

P.E.R.C. NO. 2007-65

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2007-032

FREEHOLD REGIONAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Freehold Regional High School District Board of Education for a restraint of binding arbitration of a challenge to the decision to withhold the increment of a guidance counselor represented by the Freehold Regional High School Education Association. The Commission restrains arbitration because the decision to withhold was predominately based upon an evaluation of the counselor's performance in meeting her counseling responsibilities.

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, Schwartz Simon Edelstein Celso & Kessler, attorneys (Marc H. Zitomer, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Richard A. Friedman, of counsel and on the brief; Kathleen Naprstek Cerisano and Edward M. Suarez, Jr., on the brief)

DECISION

On December 13, 2006, the Freehold Regional High School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Freehold Regional High School Education Association. The grievance asserts that the Board did not have just cause to withhold a guidance counselor's salary increment. Because the withholding was predominately based upon an evaluation of the counselor's performance in meeting her counseling responsibilities, we restrain arbitration of the decision to withhold her increment.

The parties have filed briefs and exhibits. In addition, the Board has submitted the certifications of its guidance supervisor, Joan Gagliardi, and its superintendent, James Wasser, while the Association has submitted the certification of the guidance counselor, Clare Zanfini, and an Association representative, Edward Ollinger.

The Board determined in the spring of 2006 to withhold Zanfini's increment because, it asserts, she had not made sufficient improvement under a corrective action plan ("CAP") imposed upon her in the fall of 2005. That plan required Zanfini to keep a daily journal logging telephone calls and written requests for assistance from students and parents; to review that journal daily with Gagliardi; and to "shadow" a master counselor, document that counselor's practices, and report those practices to Gagliardi. The Board asserts that the district had a practice of seeing that calls and requests were answered within 24 hours, but it did not submit a written policy to this effect.

In Freehold Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 2007-30, 32 NJPER 363 (¶153 2006), we restrained arbitration of a grievance contesting the CAP, finding that the CAP addressed the counselor's "allegedly inconsistent performance in responding to student and parent needs in a timely and effective manner and [cited] the alleged problems in returning calls to parents, submitting grade reports, and resolving an appeal." Id. at 366.

While we held that the CAP was predominately an evaluation rather than a reprimand and thus not arbitrable, we also held that the Association could arbitrate a procedural claim that the Board violated Zanfini's contractual right to be told about parental complaints and given an opportunity to respond to them. An award concerning that claim has not yet issued.

Our opinion in the CAP case details the pertinent facts through the fall of 2005. We incorporate those facts and pick up the story in 2006.

On February 6, 2006, Gagliardi gave Zanfini a memorandum concerning her CAP-plan progress. She wrote:

As of this date approximately 60 days have passed since the implementation of your Corrective Action Plan. I am concerned that your progress towards achieving the goals outlined in the Plan has not been as complete or as consistent as I feel it should be given the level and longevity of your experience in the field and in our district.

On a number of occasions you have met with me to review your journal and have presented copies of journal pages that were in unacceptable condition. They have been incomplete or inaccurate in terms of documentation, incorrectly numbered, and/or out of order. On one occasion, a page of the journal was missing and could not be produced until the following day. In addition, there have been instances where you failed to return telephone calls or respond to requests within the 24-hour period dictated by district practice under the direction of the Superintendent.

I offer the following to support my observations:

November 30, December 1, 2, 5, 6, 7, 9, 12, 13, 14, 15, 16, 19, 21 and 22, January 2, 3, 9, 10, 11, 17, 24 and 27: On these dates documentation in your journal was incomplete, inaccurate, or presented in a disorganized manner.

December 14: A request from me to contact the Assistant Superintendent was not completed until December 16.

January 3: My request for information regarding a student was not recorded.

January 13: I became aware that a telephone call from a parent received on January 12 had not been returned. I directed you to return the call on the next school day, January 17. Your documentation indicates that you did not respond until January 19.

January 17: A telephone call received from a parent early that morning was not returned until midday on January 19.

I have offered suggestions on several occasions regarding ways in which you might use your time more effectively and more efficiently to prioritize your tasks. I have also offered you the option of redesigning your journal. You have not been receptive to my suggestions, nor have you proposed another journal format.

I believe that these observations support the necessity for us to meet again on a daily basis so that we may work together to improve your performance and ensure that the needs of students and parents are addressed in a timely and effective manner. It is essential that you promptly rectify the concerns I have outlined. Failure to follow my directives which include returning telephone calls within a 24-hour period may result in my recommendation for increment withholding.

Zanfini signed the memorandum in protest, asserting that she did not have a chance to read it.

