

P.E.R.C. NO. 2010-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LINDEN BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2009-019

LINDEN EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Linden Board of Education for a restraint of binding arbitration of a grievance filed by the Linden Education Association. The grievance contests the withholding of a teaching staff member's employment and adjustment increments. The Board based the withholding related to the way a teacher interacted with a disruptive student and the student's in the hallway. 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, Weiner Lesniak, LLP, attorneys
(Mark A. Tabakin, on the brief)

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

DECISION

On October 9, 2008, the Linden Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Linden Education Association. The grievance contests the withholding of a teacher's employment and adjustment increments 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. These facts appear.

The Association represents teachers as well as other school personnel. The parties' collective negotiations agreement is

effective from July 1, 2007 through June 30, 2010. The grievance procedure ends in binding arbitration.

This case involves a middle school teacher. Before the 2008-2009 school year, he received excellent evaluations and had never received any complaints about his teaching or classroom management.

On March 12, 2008, an incident occurred involving one of his students, a 13 year old whose initials are J.I. The principal of the middle school wrote a memorandum to the superintendent concerning this incident. She wrote, in part:

On Wednesday, March 12, 2008 at approximately 11:30 a.m. J.I. came to my office in tears. He stated that his teacher had just threatened him and he wanted to call his father. According to J.I. he had gotten into trouble in [the teacher]'s class. [The teacher] called for a hall walker to have him removed. . . . [A] regular substitute hall walker arrived. He, J.I. and [the teacher] moved into the hallway where [the teacher] proceeded to tell [the hall walker] why J.I. was being asked to leave. During that time J.I. started to hum as if not listening to [the teacher]. He told J.I. that he had plenty of money and could quit this job and we can take this outside. He began to cry and asked to call his father. [The hall walker] confirmed the incident and the reference to taking it outside. Attached are written statements from the student and from [the hall walker].

I interviewed [the teacher] with his Union Representation. . . . [The teacher] referenced J.I.'s behavior but denied threatening to take it outside.

Next I met with J.I.'s father . . . , who came immediately when called. He expressed concern for the adult behavior despite acknowledging his son's behavior. He requested a meeting with [the teacher]. He expressed to me that he was looking for some type of remorse from the teacher. At this point he seemed reasonable. [The teacher] brought [the union representative] to the meeting. [The teacher] reiterated the disrespectful behavior of the student. When asked if he said he would take it outside he denied it. He then told the father that he told J.I. he would quit his job first before he will be disrespected. The father took offense at this again stating you are the adult talking to a 13 year old about quitting your job because he wouldn't pull up his pants. [The teacher] also stated to the father "I don't need to be disrespected here or in the street." At this point both [the teacher] and the parent were getting agitated. [The teacher] was asked to leave by his union representative. J.I.'s father met with [the hall walker] who confirmed that what J.I. said was accurate. He left and Mr. Thurston and I continued the meeting with the parent. I assured the parent that the incident would be reported to the Superintendent. He thanked us and said he expected something needed to be done by the district because [the teacher] just "didn't get it." He did not express an interest in pressing charges at this time and was comfortable with the way the situation was handled.

The next day, the teacher wrote a memorandum to the superintendent. He wrote:

On March 12, 2008 at the beginning of period 5 J.I. entered the classroom with his pants hanging down exposing undergarments beneath his pants and took a seat at the wrong table. Per school policy I requested that he pull his pants up and move to his appropriate area. J.I. moved to his area but did not

pull up his pants. Upon moving to his area J.I. became disruptive, attempting to engage in conversation with a classmate as opposed to completing his assignment. When I attempted to get J.I. to refocus he became noncompliant and responded by continuing to talk. Since he continued to disrupt the class and defy my request to complete the work I buzzed the office and asked for Mr. Thurston or a hall-walker to come down.

[The substitute hall-walker] asked me for details regarding what I desired to tell the office regarding J.I.'s behavior. When I attempted to relay the message, J.I. became extremely vocally disruptive. I asked J.I. repeatedly to stop and J.I. did not. I stated that I would not be disrespected inside the building or outside the building by anyone and I would rather resign than lose my job.

In his certification, the teacher asserts that J.I. became "extremely vocally disruptive" in the hallway and would not stop talking and that the meeting with J.I.'s father ended prematurely because the father would not listen to the teacher's explanation and the principal would not aid the teacher.

As a result of the allegations, the teacher was immediately suspended. He resumed teaching on March 31, 2008.

The superintendent asked the law firm representing the Board to investigate the teacher's alleged threats against J.I. and his alleged misconduct in the meeting with J.I.'s father. On April 11, 2008, the investigating attorney submitted her report. A copy was given to the teacher so we denied the Board's petition to quash the Association's subpoena for this document. P.E.R.C.

