

P.E.R.C. NO. 2008-48

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-2008-25

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 grievance filed by the Freehold Regional High School Education Association. The grievance contests the withholding of a special education teacher's salary increment for the 2007-2008 school year. The reasons given for the withholding are: inability to maintain student confidentiality; failure to communicate concerns regarding students and co-workers as they arise; and failure to create a study guide to effectively help students to compensate for learning disabilities. The Commission concludes that the first and third reasons are squarely based on an evaluation of teaching performance and therefore review of this withholding 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, Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys (Marc H. Zitomer, of counsel and on the brief; Joseph L. Roselle, on the brief)

For the Respondent, Detzky & Hunter, LLC, attorneys (Stephen B. Hunter, on the brief)

DECISION

On October 24, 2007, 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 contests the withholding of a special education teacher's salary increment for the 2007-2008 school year. Because the withholding was predominately based on an evaluation of teaching performance, we restrain arbitration.

The parties have filed briefs and exhibits. The Association has filed the certification of Beth Malfara, the teacher whose increment was withheld. The Board has filed the certification of Stephanie Kayafas, the special education supervisor. These facts are not in dispute.

The Association represents teachers and other staff. The parties' collective negotiations agreement is effective from July 1, 2005 through June 30, 2008. The grievance procedure ends in binding arbitration.

Malfara has been employed by the Board as a high school special education teacher for 21 years. During the 2006-2007 school year, she taught classes in the In Class Resource Program. Kayafas observes and evaluates special education teachers, and helps develop the curriculum and improve instruction.

On April 23, 2007, the Board voted to withhold Malfara's salary increment for the 2007-2008 school year. The next day, an assistant superintendent notified Malfara that her increment was withheld for reasons including, but not limited to:

1. Demonstrates the inability to maintain student confidentiality.
2. Does not communicate concerns regarding students and coworkers as they arise.
3. Failure to create a study guide that would effectively help students to compensate for learning deficits.

These reasons track parts of the Annual Evaluation Report that Kayafas filled out concerning Malfara's performance for the 2006-2007 school year. That report was in turn based on classroom observations that Kayafas conducted on January 25 and March 29, 2007. At the end of the report, Kayafas recommended that Malfara be re-employed, but her increment be withheld.

Section I of the Annual Evaluation Report is entitled Assessment of Teacher Performance. Paragraph B is entitled Instructional Techniques and Strategies. This paragraph stated, in part:

Mrs. Malfara has created study guides for students to utilize during test preparation. Study guides were generic in nature rather than individualized, as required in the Professional Development Plan Target 4, for this school year. Study Guides created did not take into account the affect of spatial-relations upon visual perception with regard to supporting those students struggling with visual perceptual difficulties.

Paragraph D is entitled Interaction and Motivation. This paragraph stated:

Mrs. Malfara must ensure confidentiality of the content of the IEP. As per the classroom observation of January 25, 2007, Mrs. Malfara announced to the class that students requiring extra time would be afforded that modification. Disclosure of modification should not be openly announced in the presence of classmates.

Paragraph E is entitled Classroom Management. This paragraph stated that while Malfara knew that a general education

student had threatened a special education student, she was unaware that the first student had assaulted the second student in her class and she did not communicate this incident to Kayafas.

Section V is entitled Recommendations for Development, Improvement and Consideration. This paragraph stated, in part, that Malfara should remain aware of her students' learning needs regarding visual and auditory processing; design worksheets and handouts such as study guides addressing these perceptual difficulties; discuss modifications provided a special education student under an IEP privately with that student only; remain vigilant about student interaction and safety in the classroom; and increase communication with the supervisor regarding professional issues concerning students and co-workers.

Section VI is entitled Overall Evaluation. It stated, in part:

Mrs. Malfara did not create study guides to help students to compensate for learning deficits. Mrs. Malfara must implement modifications to allow students to access information with an awareness of the impact of learning deficits, especially visual cognitive processing difficulties, upon performance. Mrs. Malfara must command the attention of students when providing instruction. Confidentiality regarding IEP directives is at issue as is the ability to remain fully cognizant of student interaction within the classroom especially in consideration of issues of safety. As cited in the Annual Performance Report of March 31, 2006 and that of the previous school year,

dated March 30, 2005 communication with this supervisor in regard to student issues remains a concern.

Malfara submitted a rebuttal to the report. That rebuttal and her certification respond to the three reasons for the withholding. With respect to the first reason, Malfara denies that she divulged confidential information and asserts that the student who was allowed extra time during the January 25 class was not a special education student. With respect to the second reason, she asserts that she handled the incident properly; she promptly removed the three students involved from the classroom and escorted them to the appropriate administrators; and she reported the incident to the school psychologist because Kayafas was not in her office at the time. With respect to the third reason, Malfara asserts that her study guides were not generic and were developed carefully and implemented appropriately.

On May 21, 2007, the Association grieved the withholding. The grievance was denied; the Association demanded arbitration; and 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]

In increment withholding cases, we focus on the specific reasons cited in the statement of reasons that a school board officially gives for a withholding. N.J.A.C. 19:13-2.2(a)(3). The Board argues that the three cited reasons involve deficiencies in Malfara's teaching performance, as noted in her evaluation for the year at issue. The Association argues that the first reason relates to an alleged failure to comply with unspecified Board policies regarding confidentiality affecting classified students and does not primarily relate to an evaluation of teaching performance; the second reason refers to communication concerns that do not involve teaching performance; and the third reason involves an inconsequential failure to fully implement an administrative directive.

We conclude that the first and third reasons are squarely based on an evaluation of teaching performance. We accordingly restrain arbitration.

With respect to the first reason, a special education teacher has a responsibility to protect the confidentiality of each student's IEP and the Board has asserted that while teaching her class, Malfara breached that confidentiality and embarrassed a student in front of the class. Cf. Dumont Bd. of Ed., P.E.R.C. No. 2007-17, 32 NJPER 323 (¶134 2007) (arbitration restrained where physical education teacher allegedly called children



offensive names). Contrast Bergenfield Bd. of Ed., P.E.R.C. No. 2006-69, 32 NJPER 82 (¶42 2006), aff'd 33 NJPER 186 (¶65 App. Div. 2007) (arbitration not restrained where annual evaluation did not reflect concern about alleged failure of special education teacher to communicate concerns about students to the child study team); Mansfield Tp. Bd. of Ed., P.E.R.C. No. 96-65, 22 NJPER 134 (¶27065 1996), rev'd and rem'd 23 NJPER 209 (¶28101 App. Div. 1997) (arbitration not restrained where annual evaluation did not reflect concern about alleged failure of special education teacher to communicate concerns about students to the child study team).

With respect to the third reason, the adequacy of study guides prepared to compensate for learning deficits and to get students ready for tests goes to the heart of teaching special education students. See, e.g., Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003) (arbitration restrained where teacher allegedly failed to develop lesson plans with clear objectives); Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 2000-28, 25 NJPER 442 (¶30194 1999) (arbitration restrained where withholding centered on classroom management, organization, and preparation of lesson plans, instruction, and communication with students). Even if this reason involves only one incident, as claimed by the Association, it nevertheless involves teaching performance.

With respect to the second reason, we will assume that the alleged problem in communicating with a supervisor does not predominately involve an evaluation of teaching performance. However, considering the three reasons together, we conclude that they predominately involve an evaluation of Malfara's performance as a special education teacher. Accordingly, we restrain arbitration.

ORDER

The request of the Freehold Regional High School District Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: February 28, 2008  
Trenton, New Jersey