On March 6, 2006, Gagliardi wrote another memorandum to Zanfini. This memorandum recorded one parent's complaint that she had not yet received a call promised seven days earlier concerning home instruction for her child and another parent's complaint that Zanfini had not scheduled an appointment her son had requested two weeks earlier. Zanfini asserts that the February 6 and March 6 memoranda continue a pattern of alleging complaints by parents and students without giving her an opportunity to respond. She also questions Gagliardi's veracity about the parental complaints.

On March 10, 2006, Zanfini received an annual evaluation report prepared by Gagliardi. She was rated as "satisfactory" in 32 categories. She was rated as "unacceptable" under "upholds and enforces Board of Education regulations and policies as well as building procedures" and as "unsatisfactory/needs improvement" under:

Seeks direction and is responsible for feedback from administrators.

Demonstrates initiative, independence, and decision-making appropriate for position.

Demonstrates dependability and self-reliance in the position.

The evaluation listed these deficiencies and areas as needing improvement:

Ms. Zanfini's time management and organizational skills are unacceptable. It is essential that Ms. Zanfini improve in these areas. Despite assistance offered throughout the school year (memorialized by the attached documents), the same issues noted on the interim evaluation - failure to return telephone calls in a timely manner and to respond effectively to student and parent requests - are still unsatisfactory at this time. While some improvement has been noted in Ms. Zanfini's demonstration of initiative, independence, and decision-making, these skills have not progressed to a satisfactory level and are not demonstrated with proficiency which reflects Ms. Zanfini's longevity and experience in the profession.

The report recommended that Zanfini's salary increment for the 2006-2007 school year be withheld.

In April 2006, the superintendent decided to accept that recommendation based on Zanfini's evaluations and his meetings with Gagliardi and an assistant superintendent responsible for human resources. The superintendent was told of Zanfini's alleged problems in not effectively communicating with parents and students, not completing professional duties on time, failing to return phone calls, not being organized, and submitting CAP-required journals that were incomplete, inaccurate, and disorganized.

On April 25, 2006, the superintendent notified Zanfini that the Board had approved his recommendation to withhold her increment for the 2006-2007 school year.

On June 5, 2006, the Association filed a grievance asserting that the withholding was discipline without just cause. On June 15, the assistant principal denied the grievance as untimely. He added that the withholding was evaluative and not subject to the grievance procedure. The Board denied the grievance and 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. We specifically do not consider the parties' competing factual allegations concerning the merits of the withholding.

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 parties dispute whether this withholding should be characterized as evaluative or disciplinary. But consistent with Scotch Plains-Fanwood, we find that this withholding like all others is a form of discipline and we focus on a different question: was this disciplinary action predominately based upon the evaluation of teaching performance given the reasons cited by

the school board? In this case, the answer to that question is yes.

Prompt and effective communications with parents and students desiring guidance are at the center of a guidance counselor's "teaching" performance. This withholding is predominately based on the Board's judgment - right or wrong - that Zanfini had a continuing pattern of being disorganized and not responding promptly to the guidance-related concerns and questions of students and parents. Compare Readington Tp. Bd. of Ed., P.E.R.C. No. 95-38, 21 NJPER 34 (¶26022 1994) (restraining arbitration of withholding based on school psychologist's alleged disorganization in scheduling appointments and working with colleagues; such disorganization may impair delivery of psychological services to students). Contrast Franklin Tp. Bd. of Ed., P.E.R.C. No. 2000-90, 26 NJPER 272 (¶31106 2000) (single instance of teacher allegedly disobeying a directive to contact a parent about a child's grade). That judgment may in turn be based on its belief that Zanfini violated an alleged requirement to return calls and answer questions within 24 hours, but the judgment itself is about her teaching performance as a guidance counselor and that is what matters. Contrast Red Bank Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-23, 24 NJPER 474 (¶29221 1998) (alleged failure to adhere to school operational procedures did not relate to teacher's classroom management, interactions, or

teaching). While the Association contends that one occasion of cited unresponsiveness did not occur at all, there are many other allegations and events at issue and this case cannot be reduced to a simple "did occur or did not occur" assessment by an arbitrator. Contrast Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991) (board alleged and teacher denied that teacher engaged in corporal punishment). For these reasons, we restrain arbitration over the decision to withhold Zanzini's increment.^{1/}

ORDER

The request of the Freehold Regional High School District Board of Education for a restraint of binding arbitration over the decision to withhold Clare Zanzini'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: May 31, 2007

Trenton, New Jersey

^{1/} As part of its argument, the Association asserts that the Board violated the counselor's right to be told about parental complaints and given an opportunity to respond to them. This is the same procedural claim held to be arbitrable in P.E.R.C. No. 2007-30. The Board has not addressed the procedural claim in this case and we do not consider it further.