

P.E.R.C. NO. 2010-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RED BANK REGIONAL HIGH SCHOOL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2010-022

RED BANK REGIONAL EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Red Bank Regional High School Board of Education for a restraint of binding arbitration of a grievance filed by the Red Bank Regional Education Association. The grievance challenges the increment withholding of a teaching staff member. Because the reasons cited by the Board for the withholding relate predominately to an evaluation of teaching performance, the Commission grants the request for a restraint.

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, Lindabury, McCormick, Estabrook &
Cooper, P.C., attorneys (Anthony P. Sciarrillo, of
counsel)

For the Respondent, Detzky & Hunter, LLC, attorneys
(Stephen B. Hunter, of counsel)

DECISION

On October 2, 2009, the Red Bank Regional High School Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Red Bank Regional Education Association. The grievance challenges the increment withholding of a teaching staff member. Because the reasons cited by the Board for the withholding relate predominately to an evaluation of teaching performance, we grant the request for a restraint.

The parties have filed briefs, exhibits and certifications. These facts appear.

The Association represents the Board's teaching staff members. The parties' collective negotiations agreement is effective from July 1, 2008 through June 30, 2011. The grievance procedure ends in binding arbitration.

On May 27, 2009, the Board voted to withhold an AP Biology teacher's employment and adjustment increment for the 2009-2010 school year. The Board issued a letter to the teacher advising her that the reasons for her increment withholding were previously issued to her in a May 7, 2009 memorandum from the Superintendent. The May 7 memorandum stated the following:

This letter is being written to summarize and document the meeting which was held today, May 7, 2009, with you [name], Jim Stefankiewicz (Principal), and Thomas Bohnyak (NJEA Field Representative). Mary Karlo, RBREA President, sat in on the meeting but did not participate in the discussion. The meeting was prompted by a student complaint, alleging that you had made comments about the student that were humiliating and derisive, causing the student to feel anxious about attending his biology class. Upon taking a statement from the student and interviewing other students in this particular class, the high school principal and his staff determined that you had coined "pet" names for several of your students and in this immediate case, called the student "big boy" and "big-chested" on several occasions. The student further alleged that he felt bullied and harassed by you. Several other students interviewed substantiated that you have pet names for students and had used these representations when referring to the student

in question. One student commented that, "[name] says really hurtful things to some of the students in my class."

In addition to this particular student, two female students (sisters) came forward the morning of our meeting to allege that you have made comments regarding their father to the degree that you have insinuated that you know him on a personal basis and that you have perhaps dated him. One sister stated that you told her that, "I know things about your father that I can't tell you about until after you graduate." These two sisters have also stated that you have made remarks about their father's muscles, directing that they should, "Call me when your father is available."

Clearly [name], these remarks are inappropriate and unprofessional. Your personnel record reflects past instances of this kind of behavior, and you have been advised not to use pet names for students, as they can be construed as derisive and hurtful. While you may not have intended to harass students in this way, you have made them feel self conscious and uncomfortable. You are not dealing with adults; you are dealing with adolescents who may be struggling with identity issues and who may be fragile.

I intend to review this matter next Wednesday evening with the Board of Education and further action may be taken. In the meantime, do not use pet names with students and be more circumspect in your comments both in and outside the classroom.

According to the teacher, she has received consistently positive evaluations; she only referred to a student as "big guy" when requesting his assistance in moving a heavy laptop cart on one occasion; the two sisters have fabricated allegations that

she made comments about their father because she refused to recommend one for a job and because the other is struggling in Biology class; and she had only met the father on one occasion four years prior.

The Association filed a grievance contesting the withholding and on July 2, 2009, the Board denied the grievance. On October 21, the Association submitted the grievance to binding arbitration.

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 Association argues that we should reevaluate the case law in which we have concluded that allegedly inappropriate in-class remarks to students relate to the evaluation of teaching performance. It finds inexplicable our conclusion that allegations of corporal punishment can be submitted to binding arbitration, but not alleged verbal comments by teachers directed to students. It contends that we have failed to address the argument that this distinction, articulated in Marlboro Tp. Bd.

of Ed., P.E.R.C. No. 2010-5, 35 NJPER 284 (¶98 2009), is inconsistent and flawed.

In Marlboro, we stated that allegations of inappropriate comments to students in the classroom involve judgments about the appropriateness of the teacher's comments and interactions with students. In this case, the Board asserts that the teacher's comments were inappropriate and contributed to a poor learning environment. The appropriateness of any particular comment involves educational judgments. By contrast, we have held that an increment withholding based solely on an allegation that a teacher used corporal punishment does not require any educational judgment about the appropriateness of a teacher's conduct. As we stated in Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991), no educational expertise is needed to decide that if a teacher hit a child, it would be improper conduct. N.J.S.A. 18A:6-1 prohibits corporal punishment of students except in very limited circumstances not applicable in that case. No corresponding statute prohibits teacher comments in the classroom. We find this analysis to be neither inconsistent nor flawed. With rare exceptions, corporal punishment is always wrong and therefore does not require educational expertise to determine its appropriateness, while remarks made to a teacher's students require educational

expertise to determine whether the teacher crossed a boundary of appropriate student-teacher interaction.

The Association also asserts that the Board's asserted reasons for the withholding are inaccurate and requests an evidentiary hearing to determine the actual reason for the withholding. N.J.A.C. 19:13-3.6. We deny the request for a hearing. In selecting a forum under N.J.S.A. 34:13A-27, we accept the board's reasons for a withholding and do not consider contentions that those reasons are pretextual or unsupported. Paterson State-Operated School Dist., P.E.R.C. No. 2010-84, ___ NJPER ___ (¶___ 2010); Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003); Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996). We assume the Board will be bound by its asserted reasons before the Commissioner of Education and that the Commissioner has the power to entertain allegations that the asserted reasons are unsupported. Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008); Fanella v. Washington Tp. Bd. of Ed., 1977 S.L.D. 383 (Comm'n of Ed. 4/11/77) (withholding set aside where recommendation to withhold for failure to complete task was made before deadline for task completion).

ORDER

The request of the Red Bank Regional Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: June 24, 2010

Trenton, New Jersey