

P.E.R.C. NO. 2007-17

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DUMONT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2007-001

DUMONT EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Dumont Board of Education for a restraint of binding arbitration of a grievance filed by the Dumont Education Association. The grievance contests the withholding of a teacher's salary increment. The Board stated that this increment withholding was based on the teacher's need to improve classroom management skills and student disciplinary procedures. The Commission concludes that the withholding relates predominately to the evaluation of teaching performance and any review must be before 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, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Linda Ganz Ott, on the brief)

For the Respondent, Springstead & Maurice, attorneys (Alfred F. Maurice on the brief)

DECISION

On July 11, 2006, the Dumont Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Dumont Education Association. The grievance contests the withholding of a teacher's salary increment.

The parties have filed the certifications of the teacher and the superintendent as well as exhibits and briefs. These facts appear.

The Association represents certificated teaching staff members. The parties' collective negotiations agreement is effective from July 1, 2005 through June 30, 2006. The grievance

procedure ends in binding arbitration of contractual disputes and advisory arbitration of other disputes.

This dispute involves a tenured physical education teacher. Employed by the Board since 1978, he teaches sixth and eighth grade physical education.

In March 2006, parents complained that during his classes, he called their children inappropriate names (e.g., retards and spastics) and put them in a closet to punish them for misconduct. The principal investigated these allegations and found them to be substantiated despite the teacher's denials and explanations. We need not detail the allegations and responses for purposes of this opinion. Similarly, we note but do not detail the allegations and responses concerning an incident in February 2005 in which the teacher allegedly grabbed a disruptive student during a physical education class and a three-day paid suspension in 2002 for speaking lewdly to students.

Based on these incidents, the principal recommended withholding the teacher's increment for the next school year. His annual evaluation for the 2005-2006 school year contained that recommendation. Under Instruction, the principal wrote:

[The teacher] . . . must continue to focus on improving classroom management skills, and student disciplinary procedures. As indicated in previous observations and meetings with . . . [the teacher], he has responded inconsistently to student misbehavior. Attempts to identify classroom management weaknesses and provide suggestions

for improvement have been met with limited improvement.

Under Summary, she wrote:

[The teacher] . . . continues to provide a well-designed physical education and health program for the sixth and eighth graders. . . . He provides for differentiation on many levels through incorporating a wide range of gross motor activities.

This year, [the teacher] . . . has made several instructional decisions regarding student behavior issues that have had a detrimental effect on the teaching and learning process. For the 2006-2007 school year, it is recommended that [the teacher] . . .

- A. Continue the classroom behavior management plan recently implemented and discussed (March 2006).
- B. Continue to immediately inform parents whenever a disciplinary issue arises in the classroom and to document all parental interactions in a parent/teacher log.
- C. Contact and seek the assistance of an administrator to assist with classroom management.

I find it necessary to recommend that [the teacher's] . . . increment be withheld for the 2006-2007 school year in [an] effort to improve his performance in the areas indicated above. These actions will certainly create and establish a positive learning environment within the gymnasium.

The teacher asserts that his first formal observation was on May 8, 2006, the date of the annual evaluation, and that the principal had often walked through the gym yet never stopped to comment about poor classroom management.

On May 26, 2006, the superintendent wrote the teacher that the Board had approved the recommendation to withhold his increment. The letter stated:

The reason for the withholding relates to the evaluation of your teaching performance based upon the need for you to improve your classroom management skills and student disciplinary procedures.

This was the first time the teacher's salary increment had been withheld. The Board also voted not to renew his contract as head volleyball coach.

Asserting that the withholding lacked just cause, the Association filed a grievance and demanded arbitration. This petition ensued. The parties agreed to postpone arbitration.

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]

We have often restrained arbitration over withholdings centering on allegations that a teacher made inappropriate comments to students during class or managed classroom discipline poorly. See, e.g., Orange Tp. Bd. of Ed., P.E.R.C. No. 2005-65, 31 NJPER 118 (¶50 2005); Old Bridge Bd. of Ed., P.E.R.C. No. 2004-57, 30 NJPER 77 (¶28 2004); Washington Bor. Bd. of Ed., P.E.R.C. No. 98-49, 23 NJPER 603 (¶28296 1997); Hazlet Bd. of Ed., P.E.R.C. No. 95-59, 21 NJPER 118 (¶26072 1995). The Association does not dispute that the concerns stemming from the March 2006 complaints and cited in the annual evaluation are teaching performance reasons; it argues instead that the Board is really punishing the teacher for insubordination in that he had been previously warned about similar teaching performance concerns and had not modified his conduct. We reject this argument. The March 2006 teaching performance complaints were at the heart of this withholding. Even if the Board viewed the teacher's alleged failure to improve his teaching performance after earlier warnings as insubordinate, such an allegation of insubordination would still be intertwined with the predominant teaching performance concerns. Hazlet at 120 (allegation of insubordination tied to teacher's alleged refusal to change his teaching techniques despite instructions to do so and the Board's concern that the teacher adopt new teaching techniques). We accordingly restrain arbitration.

ORDER

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

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

ISSUED:

Trenton, New Jersey