association. The grievance contests the withholding of a teaching staff member's salary increment. The Commission concludes that this withholding is based predominately on an evaluation of teaching performance and may only be challenged before the Commissioner of Education. The alleged deficiencies stem from the teaching staff member's interaction with students in her classroom, the media center.

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, Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys (Kevin P. Kovacs, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Sasha A. Wolf, on the brief)

DECISION

On March 4, 2005, the Middlesex Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Middlesex Education Association. The grievance contests the withholding of a teaching staff member's salary increment.

The parties have filed briefs and exhibits.^{1/} These facts appear.

The Association represents teachers and other employees. The parties' collective negotiations agreement is effective from

^{1/} The Board's request for oral argument is denied. The matter has been fully briefed.

July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

Barbara Sottilaro is a tenured media specialist/librarian in the middle school. Grades four through eight are taught at that school.

On May 17, 2004, the Board passed a resolution to withhold Sottilaro's salary increment for the 2004-2005 school year. The superintendent's notice to Sottilaro stated:

The reasons for the Board's actions are set forth in several documents, identified below, all of which were previously received by you. The Board also considered your failure to recognize and accept the existence of the negative environment created by you in the Middle School's media center, despite being informed of the problem. The Board considered the following documents, as well as your responses to each:

1. June 2003 teacher evaluation authored by Elizabeth Tallman;
2. January 22, 2003 observation report authored by Elizabeth Tallman;
3. March 9, 2004 letter authored by Robert Heidt, Principal regarding unprofessional comments;
4. October 26, 2003 letter authored by Robert Heidt, Principal regarding inappropriate comments; and,
5. October 1, 2003 letter by Robert Heidt, Principal, regarding inappropriate comments.

A summary of each document follows:

1. In the January 2003 observation report, Principal Elizabeth Tallman noted her concern with the classroom environment. She wrote that "the limited amount of praise, combined with an overemphasis on negative comments made this problematic." She also criticized Sottilaro's interactions with students and stated that the structure of the lesson did not reflect current middle school pedagogy. Tallman suggested discussing strategies for reaching lower school students in a positive way.

2. Under Planning and Preparation in the June 2003 evaluation, Tallman wrote:

Mrs. Sottilaro has a fine working knowledge of media and its application to learning situations, however her content knowledge is not matched by a working knowledge of her students and their needs. Special education students have needs that require adaptation and flexibility in the delivery of instruction. IEPs should be used as a guide for those special needs students. Assessment of student learning needs to [be] separated from student behavior. A student cannot fail because of a behavioral issue - the two are separate and distinct and need to remain that way. Mrs. Sottilaro makes good use of the resources that are available to her, but needs to extend research to include the use of the computer labs for research.

Under Classroom Environment and Instruction, the principal wrote:

The media center is not an environment of mutual respect or rapport. Many students (and some faculty) feel uncomfortable in the library, and attribute their discomfort to Mrs. Sottilaro. Students and adults are spoken to sharply and in a manner that does

not support inquiry or interest in the library. The physical space is well organized and accommodates the Basic Skills program. Students thrive in an atmosphere of positive reinforcement.

Under Instruction, the principal wrote:

Communication with Ms. Sottilaro is terse, and limits student's full engagement in the learning process. Feedback to students needs to be positive, and all too frequently it is not. Referring to a student by race is not acceptable, and applying labels to students creates lifelong wounds. Flexibility is also problematic. The media center is a part of the school, and as such is open to outside groups for meetings - Girl Scouts, PTO, Band Boosters. Speaking sharply to community representatives creates a situation that defeats the best public relations attempts.

The principal wrote that even though Sottilaro attended workshops and that she, along with her full-time library assistant, runs a media center that services 847 students and a staff of 90, Sottilaro did not meet her expectations for a media specialist. She wrote that the media center needs to become a place where learning is nurtured and a love of learning blooms.

3. The October 1, 2003 memorandum to Sottilaro stated that as Principal Robert Heidt was walking through her class, he overheard her chastising a child in front of the class because the student had not held his eyes on her but had looked away. He reminded her that the "Student Discipline Policy" provides that students should never be confronted in front of their classes or peers.

