

P.E.R.C. NO. 2005-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WASHINGTON TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2005-050

WASHINGTON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Washington Township Board of Education for a restraint of binding arbitration of a grievance filed by the Washington Township Education Association. The grievance contests the withholding of a teaching staff member's salary increment. The Commission concludes that this withholding was based on the teacher's alleged failure to communicate with parents concerning their children's academic performance, coupled with the other alleged deficiencies. The Commission holds that this withholding was predominately based on an evaluation of teaching performance. The Commission declines to restrain binding arbitration over the Association's claims concerning contractually mandated notice and evaluation procedures.

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, Capehart & Scatchard, attorneys
(Michael Heston, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Keith Waldman, on the brief)

DECISION

On January 27, 2005, the Washington Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Washington Township Education Association. The grievance contests the withholding of a teaching staff member's salary increment.

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

The Association represents teaching staff members. The parties' collective negotiations agreement is effective from July

1, 2004 through June 30, 2007. The grievance procedure ends in binding arbitration. Article IV. D provides that "No employee shall be disciplined without just cause in areas ruled negotiable."

Board policy 3152 is entitled Withholding An Increment and sets forth the requirements for receiving annual employment and adjustment increments. It provides that advancements require "favorable evaluations of the employee's performance of assigned duties, a satisfactory attendance record, and adherence to the rules of this district and high standards of professional conduct."

Beth Weid is a tenured math teacher at the high school. On March 5, 2004, the Executive Assistant Principal wrote the following memorandum to the Superintendent:

Beth Weid, a tenured math teacher at the High School, has failed to follow both verbal and written directives concerning parent communication and the return of graded work in a timely fashion. Moreover, she has failed to follow specific directives delineated in her action plan relative to parent communication. Therefore, I am recommending that her employment and salary increments for the 2004-2005 school year be withheld, and that her 2004-2005 salary remain at the 2003-2004 level.

Please find attached all of the pertinent written communications to Mrs. Weid regarding the above, which includes memos from administrators dated 12/23/98, 1/31/01, 3/13/01, 10/26/01, 1/17/02, 3/5/02, 1/20/03, 5/8/03 and 11/17/03. In addition, please refer to the attached summative evaluations

dated 4/28/99, 6/14/02, and 5/7/03, and copies of the two action plans signed and dated 3/7/03 and 9/12/03. Significantly, my memo of 2/10/03 states that "future incidents may be met with further disciplinary action."

Moreover, my involvement in several parent complaints regarding communication issues that were brought to my attention in January 2004 heightened my concern that the previous verbal/written directives have been disregarded, and that a more significant administrative response is necessary. One of the complaints centered on Mrs. Weid failing to contact the parent of [a student] after they made a request through guidance in mid-December, 2003 to have her teachers contact them regarding their daughter's illness, absences and progress. All of [the student's] teachers contacted the parents except Mrs. Weid. The only explanation offered by Mrs. Weid was that her voice mail was not working properly, which I subsequently found to be invalid. The other two parent complaints arose from allegations that two 11th grade students in Mrs. Weid's Algebra 2 class . . . cheated on an 11/25/03 exam. My investigation revealed that neither the students nor their parents were contacted about the alleged cheating until well into the second marking period, and only after the students initiated the concern after realizing the dramatic drop in their grades as shown in progress reports. Additionally, the graded test had never been returned to these students or any other student in that class. As to [one student] there had been several missed opportunities to inform the student and his parents of the cheating incident being a factor in the low grade. Indeed, these opportunities arose due to the parent complaining that Mrs. Weid had not returned various voice mail messages. Also, Mrs. Weid gave conflicting accounts as to whether she ever confronted [the student] regarding the allegation of cheating in my meeting with her and her union representative

on 1/29/04, and then later in the meeting with [the student's] parents on 2/4/04.

Due to these concerns and subsequent investigation I conclude that Mrs. Weid has failed to comply with both written and verbal directives from the high school administration and is subject to further disciplinary action as recommended in the opening paragraph of this memorandum.

