

P.E.R.C. NO. 2006-81

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WOODBURY BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2006-048

WOODBURY EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

\_\_\_\_\_The Public Employment Relations Commission grants, in part, the request of the Woodbury Board of Education for a restraint of binding arbitration of a grievance filed by the Woodbury Education Association. The grievance asserts that the Board violated the parties' collective negotiations agreement when it withheld a teachers's salary increments without just case and did not comply with contractual evaluation procedures. The Commission is disturbed by the Board's failure to comply with notice to teacher requirements of N.J.S.A. 18A:29-14. However, the Board has produced an annual performance review that cites teaching performance concerns and the Commission does not have a basis for determining that the performance review should not be given significant weight in the Board's reasons for the withholding. The Commission restrains binding arbitration of the substantive decision to withhold the increments, but denies the request for a restraint concerning procedural claims.

\_\_\_\_\_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, Taylor, Whalen Hybbeneth, Labor  
Relations Consultants (Bruce Taylor, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys  
(Michael C. Damm, on the brief)

DECISION

On January 4, 2006, the Woodbury Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Woodbury Education Association. The grievance asserts that the Board violated the parties' collective negotiations agreement when it withheld a teacher's salary increments without just cause and did not comply with contractual evaluation procedures.

The parties have filed briefs and exhibits. The Board has submitted an affidavit of Daniel J. Mackie, the high school principal. The Association has submitted the certification of

Marvin T. Clark, the teacher whose increments were withheld. These facts appear.

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

Article V is entitled Teacher Rights. Section B provides:

No teacher shall be disciplined in any manner or form without just cause. Any such action . . . shall be subject to the grievance procedure. . . .

Article XV is entitled Teacher Evaluation. Section E provides:

All tenured teachers must be observed and evaluated at least once prior to May 15th. All PIP's shall be completed at least seven (7) days prior to the last teacher work day.

Marvin Clark is a tenured teaching staff member. He has been employed by the Board for 11 years and teaches social studies at the high school.

At its June 28, 2004 meeting, the Board approved the administration's recommendation that it withhold Clark's employment and adjustment increments for the 2004-05 school year. The minutes of that meeting cited inefficiencies in performance as the reason. Clark was given a Corrective Action Plan (CAP) for the next school year.

During the 2004-05 school year, Clark was supervised by Mackie and three other certified supervisors. Mackie and Clark met several times during the year, but Mackie did not tell Clark of any complaints and he signed Clark's journal concerning the CAP.

Clark was scheduled to meet with Mackie sometime in April 2005 to discuss his Annual Performance Review (APR) and the 2005-06 Professional Improvement Plan (PIP). But the meeting was postponed by the administration and rescheduled to June 16, 2005, the next to last day of school.

Clark asserts that he and Mackie have had a strained relationship and that during the June 16 meeting, a disagreement arose when Mackie questioned Clark's grading and took his grade book. Clark states that grading had not been an issue before. He asked for his grade book back so that he could record exam results from the day before; Mackie refused to give him the book. According to Clark, Mackie called security, but Clark left before security arrived.

Mackie then prepared an APR dated June 16, 2005. Under Section I, Overall, the review stated:

Mr. Clark's performance for this year has been less than satisfactory. This is the second year in a row. This statement is based on this year's performance/observations (see attached).

One observation identified the need for more planning. There was no clear objective. The

assessment strategy lacked teacher feedback and student participation. This lesson was absent of teacher content knowledge input.

A second observation revealed sufficient teacher/student interaction with healthy teacher involvement. Students eagerly participated and completed/listened to teacher input and directions. It was suggested that the outline activity could best be accomplished for homework therefore allowing time for more direct instruction, discussion leading to further understanding.

A third observation generated a description of a non-teaching activity day. Students were assigned to do work and little teacher input and feedback occurred. Reflective comments indicated a need to include higher level thinking skills by way of learning strategies and increased interaction.

A fourth observation revealed limited teacher input. Instruction included minimal visual information and most of the student activity was textbook based. Most of the learning activity was independent and absent of teacher feedback and student/student interaction.