4. The October 26, 2003 letter from Heidt concerned Sottilaro's criticism of a teaching assistant in front of students. He directed Sottilaro to "cease and desist from such discourses."

5. The March 9, 2004 letter from Heidt stated:

This week I had two members of our professional staff come to me with concerns regarding your verbal treatment of your 5th grade Information Literacy class. Both independently reported that on Friday, February 27, 2004 you made numerous comments that were inappropriate and unprofessional. These comments included "you can't do anything right," "you never get here on time," and "don't make me take a pill." Chastising the whole group for the infractions of a few is extremely counterproductive to good classroom management. Furthermore, your obvious frustration, demonstrated by your yelling and screaming at the class "shut up, you need to shut your mouths now just shut up!" is totally inappropriate for an educational professional. The staff members that came forward with this information did so out of concern and compassion for the students. They were "shocked" by the behavior they witnessed and "wouldn't want their own children spoken to that way."

To further substantiate the above claims, I called in two additional staff members who were also present at the time. Independently, both verified the above to have occurred.

Please note that this is now the third letter you have received from me this year regarding inappropriate comments to students and/or fellow teachers. Based on your inability to recognize and correct this problem I am forwarding my recommendation to Superintendent of Schools, Dr. Pat Johnson,

to withhold any increment in your salary for the 2004-2005 school year. As with the other letters of reprimand, you may submit a rebuttal to this notice or take any legal actions your association deems appropriate.

On May 17, 2004, the Board voted to withhold Sottilaro's increment. Although no grievance documents have been submitted, the Association states that it filed a grievance. On September 27, 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 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 is based predominately on an evaluation of Sottilaro's teaching performance. In particular, the Board states that the withholding focuses on its assessment that Sottilaro has created a "negative environment" as documented in the submitted evaluations and memoranda.

The Association argues that this withholding is not based on the evaluation of teaching performance, but instead on Sottilaro's failure to follow administrative directives and her professional demeanor and attitude. The Association also argues that Sottilaro's comments to students and co-workers were not curricular-based and did not involve teaching performance.

This withholding is based predominately on an evaluation of teaching performance and may only be challenged before the Commissioner of Education. The teacher's alleged deficiencies stem from her interaction with students in her classroom, the media center, specifically her alleged comments to students in the classroom and her alleged criticisms of fellow staff members in front of students. These classroom management and student interaction concerns all involve teaching performance. Compare Dennis Tp. Bd. of Ed., P.E.R.C. No. 98-50, 23 NJPER 605 (¶28297 1997). That administrators may have issued "directives" to the

teacher to comply with Board policies on appropriate interactions with students in the classroom does not eliminate the underlying connection to teaching performance.

The Association's reliance on Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001), is misplaced. In that case, we found that a withholding was not based on the evaluation of teaching performance where the teacher had allegedly violated a policy prohibiting teachers from leaving students alone in the classroom and more general directives and policies concerning student supervision. We noted that had the withholding been based on an allegation of poor judgment in how to supervise students in the classroom, it would most likely have involved an evaluation of teaching performance. We emphasized that, "[w]here a withholding flows from a board's subjective educational judgment about what type of interaction should take place in a classroom, it is predominately related to an evaluation of teaching performance." Id. at 392. That is exactly what we find here. Contrast Franklin Tp. Bd. of Ed., P.E.R.C. No. 2000-90, 26 NJPER 272 (¶31106 2000) (withholding not based on teaching performance where teacher allegedly failed to comply with directive to communicate with a parent); 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) (withholding not based on teaching performance where teacher's alleged misinforming of

students about why their class was moved did not involve curriculum, teaching or materials; students would have had no basis for knowing that teacher's response was misleading or inappropriate). Accordingly, we restrain binding arbitration. This teaching staff member may file a petition of appeal with the Commissioner of Education. N.J.S.A. 34:13A-27(d).

ORDER

The request of the Middlesex 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, Fuller and Katz voted in favor of this decision. Commissioner Watkins abstained. Commissioner Mastriani was not present. None opposed.

DATED: June 30, 2005
Trenton, New Jersey
ISSUED: June 30, 2005