Your time and consideration in this matter is appreciated.

On March 12, 2004, the Superintendent wrote to Weid asking her to meet with him on March 22 to discuss "concerns regarding your evaluations and teaching performance." He stated that the meeting would also concern the recommendations of the high school administration to withhold her increment for the 2004-2005 school year. She was also advised that she had the right to have union representation during the meeting.

On April 20, 2004, Weid responded to the March 5, 2004 memorandum recommending the withholding of her increment. She stated that all conferences that she had with students ended positively and students continued successfully in her class and all her evaluations were satisfactory and in some cases outstanding. She also stated that only one action plan had been developed the prior Spring and continued for the 2003-2004 school year and that she had complied with all aspects of the plan and submitted the required communication logs for each month to show

that she had responded to all three parents who complained that she had not done so.

On April 22, 2004, the Director of Human Resources advised Weid that there would be a discussion and decision concerning her increment withholding at the April 27 Board meeting. On April 27, the Board voted to withhold Weid's employment and salary increments for the 2004-2005 school year.

On May 24, 2004, the Association filed a grievance contesting the withholding as violating Article IV. D. The Board denied the grievance and on December 17, the Association demanded arbitration. This petition ensued.

On April 7, 2005, the Commission Case Administrator wrote to the Board asking it to provide a copy of the written statement of reasons that informed the employee of the basis for the increment withholding. The letter explained:

In increment withholding cases, where a board of education has not submitted a copy of the official statement of reasons for the withholding that was provided to the teaching staff member pursuant to N.J.S.A. 18A:29-14, the board must submit certifications from the principal actors in the dispute explaining the facts surrounding the withholding, the basis for the recommendation to the board, and the basis of the board's action. A union may subsequently file certifications in response to the Board's submissions.

If an official statement of reasons is not provided, certifications in support of the Board's petition must be filed within 10 days of receipt of this letter. The Association shall have 7 days from receipt to file

certifications in response to any Board certifications.

On April 8, 2005, the Board submitted an April 28, 2004 letter to Weid that advised her of the Board's decision but did not state the reasons for its action. No certifications were filed. In its initial submissions, the Board included the memoranda and evaluations referred to in the Assistant Principal's March 5, 2004 memorandum to the Superintendent recommending the withholding. These documents are as follows:

1. A December 23, 1998 memorandum to Weid advising her that she should contact parents whenever any student's academic performance declines.
2. A 1999 Summative Evaluation Form in which Weid received a satisfactory evaluation and outstanding ratings under Supervisory Duties and Professional Growth. A Narrative Summary commended Weid's rapport with her students and her well organized and clearly presented lessons. However, the summary also recommended that Weid respond to parents' calls or notes in a timely fashion. The evaluator suggested that she check voice mail daily and return parents' calls the same or next day.
3. A memorandum dated January 31, 2001 concerning a parent conference reminding Weid to check her voice and e-mail regularly and respond to parents' calls in a timely manner. She was also advised to remind students on a weekly basis of her availability for after school help. Finally, she was directed to handle disciplinary issues tactfully.
4. A March 13, 2001 memo reminding Weid to check voice and e-mail messages

regularly and to return parents' calls within 24 hours. It also reminded Weid to grade and return work as quickly as possible.

5. A 2001 Summative Evaluation Form that recommends Weid's contract renewal for the 2001-2002 school year. She was rated Outstanding for teaching performance, professional competencies, punctuality, supervisory duties and professional growth and satisfactory in all other categories except human relations, where she received a needs improvement with a note to see the narrative section. That section recommended that Weid respond to parents in a timely fashion and that she check her e-mail and voice mail on a regular basis. The narrative referred to the 1/31 and 3/13/01 memos on the subject of communicating with parents.
6. An October 26, 2001 memorandum to Weid concerning a teacher conference about a student who had missed several classes. The memorandum advised Weid, among other things, to communicate with parents via e-mail or phone concerning the student's progress.
7. A January 17, 2002 memorandum to Weid that followed up on a January 7, 2002 meeting. The purpose of the memo was to reiterate the importance of these points:

Being at her door to greet students at the beginning of class.