No. 2009-52, 35 NJPER 77 (¶30 2009). The report summarized the attorney's interviews with the hall walker, the principal and vice-principal, and the teacher. The hall walker and the administrators told the investigator that the teacher had an intimidating "in your face" disciplinary style while the teacher told her that respect was a "main component in his classroom" and that he was one of the most respected teachers. The hall walker also asserted that the teacher had told J.I. that he could "take you outside," but the hall walker believed that the teacher was speaking out of frustration and did not intend to act on that statement. The teacher denied making that statement. The attorney concluded that even if the teacher did not make this statement, he still acted inappropriately in the hallway and in the meeting with J.I.'s father and that an increment withholding would be justified.^{1/} "In order to properly posture this withholding for performance reasons," she recommended that the teacher's annual evaluation include "Unsatisfactory" ratings in specified categories and a detailed account of the incident and that the report be completed by the principal rather than the person who normally evaluated the teacher.

1/ According to the report, J.I. was also present at the teacher's meeting with the father, the principal and vice-principal, and the teacher's Association representative.

On April 16, 2008, the principal observed a class taught by the teacher. The observation report commended the teacher for his planning and consistent reinforcement of classroom expectations, but criticized him for encouraging the students to be "politically correct" and use the word "challenged" instead of "dummy" and conducting the class at too fast a pace. The teacher wrote a rebuttal.

On April 25, 2008, the principal issued the teacher's annual evaluation report. The teacher received "Excellent" ratings in 21 out of 27 categories; an "NA" rating in one category; a "Suggested Area for Development" rating in the category of "Paces and sequences instruction appropriately"; and "Unsatisfactory" ratings in the four categories specified by the investigative report: "Manage classroom behavior," "Function effectively and responsibly within the educational system," "Interact appropriately with parents, staff, and community," and "Maintain professional skills and standards." The "Comments" section cited the principal's concerns about pacing, the teacher's loss of temper with students who did not follow his structure and rules, and several incidents of his not signing in on time or at all. The report contained this account of the events of March 12:

During a disciplinary incident with student JI who refused to pull up his pants, you pulled your ID and keys off your belt in anger, stating that you'd rather resign than get disrespected in or out of the building. You continued to angrily tell JI to go ahead

and call his father if he had a problem with your discipline of him. These statements could be construed as threats to JI. This behavior was inappropriate and evidences your failure to act responsibly within the educational system. Your behavior adversely impacted JI's educational environment and prevented him from receiving effective educational services. The improper methods you chose to implement in disciplining this student evidence your failure to maintain professional decorum in your interaction with students, your failure to responsibly foster an effective educational environment and your ineffective classroom management skills. During the subsequent meeting with JI's parent, you again reiterated that you would not be disrespected in school or on the street, became angered with the parent's statements and left the meeting on advice of your union representation due to your obvious anger and inability to interact appropriately with the student's parent. This behavior again indicated your ineffective maintenance of professional standards in the educational system and failure to maintain proper decorum when interacting with parents. This improper behavior adversely affected the District's ability to proffer effective educational services and maximize student achievement. Your failure to appropriately discipline a student compounded with your failure to appropriately engage with the parent evidences your inability to function responsibly within the educational system, thus interfering with the provision of effective educational services to students.

The report set forth a Professional Improvement Plan requiring the teacher to attend professional development sessions concerning "anger management, effective discipline for difficult students, positive parent conferencing, and responsibilities within the educational system." The principal recommended that

the teacher's employment and adjustment increments be withheld for the following school year.

The teacher wrote a rebuttal. He stated that the March 12 incident was the only allegation against him in an unblemished seven-year career; that he carried himself respectfully at all times; and that he was a "dedicated, passionate, and positive role model." He also stated that it was J.I.'s parent who was angered and unable to interact appropriately and that his Association representative advised him to leave the meeting because "I was not going to be able to provide answers with resolve."

On June 16, 2008, the Board voted to withhold the teacher's increments "for reasons related to his teaching performance." A letter then notified the teacher that his increments were being withheld "due to poor performance."

The Association grieved the withholding, claiming it violated a contractual clause prohibiting discipline without just cause. The Board denied the grievance and the Association demanded binding 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]

The Board argues that this withholding is based on teaching performance because the improper, racially insensitive comment was made to the teacher's student while in the classroom. With respect to the March 12 events, the Board argues "the facts and documentary evidence clearly establish that [the teacher]'s increment was withheld as a result of his failure to maintain proper decorum in the classroom setting while attempting to discipline a student, his failure to interact appropriately with parents and his failure to effectively maintain classroom behavior." (Board's brief at 12). The Board also argues that the teacher's performance deficiencies extended beyond that incident to include the principal's concerns about his repeatedly using the word "challenged" as a "polite way" to insult students and his rapid pacing and sequencing of instruction. The Association responds that the single incident involving the teacher's hallway interaction with J.I. is insufficient to support an increment withholding; the interaction with J.I.'s father did not occur during a formal parent-teacher conference and should be considered a disciplinary reason; and the annual evaluation should be disregarded as a pretext prepared to support the withholding.