Examination of grade book during the APR conference on 6/16/05 disclosed failure to adequately record student grades for three courses (see attached). Attendance records were unavailable.

Under Areas of Strength, the APR cited Clark's outstanding content knowledge. Under Areas of Improvement, the APR stated:

Mr. Clark needs to plan more deeply/comprehensively and be more engaging with student inquiry and higher order thinking.

Lesson plans were submitted. Observations generally do not indicate adequate preparation, assessment strategies or

implementation of learning strategies.  
Teacher enthusiasm leading to inquiry based  
activity is needed. Rigor and assessment  
strategies that promote achievement at the  
highest levels are strongly needed.

At the end of the APR, Mackie recommended that Clark's contract be renewed. But he also recommended continuing to withhold his increment for the 2005-06 school year based on Clark's alleged "failure to make adequate progress on 2004-05 APR recommendations and failure to adequately record students grades in three courses." Clark states that before June 16 he had no indication that his increment would be withheld.

The next day, the interim superintendent informed Clark that he would recommend that the Board withhold his increments for the 2005-06 school year based on his failure to make adequate progress under the CAP. He wrote that "[e]vidence of your continued inefficiency in your teaching performance is shown by your failure to maintain daily student grades for three of your classes."

The Board met on June 28, 2005 and approved the recommendation that Clark's increments be withheld. The minutes of that meeting state that the continued withholding for the next school year was "based upon the inefficiencies of his teaching performance. Mr. Clark failed to maintain student grades for three of his classes."

N.J.S.A. 18A:29-14 requires that a teacher receive written notice of a withholding and the reasons for it within ten days of a board's vote to withhold increments. Clark did not receive any notice or reasons from the Board and the Board did not submit such a document in response to our request for one.

On July 21, 2005, the Association's president asked the Board for a hearing. The acting superintendent denied that request. He cited the reason for the withholding to be "teacher inefficiency based upon an evaluation of your teaching performance that indicated a special concern associated with your failure to appropriately record student grades."

On August 15, 2005, the Association filed a grievance with the superintendent and Board. The accompanying letter stated:

It is the Association's position that Mr. Clark was treated unfairly. At a June 17th meeting (violation of Article 15E) a disagreement occurred. The position of the Association is that the increment withholding is a disciplinary act and that Dr. Mackie has a bias towards Mr. Clark. Throughout the 2004-05 school year, Dr. Mackie met with Mr. Clark once a month and never once indicated a problem with Mr. Clark's meeting the requirements of the [CAP], nor did any of his observations reflect a grade problem. The Association feels that Mr. Clark met the terms of his [CAP] and the increment withholding is a personal attack and not a performance issue.

The grievance alleged that the withholding lacked just cause and violated evaluation guidelines. The Association sought this relief: restoration of the 2005-06 increment; Mackie no longer be

Clark's immediate supervisor; the APR and PIP for the 2005-06 school year be developed as soon as possible, and any other appropriate relief.

On August 24, 2005, the superintendent denied the grievance.

He wrote:

The first aspect of the filed grievance deals with Mr. Clark's claim that the decision to withhold his increments for the 2005-06 school year was disciplinary. My finding is that the recommendation to withhold the employment and adjustment increments by the prior superintendent in June of 2005 was based on Mr. Clark's failure to make adequate progress on his 2004-05 APR recommendations, his [CAP] for 2004-05, and his failure to adequately record student grades. The Board resolution speaks specifically to the withholding of the increments based on teacher inefficiency associated with the grading issue.

The recommendation and board action are clearly teacher performance based and not disciplinary. Therefore, this action is not subject to the grievance procedures. The increment withholdings stand.

I find that it is true that the administrator responsible for completing the annual performance review failed to meet the contractual expectation of having the PIP "completed at least seven (7) days prior to the last teacher work day." (Article XV.E.) I will send correspondence to all administrators indicating the expectation that all will follow this evaluation timeline requirement and all aspects of the negotiated agreement. In addition, I will address the relief sought with respect to this aspect of the grievance by assigning a new immediate supervisor for Mr. Clark for the upcoming school year. . . .



Clark received his 2004-05 APR and 2005-06 PIP and the superintendent's letter around August 27. He states that he could not timely correct the APR's many errors because he did not receive it until two months after the withholding vote.

