

P.E.R.C. NO. 2007-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STERLING HIGH SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2007-035

STERLING EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Sterling Board of Education for a restraint of binding arbitration of a grievance filed by the Sterling Education Association. The grievance alleges that the Board withheld a teacher's increment without just cause. The Commission concludes that the withholding was predominately based on an evaluation of teaching performance. The Commission denies a request for a restraint of binding arbitration of two grievances asserting that the Board violated the parties' contract when it issued observation reports to a teacher more than five days after the classroom observations, thereby warranting the removal of the reports from her personnel file. The Commission declines to restrain arbitration over alleged procedural violations and declines to speculate about what remedies might be awarded and may be appropriate.

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
(Garry M. Whalen, consultant, on the brief)

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

DECISION

On December 19, 2006, the Sterling High School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of three grievances filed by the Sterling Education Association. Two grievances assert that the Board violated the parties' contract when it issued observation reports to a teacher more than five days after the classroom observations, thereby warranting the removal of the reports from her personnel file. We decline to restrain arbitration of the alleged procedural violation or to speculate about the propriety of any remedy that might be awarded. The third grievance alleges that the Board

withheld the teacher's increment without just cause. We restrain arbitration over the withholding because it was predominately based on teaching performance reasons.

The parties have filed briefs and exhibits. The Board has submitted its superintendent's certification. These facts appear.

The Association represents teachers and other employees. The parties' collective negotiations agreement is effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration.

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 the contractual merits of the grievances or any contractual defenses the Board may have.

The Observation Report Grievances

Article 28 is entitled Teacher Evaluation. Section E provides:

- E. A teacher shall be given the written analysis of any observation within five (5) days of the evaluation. Upon request, the teacher shall be granted a conference to discuss such analysis. The written analysis shall be submitted to the teacher simultaneously with its presentation to the Administration. A teacher shall have the right to submit a written answer to any written analysis which shall be reviewed by the Administration, together with the analysis.

Linda Heuschkel is a physical education teacher. She filed two grievances alleging that the Board violated Section E when she received her observation reports more than five days after her classes were observed in the fall of 2005 and the spring of 2006. The grievances sought the removal of the reports from her personnel file and asked that they not be used in any increment withholding decision or any future school years or litigation.

The superintendent, Personnel Committee, and Board denied the grievances. Among the defenses raised were that the grievances were untimely, Heuschkel was able to discuss the points made, and Section E required that reports be issued within five school days, not five calendar days, of the observation. The Association demanded arbitration and this petition ensued.

The parties agree that Section E is mandatorily negotiable and that the question of whether the Board violated that section

may be arbitrated. The arbitrator may consider the Board's contractual defenses concerning the timeliness of the grievances and the meaning of "five days" in Section E.

While it does not object to the alleged procedural violation being arbitrated, the Board does ask that we restrain arbitration over any remedy that would remove the observation reports from Heuschkel's personnel file. As a rule, we decline to speculate about what remedies may be awarded and may be appropriate. See, e.g., Deptford Tp. Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 86 (¶12034 1981). The cases cited by the Board involved direct substantive contract restrictions that are non-negotiable rather than procedural contract provisions that are negotiable. See, e.g., Moorestown Tp. Bd. of Ed., P.E.R.C. No. 94-21, 19 NJPER 445 (¶24215 1993) (provision empowered arbitrator to remove personnel documents deemed obsolete or inappropriate). We add that in Lacey Tp. Bd. of Ed., P.E.R.C. No. 89-81, 15 NJPER 99 (¶20045 1989), we declined to restrain arbitration of a grievance alleging that an evaluation report had not been timely provided; the arbitrator ordered expungement of the report; and the Appellate Division and the Supreme Court upheld that order. Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div 1991), aff'd o.b. 130 N.J. 312 (1992). Given our policy against ruling on remedies in advance of awards, we do not consider whether Lacey's rationale would apply if expungement

were ordered. That question can be considered, if necessary, in post-award proceedings pursuant to N.J.S.A. 2A:24-8. We therefore decline to restrain arbitration of these grievances.

