

P.E.R.C. NO. 2010-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BETHLEHEM TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2009-066

BETHLEHEM TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Bethlehem Township Board of Education for a restraint of binding arbitration of a grievance filed by the Bethlehem Township Education Association. The grievance contests the withholding of a teacher's salary increment. The Board based its decision on the teacher's allegedly harsh and negative interactions with her students. Because the withholding is based predominately on an evaluation of teaching performance, the Commission restrains binding 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, Schwartz Simon Edelstein Celso & Zitomer, attorneys (Marc H. Zitomer, on the brief)

For the Respondent, Wills, O'Neill & Mellk, attorneys (Arnold M. Mellk, on the brief)

DECISION

On March 20, 2009, the Bethlehem Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Bethlehem Township Education Association. The grievance contests the withholding of a teacher's salary increment for the 2008-2009 school year. Because the withholding is predominately based on an evaluation of teaching performance, we restrain binding arbitration.

The parties have filed briefs, certifications, and exhibits. We deny the Association's request for an evidentiary hearing

pursuant to N.J.A.C. 19:13-3.6 because the factual issues it raises pertain to the merits of the withholding rather than our gate-keeping function of determining the appropriate forum for reviewing the merits of a withholding. For purposes of that limited function, these relevant facts appear.

The Association represents certificated teaching staff members as well as bus drivers and cafeteria employees. The parties' collective negotiations agreement contains a grievance procedure ending in binding arbitration.

This case involves a tenured elementary school teacher who has taught in the Bethlehem school system for 31 years. She teaches at the Thomas B. Conley School. The principal of that school is Dr. Nancy Lubarsky.

On June 24, 2008, the Board voted to withhold the teacher's increment for the next school year. On July 15, the Interim Superintendent sent the teacher a letter notifying her and stating that the reasons for the withholding were set forth in the annual evaluation for the 2007-2008 school year prepared by Lubarsky. The letter specified these reasons:

During the school year, two different corrective action plans were implemented as a result of your unacceptable negative behavior as it related to your harsh tone with several students. One of these incidents resulted in a child being removed from your class. Ongoing communication regarding these

incidents took place between you and Dr. Lubarsky.

After the first corrective action plan was completed, there were further instances of parental complaints about your continued harsh interactions with their children, to the point that the children in question did not want to come to school. Dr. Lubarsky discussed each of these instances with you.

A further corrective action plan was implemented and you followed the steps outlined by the Principal, Dr. Lubarsky. However, after the end of the period covered by the corrective action plan, two parents again complained about your negative behavior with their children, which Dr. Lubarsky shared with you.

The annual evaluation cites these reasons and asserts that this teacher "has a responsibility to all the students in the class to provide a safe, supportive, nonthreatening environment for learning." The evaluation also mandates that the teacher continue to show improvement in these areas:

Provide a positive, supportive, non-threatening classroom environment that fosters learning, self-esteem and personal growth.

Maintain professional competence and behavior.

Develop awareness and sensitivity to the particular needs of students who learn differently, are sensitive, are easily intimidated, who have low self-esteem, and/or who may perceive you as harsh.

Communicate with parents with regard to any and all contact/correspondence in a timely fashion, and demonstrate flexibility in the scheduling of make up and/or modifications of tests, quizzes and homework assignments.

The reasons and recommendations in the annual evaluation and the Interim Superintendent's letter are based on the teacher's interactions with three of her students during the 2007-2008 school year. Those interactions are described and disputed in the certifications submitted by Lubarsky and the teacher.

The Association grieved the withholding, asserting that the teacher had complied with the directives set forth by the action plan during the 2007-2008 school year and claiming that the withholding thus violated a contractual clause prohibiting discipline without just cause. Lubarsky denied the grievance, asserting that the teacher's performance in the classroom and with parents had not improved and had resulted in a second corrective action plan. The Association appealed and the Interim Superintendent also denied the grievance. Her response stated that "[a]lthough [the teacher] followed the parameters of the action plan developed by Dr. Lubarsky, there were still issues regarding her interactions with certain students" and she therefore continued to recommend that the increment be withheld. The Association demanded arbitration and the Board filed this petition.

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 reasons for this withholding are set forth in the Interim Superintendent's letter to the teacher notifying her of the withholding. The specified reasons involve the teacher's allegedly harsh and negative interactions with her students in her classroom. Under our case law, these concerns as well as the allegedly inappropriate interactions with three students and one student's parents that underlie the withholding are teaching performance reasons that must be reviewed by the Commissioner of Education rather than an arbitrator. See, e.g., Robbinsville Bd. of Ed., P.E.R.C. No. 2009-3, 34 NJPER 220 (¶75 2008) (comments made in classroom); Dumont Bd. of Ed., P.E.R.C. No. 2007-17, 32 NJPER 323 (¶134 2006); (comments made in classroom); North Caldwell Bd. of Ed., P.E.R.C. No. 98-80, 24 NJPER 52

(¶29033 1997) (classroom interactions and disciplinary techniques).

The Association does not assert that different reasons, disciplinary in nature, formed the basis for the withholding. Instead, it asserts that the reasons cited by the Board are inconsistent with laudatory comments made in the teacher's evaluation for the previous school year; that the allegations set forth in Lubarsky's certification are "full of vague, unsupported pronouncements regarding [the teacher's] teaching performance" (Brief at 3); and that we should not accept the "facts" alleged by the Board without determining their veracity or supportability or at least holding a hearing, especially since, it claims, the Board's entire case is based on hearsay (Brief at 7-8).

All these arguments are misdirected. We have no jurisdiction to resolve the merits of a withholding or to screen the merits to ascertain whether a certain quantum of evidence has been presented to support the reasons cited for the withholding. Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996). Our only function is to determine whether the cited reasons predominately involve an evaluation of teaching performance. In this case, the cited reasons do. Therefore, we must restrain binding arbitration and any appeal of the withholding must be filed with the Commissioner of Education.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: October 29, 2009

Trenton, New Jersey