On September 1, 2005, the Association appealed the grievance denial to the Board. The appeal stated:

The Association feels the action taken was disciplinary. Mr. Clark was never given any indication that he was not meeting any part of his [CAP] throughout the year. The grade book was never part of the [CAP], nor was Mr. Clark given any indication as to what was to be in his grade book.

We are not satisfied with the superintendent sending a letter to the administration regarding meeting their timelines set in the contract (Article XV E), unless we receive a copy of this letter and also the consequences for the administrators not meeting this timeline. We want the same relief as in the original grievance for Mr. Clark.

The Association believes that Mr. Clark's increment was withheld because he did not share the same opinion as Dr. Mackie, not because of his performance.

On October 3, 2005, the Board's Personnel Committee denied the grievance. It affirmed the withholding for the reasons given by the superintendent.

On October 6, 2005, the Association demanded arbitration. The demand for arbitration alleges that the Board violated Article XV, Section E and Article V, Section B and any other applicable provisions when it withheld Clark's increment without

just cause and violated evaluation guidelines. The demand sought restoration of Clark's increments, mutual development of a new PIP, and any other proper relief. This petition ensued.

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 asserts that this withholding was predominantly based on an evaluation of teaching performance as indicated by the reasons given in the APR for the 2004-05 school year. The Association has not disputed the Board's assertion that the APR reasons are grounded in teaching performance. However, the Association argues that these reasons are pretextual and the withholding was instead based on a personality clash and difference of opinion.

We are disturbed by the Board's unexplained failure to comply with the notice to teacher requirements of N.J.S.A. 18A:29-14. It is unclear to us why a school board would not discharge such an important and easy obligation. But the Board has produced an APR that cites teaching performance concerns that were raised during the June 16 conference and we do not have a

basis for determining that this APR should not be given significant weight in determining the Board's reasons for the withholding. And the principal has certified that continued teaching inefficiencies were the basis for his recommendation and the minutes of the Board meeting support that assertion and specify Clark's alleged failure to maintain student grades. In these regards, this case is markedly different from Pleasantville Bd. of Ed., P.E.R.C. No. 2002-21, 28 NJPER 17 (¶33004 2001), where the board did not produce any document or certification explaining the basis of the withholding, and Boonton Tp. Bd. of Ed., P.E.R.C. No. 99-101, 25 NJPER 288 (¶30121 1999), where the board had already voted to approve a teacher's increments for the next school year based on an annual evaluation and would not have withheld the increments absent a furor about the teacher's coaching actions in a softball game.

We will not look behind the reasons stated in the APR to see if an improper motive drove this withholding. Such an inquiry goes beyond our limited gatekeeping function by requiring us to conduct a full-scale hearing and plunging us into judging the merits of a withholding. Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996) (Commission assumed that the Board would be bound by its asserted reasons before the Commissioner and that the Commissioner had the power to set aside a withholding induced by an improper motive). We will thus

restrain binding arbitration over the substantive decision to withhold Clark's increments.

The parties agree that the Association's procedural claims may be arbitrated. See, e.g., Woodbury Bd. of Ed., P.E.R.C. No. 2000-108, 26 NJPER 313 (¶31127 2000). The Board, however, argues that education law requires that every teacher receive a written annual performance report and thus preempts an arbitral remedy of ordering the removal of the APR from Clark's personnel file. The Association responds that such a remedy would be permissible under Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div 1991), aff'd per curiam 130 N.J. 312 (1992).

The Association has not specifically requested removal of the APR as a form of relief. In any event, we follow our custom of declining to decide the legality of possible remedies in advance of arbitration. See Woodbury; Washington Tp. Bd. of Ed., P.E.R.C. No. 2004-62, 30 NJPER 105 (¶42 2004).

#### ORDER

The request of the Woodbury Board of Education for a restraint of binding arbitration is granted to the extent the grievance contests the substantive decision to withhold Clark's increments. The request for a restraint is otherwise denied.

BY ORDER OF THE COMMISSION

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

ISSUED: April 27, 2006

Trenton, New Jersey