Being up and active during class and not teaching from her desk.

On-going evaluation of students. Being certain that students are grasping the material taught and its concepts.

Keeping lines of communication open between her and her students and their parents. Return phone calls, answer e-mails and set up conferences to address issues.

8. A March 5, 2002 memorandum to Weid summarizing a meeting on that date concerning a parent's concerns about her son's failing grade, timely return of phone calls to the parent, ability of the student to get after school help and rudeness on the phone. The memorandum advises Weid to return phone calls in a timely fashion, to provide after school help, and provide missed work when a student is absent.
9. A formative evaluation dated April 23, 2002 which gave Weid all successful ratings and commended her class preparation, knowledge of content, and her use of peer instruction. The recommendation for improvement suggested that Weid use various "checks for understanding" to monitor student progress in understanding the lesson being taught.
10. A Teacher Summative Evaluation for the 2001/2002 school year in which Weid received all satisfactory ratings in the classroom responsibilities section of the form and satisfactory and outstanding ratings in non-classroom responsibilities and "other indicators." The narrative summary complimented Weid for her diligence and her use of a variety of teaching materials to best meet her objectives. However, the evaluator also recommended that Weid keep lines of communication with parents and students open by continuing to return phone calls in a timely fashion.
11. A professional improvement plan for 2002/2003 that set goals relating to

training in the district's new student software management system; development of new instructional strategies; and assessment of work submitted by teachers who had applied for certification by the National Board for Professional Teaching standards.

12. A February 10, 2003 memorandum to Weid from the principal stating that "communication" had been a recurring issue over the course of Weid's employment. The principal stated that she had been reminded on numerous occasions to return parents' calls and e-mail messages in a timely fashion. He wrote that these concerns were again raised at a parent-teacher conference and stated it was imperative that Weid return all parents' messages within 24 to 48 hours. He also advised that an action plan was being developed to help Weid improve communication.
13. An action plan signed by Weid on March 7, 2003. The plan set forth seven recommendations for improving communication, including checking e-mails at least daily and maintaining a log of parent contacts.
14. A memorandum from the department supervisor to Weid stating that it was unacceptable for her to take from Wednesday to Monday to grade a quiz, especially since the parents had requested an update on their child's grades for the marking period.
15. A Teacher Summative Form for June 2003 in which Weid received outstanding ratings in supervisory duties and professional competence and growth, and satisfactory ratings in all other areas. The last paragraph of the narrative stated:

In March of this year Ms. Weid was given a Teaching Performance Action Plan to improve parent communication. She has been maintaining a monthly log of parental contacts which she submits at the end of each month. I would ask Ms. Weid to continue keeping lines of communication open with students and parents when questions arise relative to your class. Please continue to return calls and e-mails in a timely fashion.

16. A memorandum from the department supervisor to Weid advising her that the teaching performance plan to improve parent communication would be continued for the 2003-2004 school year.
17. A memorandum from the department supervisor to Weid dated November 17, 2003 advising her that she had not received a parent communication log for October as set forth in the action plan.
18. A memorandum from the department supervisor to Weid stating that the October log had been received.

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 on an evaluation of teaching performance and that communicating openly with parents for the benefit of the pupil is one of the district's performance indicators for teachers. It maintains that, in evaluating Weid, it determined that she had not followed either verbal or written directives to communicate openly with parents and pupils. It contends that regardless of the "further disciplinary action" statement in the Assistant Principal's March 5 memorandum, this withholding is predominately based on an evaluation of teaching performance.

The Association counters that based on the language of the March 5 memorandum, this withholding is predominately disciplinary. It states that the withholding is not tied to a

subjective assessment of in-class teaching performance and that we have declined to restrain arbitration where the withholding is based on objective reasons like allegedly excessive absenteeism, leaving a student unattended, or similar conduct. It asserts that allegations that a teacher consistently failed to respond to communications from parents center on improper conduct rather than teaching performance.

