

P.E.R.C. NO. 2008-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2007-046

OLD BRIDGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Old Bridge Board of Education for a restraint of binding arbitration of a grievance filed by the Old Bridge Education Association. The grievance contests the withholding of a teacher's salary increment. The teacher asked a student to take an Association document to the classroom of other teachers and have them sign it while the rest of the class continued their work. The Commission finds that this withholding was not predominately based on an evaluation of teaching performance and declines to restrain arbitration.

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, Sills, Cummis, Epstein & Gross,
P.C., attorneys (Philip E. Stern, of counsel and on the
brief; Nicole G. Conforti, on the brief)

For the Respondent, Bergman & Barrett, attorneys
(Michael T. Barrett, on the brief)

DECISION

On January 29, 2007, the Old Bridge Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Old Bridge Education Association. The grievance contests the withholding of a teacher's salary increment. Because the withholding was not predominately based on an evaluation of teaching performance, we decline to restrain arbitration.

The parties have filed briefs and exhibits. The Board has filed a certification from its superintendent. These facts appear.

The Association represents all certificated and non-certificated employees, excluding administrators and supervisors. The parties' collective negotiations agreement is effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration.

Nadine Waldman has tenure, teaches fifth grade, and is an Association member. On November 28, 2006, her principal investigated a November 22 incident where Waldman asked a student to take an Association document to the classrooms of other teachers to have them sign it while the rest of the class continued with their assigned work. Waldman acknowledged that she had used the student so she could find out whether certain teachers were being compensated for involvement in student clubs.

The superintendent recommended that the Board withhold Waldman's salary increment for the 2007-2008 school year. On December 19, 2006, the Board adopted his recommendation. The next day, the Association filed a grievance asserting that the withholding was without just cause. On January 4, 2007, the superintendent denied the grievance. He wrote, in part:

The Association and the grievant are seeking the prospective restoration of the grievant's 2007-2008 increment, which the Board of Education voted to withhold at the December 19 Board of Education meeting. As you should be aware, the action taken against Ms. Waldman was based upon her specific unacceptable performance as a teaching staff member as it related to the facts of the matter leading to the action taken.

The grievant took time from her instructional class to perform Association related tasks; the grievant inappropriately utilized a student to assist her in the performance of said Association tasks, depriving the student of appropriate educational opportunity; the grievant caused other teachers and other students to be deprived of appropriate educational opportunities through the disruption created by the student entering said classrooms. All of these actions intimately and irrevocably are tethered to Ms. Waldman's performance as a 5th grade teacher at the Walter Schirra Elementary School.

On January 16, 2007, the Association demanded arbitration. This petition ensued.

On April 19, 2007, the Commission Case Administrator wrote to the Board requesting "the statement of reasons or a certification from the person who made the withholding recommendation to the Board explaining the basis of the recommendation and the Board's action. N.J.A.C. 19:13-2.2 (copy of statement of reasons must be filed with petition); N.J.A.C. 19:13-3.5 (all pertinent facts must be supported by certifications based upon personal knowledge). The Board did not provide the requested information. On May 14, the Chairman dismissed the petition.

On June 27, 2007, the Board moved to reinstate the petition. The Board asserted that it could not provide the requested information because it was not until May 1, 2007 that the Board voted to withhold Waldman's increment and until May 11 that she

received a statement of reasons. On July 6, the Association replied that it would leave reopening the petition to the Commission's discretion. On July 24, the Board's motion was granted.

The May 11 statement of reasons provides:

The Board took this action in response to serious classroom performance concerns. The Board was informed that you directed a student to carry out union activity on your behalf during class time. This student not only missed invaluable instructional time, but also, as a result of your directive the instructional time of those students whose classrooms she entered was also inexcusably disrupted.

The Board is particularly troubled with the quality of instruction suffered by its students due to your insistence of carrying out union activity during class time. The Board expects that all teachers will maintain the highest level of performance at all times. Your failure to meet the Board's high expectations for teaching performance by neglecting your teaching duties during class is inexcusable.

The Board is hopeful that your classroom performance will improve.

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 resulted from Waldman's unsatisfactory use of classroom time to conduct Association business and is not arbitrable. The Association argues that Waldman's using the student as a courier was not related to teaching performance. The Association maintains that it is not the interruption that the Board is concerned with, but the reason for the interruption, and that the reason for the interruption does not impact the student-teacher relationship.

Given the circumstances of this case and the reasons that follow, we decline to restrain arbitration. This withholding is based predominately on a single incident of alleged inappropriate use of a student to conduct Association business, rather than an evaluation of Waldman's performance as a classroom teacher. Asking a student to conduct an errand during class interrupts the educational program, but it does not involve actual teaching. Thus, in Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-72, 18 NJPER 64 (¶23028 1991), we declined to restrain arbitration where an increment was withheld in part based on allegations that teacher left a classroom unattended and let other students sit in on class. Similarly, in Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001), we declined to restrain arbitration where an increment was withheld from a teacher who allegedly left children unattended in the classroom. We recognized that the alleged violations of Board

policy impacted on students, but teaching and managing students in class were not in issue. See also Burlington Tp. Bd. of Ed., P.E.R.C. No. 94-77, 20 NJPER 71 (¶25031 1994) (allegations that teacher used high school and middle school students to act as her "eyes and ears" to help her spouse were unrelated to teaching performance); Camden Cty. Voc. Tech. Sch. Bd. of Ed., P.E.R.C. No. 2007-47, 33 NJPER 24 (¶9 2007) (teacher's practice of remaining in her classroom after another teacher began teaching might be inconsiderate, but incidents were unrelated to teaching performance).

Florham Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 159 (¶24081 1993), a case the Board relies on, is distinguishable. There, the increment was withheld based on allegations of inappropriate classroom discussion; lack of control over classroom discussion; poor classroom management and climate; failure to implement appropriate classroom teaching skills; improper lesson presentation; and conduct unbecoming a teacher. Review of the withholding required educational judgments about how to respond to comments from students in class and about what subject matters should be discussed with students in class.

The instant withholding does not involve Waldman's teaching or classroom discussions with students. It involves her decision to ask a student to run an Association errand during class. We hold only that the incident did not predominately involve

teaching performance. The Board may argue to an arbitrator that the incident gave it just cause to withhold the teacher's increment.

ORDER

The request of the Old Bridge Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: September 27, 2007

Trenton, New Jersey