In determining the predominate basis for a withholding, we ordinarily look to the official statement of reasons given in the letter notifying a teaching staff member of a withholding. In this case, that letter asserts only that the withholding was due to "poor performance" and is too conclusory to permit the assessment required by N.J.S.A. 34:13A-26. We thus turn to the annual evaluation report for the reasons cited by the principal to support her increment withholding recommendation. It is clear from this document that the withholding was predominately if not exclusively based on the teacher's March 12 interactions with J.I. and his father.^{2/} That the annual evaluation report was prepared in anticipation of a legal fight over the withholding and on the advice of counsel does not mean the Board's reliance on the March 12 events should be considered a pretext - we will neither look behind the cited reasons nor consider their validity. See Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1992).

We reject the Board's assertion that the March 12 events involved the teacher's management of students within his

^{2/} This report did question the pacing and sequencing of a class taught by the teacher, but did not rate him "Unsatisfactory" in this category. And the report did not repeat the observation report's concern about the teacher's mentioning "political correctness" or specify any qualms about any in-class comments. We do not regard either concern as a significant or motivating factor for this withholding.

classroom. No administrator has suggested that the teacher erred in removing J.I. from the classroom or acted improperly until he and J.I. were in the hallway. However, the allegations concerning the teacher's treatment of J.I. in the hallway involve his techniques and style for disciplining a student who was unruly in his classroom. Such student discipline issues involve a subjective assessment of teaching performance. See, e.g., Robbinsville Bd. of Ed., P.E.R.C. No. 2009-3, 34 NJPER 220 (¶75 2008); Dumont Bd. of Ed., P.E.R.C. No. 2007-17, 32 NJPER 323 (¶134 2006); North Caldwell Bd. of Ed., P.E.R.C. No. 98-80, 24 NJPER 52 (¶29033 1997); Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991); cf. Willingboro Bd. of Ed., P.E.R.C. No. 2001-68, 27 NJPER 236 (¶32082 2001) (restraining arbitration of withholding based on allegedly inappropriate comments made to students in hallway and cafeteria; comments not isolated or unrelated to comments made in class). Whether this incident of alleged misconduct stands alone is immaterial for our purposes; all that matters is that it involves an educational judgment about a teaching performance issue. Robbinsville.

We turn now to the Board's reliance on the teacher's alleged misbehavior during the meeting with J.I.'s father as a reason for the withholding. Our cases have drawn distinctions between parent-teacher interactions occurring in formal or regular

conferences and those occurring in unplanned settings without any students being present or any curricular involvement. Contrast Southern Gloucester Cty. Reg. Bd. of Ed., P.E.R.C. No. 93-26, 18 NJPER 479 (¶23218 1992), and Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) (both cases restraining arbitration where interactions occurred in formal settings and where teachers had other alleged problems with students in classes) with Pleasantville Bd. of Ed., P.E.R.C. No. 2002-21, 28 NJPER 17 (¶33004 2001), and Demarest Bd. of Ed., P.E.R.C. No. 99-36, 24 NJPER 514 (¶29239 1998), aff'd 26 NJPER 113 (¶31046 App. Div. 2000) (neither case restraining arbitration where interactions involved unscheduled meetings in which upset parents came to school to confront teachers over incidents involving their children; no curricular or classroom management issues were involved). In deciding whether a withholding is based on an evaluation of teaching performance, the location, content, subject, and overall nature of a parent-teacher interaction may be relevant. We must consider all the circumstances and decide whether under all those particular facts, the withholding partially or wholly involves teaching performance issues. We believe it does because the meeting with J.I.'s father essentially involves the same issues of disciplinary techniques and style as in the teacher's encounter with J.I. in the hallway. The meeting was triggered by J.I.'s request for his father's presence and by the father's concern about [the teacher]'s alleged intimidation of his child. Although held on short

notice, it was a structured meeting rather than an unmediated and impromptu encounter. The discussion at the meeting centered on a disagreement about whether the teacher acted appropriately in how he demanded J.I.'s respect and then apparently segued into a disagreement as to whether the teacher was disrespecting the father or vice-versa. The "respect" issues involving the teacher's interactions with J.I. and his father cannot be cleanly separated and will necessarily involve a similar and subjective judgment about the propriety of the teacher's style in demanding that he be respected. We thus conclude that this reason for the withholding is based at least in part on teaching performance concerns.

Given the preceding analysis, we hold that this withholding was predominately based on an evaluation of teaching performance and we restrain arbitration. Any appeal of the withholding must be made to the Commissioner of Education.

ORDER

The request of the Linden 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