In addition, the Association argues that even if we find that the basis for this withholding is predominately an evaluation of teaching performance, the portion of the grievance that addresses the issue of the Board's failure to follow contractually-mandated procedures should be allowed to proceed to arbitration.

We start with a threshold procedural issue. In increment withholding cases the school board ordinarily provides us with the same statement of reasons it was required to give the teacher under N.J.S.A. 18A:29-14. In selecting a forum under N.J.S.A. 34:13A-27, we accept that statement of reasons, determine whether the stated reasons are predominately based on the evaluation of teaching performance, and do not consider contentions that those reasons are pretextual or unsupported. See Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003); see also North Caldwell Bd. of Ed., P.E.R.C. No. 2001-76, 27 NJPER 290 (¶32105 2001); Greater Egg Harbor Reg. Bd. of Ed., P.E.R.C. No. 2000-85,

26 NJPER 214 (¶31088 2000); Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996). Thus, the statement of reasons is critical to the exercise of our forum selection jurisdiction and, where no statement exists, we will ordinarily require certifications from the principal actors attesting to the reasons for the withholding. In this case, however, there appears to be no dispute that the withholding was based primarily on the reasons stated in the executive assistant principal's March 5, 2004 memorandum.

In considering whether those reasons were predominately related to an evaluation of teaching performance, we start with a brief review of our case law framework in increment withholding cases. While we decide these forum-selection matters case by case, we have, in broad outline, restrained arbitration of withholdings based on allegations of poor instruction, inadequate classroom management, or inappropriate in-class remarks or conduct. See, e.g., Knowlton Tp. Bd. of Ed., P.E.R.C. No. 2003-47, 29 NJPER 19 (¶5 2003) (allegations that a teacher humiliated students in class); Northern Highlands Reg. Bd. of Ed., P.E.R.C. No. 2003-49, 29 NJPER 24 (¶7 2003) (alleged difficulties in relating to female students, as well as allegedly inappropriate demeanor with the entire class); South Harrison Bd. of Ed., P.E.R.C. No. 96-36, 22 NJPER 20 (¶27007 1995) (alleged deficiencies in preparing lessons, instructing students, and

difficulty in maintaining classroom discipline); Wood-Ridge Bd. of Ed., P.E.R.C. No. 98-41, 23 NJPER 564 (¶28281 1997) (ineffective instruction). The touchstone of these decisions is that such allegations involve subjective educational judgments about whether the district's curriculum is being properly implemented or what type of instruction or interactions should take place in a classroom. Accordingly, we have held that such withholdings are predominately related to an evaluation of teaching performance and, therefore, are to be reviewed by the Commissioner of Education.

On the other hand, we have declined to restrain arbitration of withholdings based predominately on allegations of excessive absenteeism, violations of administrative procedures, or certain non-classroom interactions with parents or students. 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 allegedly inappropriate confrontation with a parent who had approached him at a holiday concert did not involve teaching, interacting with students, or meeting with the parent in a formal parent-teacher conference); Edison Tp. Bd. of Ed., P.E.R.C. No. 97-40, 22 NJPER 390 (¶27211 1996), aff'd 304 N.J. Super. 459 (App. Div. 1997) (excessive absenteeism); Morris Bd. of Ed., P.E.R.C. No. 93-50, 19 NJPER 50 (¶24023 1992) (sixth grade teacher sent allegedly inappropriate Christmas card to ninth-

grade former student); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992) (teacher allegedly left work early, falsified sign-out sheet, repeatedly missed back-to-school night, and was generally insubordinate). We have also allowed arbitration in a corporal punishment case where the teacher denied the charges and an arbitrator could objectively determine whether the teacher engaged in indisputably improper conduct. See Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991). The gravamen of these decisions is that the allegations did not involve instruction, maintenance of an appropriate classroom environment, or in-class conduct. Given a legislative framework that presumes that some withholdings are not predominately related to an evaluation of teaching performance, we found that these withholdings did not implicate the Commissioner of Education's educational expertise and could therefore be arbitrated.