The Increment Withholding Grievance

On April 13, 2006, the superintendent wrote Heuschkel that he would be recommending the withholding of her 2006-2007 increment. He stated these reasons:

1. Inappropriate methods of disciplining students, specifically the lowering of grades in response to disciplinary infractions as referenced in [four] memos. . . .
2. Inappropriate classroom management of class, specifically shutting down class on November 15 and 16, 2005, as referenced in [two] memos:
3. Inability to implement daily activities required of a veteran teacher, specifically assessment of students, supervision of students, as referenced in [two] memos:

The memoranda specified in the first reason criticize Heuschkel for disciplining unruly students by lowering their grades. In April of 2005, the administration advised Heuschkel that this practice violated school policy. On August 15, 2005, the superintendent directed Heuschkel to meet with parents who had complained that the grades of their children had been improperly lowered. His memorandum stated:

[S]tudent] grades cannot be lowered due to behavior problems. There are sufficient disciplinary procedures which I reviewed in my July letter to deal appropriately with behavior problems. Grades can only reflect learning performance. I verbally gave you this directive on April 27 after attending your parent conference with Mrs. Buckingham. I told you the same thing on several occasions between that date and June 29 when I repeated it to you in front of Mrs. Rosbert. I subsequently learned after the semester ended that at the start of the Health class on May 16 you still went ahead and gave every student in the class the enclosed "Classroom Participation/Behavior-Health III" handout. This explained how points would be taken off of students' grades for seven specified infractions and "other infractions will be determined as the behavior occurs in class." This is an act of direct insubordination on your part. . . .

We must address these parents' concerns as soon as possible. Policy 6020 does not permit behavior to be used as a favor in grading. There is nothing to be gained by prolonging the process. I look forward to your prompt cooperation in setting up parent conferences by August 19. If you do not contact me and make arrangements to meet with these parents to address these concerns, administrative action will be taken to review your students' grades. Appropriate corrections will be made so that none of their grades are negatively impacted by points removed for misbehavior.

On October 5, 2005, the superintendent and others met with Heuschkel in an "Insubordination Meeting." A memorandum about that meeting indicates that the principal referred to Heuschkel's insubordination for not following the directions given to her in April.

On October 25, 2005, the superintendent again wrote Heuschkel insisting she comply with school policy concerning grading and student discipline. The last two paragraphs stated:

. . . Your actions in this matter indicate that where Board policy and well-established administrative procedures conflict with your own opinions on a matter, your opinions will guide your professional actions. This approach is unacceptable.

I intend to recommend that the Board of Education withhold your increment for the 2006-2007 school year.

The memoranda specified in the second reason raised concerns about two health classes on November 15 and 16, 2005. They alleged the following: (1) Heuschkel had a hard time controlling unruly students so she "shut down" the November 15 class ten minutes early and told the students that since they were not allowing her to teach, they could get their notes and read their books on their own; (2) the next day she told the class that since they were not allowing her to teach, they would have study time and that if they had questions they could raise their hands and she would go over the material with them; and (3) she also told the students that they would be tested the next day, rather than a day later as had been planned.

One memorandum specified in the third reason criticized Heuschkel for assessing students based on "rote recall of information in a multiple choice-true or false 'objective' format" rather than based on new assessment methods demonstrated

in recent training sessions. The other memorandum criticized her for conducting activities outside the approved curriculum and for answering untruthfully when questioned about those activities.

On May 11, 2006, the Board accepted the superintendent's recommendation to withhold Heuschkel's increment. She then filed a grievance alleging that the withholding decision was "premeditated and retaliatory." After the grievance was denied, the Association demanded arbitration. 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]

Applying these tests, we conclude that the cited reasons for the withholding are predominately based upon an evaluation of Heuschkel's teaching performance. The first reason centers on Heuschkel's allegedly inappropriate grading of students as a response to student discipline problems and has elements of both teaching performance and insubordination. See, e.g., Tenafly Bd. of Ed., P.E.R.C. No. 91-68, 17 NJPER 147 (¶22058 1991). However, Heuschkel's alleged failure to comply with directives to change her grading policy does not change the underlying nature of the

conduct to be reviewed from teaching performance to something else. Dumont Bd. of Ed., P.E.R.C. No. 2007-17, 32 NJPER 232 (¶134 2006) (even if board viewed teacher's alleged failure to improve teaching performance after earlier warnings as insubordinate, allegation of insubordination would still be intertwined with the predominant teaching performance concerns). The second reason centers on Heuschkel's allegedly inappropriate response while teaching classes to unruly students. Classroom management is a teaching performance concern. See, e.g., Morris School Dist. Bd. of Ed., P.E.R.C. No. 99-85, 25 NJPER 164 (¶30075 1999); Randolph Tp. Bd. of Ed., P.E.R.C. No. 099-94, 25 NJPER 238 (¶30100 1999). The parties agree that the third reason is a teaching performance reason. Thus, the withholding viewed as a whole was predominately based on teaching performance reasons, so we restrain arbitration of this grievance.

ORDER

The request of the Sterling High School District Board of Education for a restraint of binding arbitration of the grievances concerning the timeliness of the observation reports

issued to Linda Heuschkel is denied. The Board's request for a restraint of the grievance contesting the withholding of Heuschkel's increment is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: April 26, 2007

Trenton, New Jersey