Comparatively few of our increment withholding cases have centered on teacher-parent interactions. As noted, Demarest held that a single, out-of-class, allegedly inappropriate interaction with a parent did not predominately relate to an evaluation of teaching performance. In Franklin Tp. Bd. of Ed., P.E.R.C. No. 2000-90, 26 NJPER 272 (¶31106 2000), we stated that communication with parents is an element of teaching performance, but found that a single incident of a teacher refusing to communicate with

a parent about her son's grade did not involve an evaluation of teaching performance. We noted that the Board did not dispute the Association's contention that the teacher's performance was exemplary.

By contrast, in Southern Gloucester Cty. Reg. School Dist., P.E.R.C. No. 93-26, 18 NJPER 479 (¶23218 1992), we restrained arbitration of a withholding based, in part, on ongoing parental complaints about a teacher's in-class humiliation of students and her adversarial dealings with the parents in parent-teacher conferences.

Against this backdrop, we turn to the facts in this case. The undisputed basis for this withholding was Weid's alleged failure to communicate with parents about their children's academic performance, coupled with the other alleged deficiencies outlined in the March 5, 2004 memorandum and the documents it referenced. We conclude that these reasons are predominately related to an evaluation of teaching performance.

Unlike Franklin, this case does not involve a teacher's alleged failure to complete a single, discrete task - contacting a parent about one student's grades. Nor were the repeated admonitions that Weid check her e-mail and voice mail and promptly respond to parental inquires simply reminders to comply with administrative protocols in these areas. Instead, they reflected the Board's concern that her alleged deficiencies in

communicating with parents had affected, or could affect, the continuity or effectiveness of her instruction for some students. Thus, the first memorandum in the record requires Weid to inform parents when a student's academic progress declines; she was advised on two occasions to contact the parents of students who had missed several classes due to illness; and admonished on another for not promptly contacting a parent to discuss her son's failing grade. In the case of absent students, the Board evidently views parental contacts as necessary to ensuring continuity of instruction, and, with respect to poorly performing students, believes that parental contacts are one facet of a teacher's monitoring and improving on the effectiveness of her instruction. Accordingly, we conclude the Board's concerns about parental communications were closely intertwined with judgments about the type of instruction and educational support that a teacher should provide to students. Within our case law framework, these reasons predominately involve an evaluation of teaching performance.

We similarly conclude that the additional criticisms outlined in the March 5, 2004 memorandum and other documents are predominately related to an evaluation of teaching performance. For example, the Board was concerned that Weid grade and return examinations as soon as possible; advised her to remind students of her availability for after-school help; and directed her to

handle disciplinary issues tactfully and keep lines of communication with students open. The March 5 memorandum also questioned her judgment in handling a situation where two students had allegedly cheated on a test and questioned why she did not confront the students or contact their parents. All of these concerns center on instruction or classroom management and thus fall squarely within the ambit of cases finding that withholdings were predominately related to an evaluation of teaching performances.

Finally, the Board did not file a reply brief addressing the Association's claim that it may arbitrate the portion of the grievance alleging that the Board violated contractually mandated notice and evaluation procedures. Therefore, there is no basis to restrain arbitration over this issue and we do not consider it further. See Montclair Bd. of Ed., P.E.R.C. No. 2002-3, 27 NJPER 321 (¶32114 2001).

For the foregoing reasons, we conclude that the withholding was predominately based on an evaluation of teaching performance.

ORDER

The request of the Washington Township Board of Education for a restraint of binding arbitration over the decision to withhold Beth Weid's increment is granted.

BY ORDER OF THE COMMISSION

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

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners DiNardo, Fuller, Katz and Watkins voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioner Mastriani was not present.

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