

P.E.R.C. NO. 2013-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SUMMIT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2012-026

SUMMIT EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Summit Board of Education for a restraint of binding arbitration of a grievance filed by the Summit Education Association. The grievance contests the withholding of a physical education teacher's salary increment. The Board withheld the increment due to the teacher's violation of a no alcohol policy during an out-of-state trip in his capacity as a coach. Because the reasons cited by the Board for the withholding are predominately disciplinary, and because they concerned extracurricular assignments, the Commission holds that the grievance is arbitrable.

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.

P.E.R.C. NO. 2013-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SUMMIT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2012-026

SUMMIT EDUCATION ASSOCIATION,

Respondent.

Appearances:

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

For the Respondent, Oxfeld Cohen, P.C., attorneys (Sanford R. Oxfeld, of counsel)

DECISION

On December 14, 2011, the Summit Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Summit Education Association. The grievance contests the withholding of a physical education teacher's salary increment.

The parties have filed briefs and exhibits. The Board has filed the certification of its director of human resources. These facts appear.

The Association represents full and part-time teaching staff, maintenance and custodial staff, as well as secretarial and clerical employees. The parties' collective negotiations

agreement is effective from September 1, 2008 through August 31, 2011. The grievance procedure for teaching staff ends in binding arbitration.^{1/}

Article V - Employee Rights provides:

[N]o tenured employee shall be discharged or any employee otherwise penalized (excluding non-renewal of a non-tenure employee) without just cause. Any such action by the Board shall be subject to the grievance procedure.

The physical education teacher has been employed by the Board since 2004 and is tenured. He is also head coach of a varsity high school sport and receives a separate stipend in addition to his salary as a physical education teacher.

In the Spring of 2011, the teacher, in his capacity as head coach, was in charge of an out-of-state, multi-day, field trip to the annual convention of the sport he coached, held in a major city. The traveling party was composed of 22 team members, three additional teachers, a volunteer coach and three volunteer parent chaperones. The head coach had attended previous conventions of the sport and of another varsity sport that he also coached.

During the convention, the head coach, the other teachers, and the other adults gathered on three nights in a hotel room

^{1/} In addition, N.J.S.A. 34:13A-26, 27a and 29 provide that, where an increment is withheld for predominantly disciplinary reasons, grievances challenging such withholdings will be resolved through binding arbitration with the burden of proof on the school district. See Scotch Plains-Fanwood Bd. of Ed. and Scotch Plains-Fanwood Ed. Ass'n, 139 N.J. 141 (1995).

occupied by one of the parent chaperones and consumed alcoholic beverages. No students were present. The head coach, who initially denied the incident, later admitted to having two drinks on each of the three evenings.

Part of a Board policy, applicable to both day and overnight field trips, provides:

Smoking and the use of smokeless tobacco, alcohol and any controlled dangerous substances are prohibited for pupils, chaperones and teachers.^{2/}

On June 1, 2011, the head coach was interviewed about the incident. Also present were an Association representative, the principal, the HR director and the athletic director. At the beginning of the session, the HR director stated that the interview would focus on alleged violations of both the field trip policy and the substance abuse policy.^{3/}

2/ A policy on substance abuse, applicable "when an employee is suspected of having a dependency upon or illegal use of a controlled dangerous substance," provides that the penalty for a third offense will be the loss of an increment.

3/ There were also questions concerning hotel room locations, a brief incident where some team members pushed the head coach and others into a hotel swimming pool, concerns about how team members were using social media, and how team members were chaperoned during trips to a mall. There were two vans available to transport the traveling party during their stay. Two trips were made to a mall. The head coach said he drove one of the vans on the first trip, but missed the second trip because he was changing his wet clothes. In all cases, parents and/or teachers chaperoned the mall trips and drove the vans. There was no suggestion that anyone was impaired while driving team members to the mall.

On June 10, 2011, the Superintendent issued a letter of reprimand to the head coach. It alleges that the head coach:

- Violated the Field Trip Policy regarding his obligation to select dependable chaperones and advise them of their obligations;
- Violated the Field Trip policy concerning the use of alcohol by teachers and chaperones;
- Violated the Substance Abuse policy by using alcohol "on school premises or as any part of its activities by an employee . . . as well as reporting to the workplace under the influence . . . of alcohol."

The Superintendent's letter also notes that the head coach initially tried to cover up the drinking, asserts that the chaperones became intoxicated, compromising their ability to supervise the pupils, and that the head coach, an assistant coach, or the volunteer coach should have accompanied the team members on trips to the mall. The letter advises the head coach that he would lose his coaching positions in the district and that the Superintendent would recommend that the Board withhold his salary increment.

On June 17, 2011, the Board Secretary issued a letter to the head coach that the Board had voted to withhold his increment at its June meeting. The Association filed a grievance, dated June 15, alleging that the withholding of the increment constituted discipline without just cause. The grievance notes that dismissal from his coaching positions (with the accompanying loss of the extra-curricular stipends) was an "appropriate

disciplinary action." The grievance also does not seek removal of the letter of reprimand. However, it argues that the alleged policy violations took place in another state and were unrelated to the head coach's performance as a physical education teacher. The grievance asserts:

[J]umping directly to an increment withholding is not following proper protocol and constitutes too severe a punishment for a one-time, first-time concern.^{4/}

The grievance seeks restoration of the increment.

The Board denied the grievance and on July 21, 2011 the Association filed a demand for arbitration (Docket No. AR-2012-049) challenging the withholding of the increment as discipline without just cause. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause

^{4/} Although we do not normally consider evaluations from past school years in deciding whether an increment withholding was performance-based or disciplinary, the Board chose to append four of the physical education teacher's annual evaluations to the certification of the HR director. All evaluations give the physical education teacher the highest rating in each category and contain narratives praising his performance.

in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider whether the Board had cause to withhold the teacher's increment.

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, 146 (¶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.^{5/}

The Board argues that this withholding relates predominantly to the teacher's failure to properly supervise the pupils, thus potentially affecting their safety. It contends that because his performance evaluations note he attended at conventions like the one in question, they are part of his normal teaching duties and thus his actions are relate to teaching performance.

The Association contends that increment withholdings based on conduct occurring in the course of an extra-curricular or

^{5/} The arbitrator held that the Board lacked just cause to withhold the teacher's increment. His determination was appealed and eventually upheld by the Supreme Court in an opinion that concurred with our approach. See Scotch Plains-Fanwood Bd. of Ed. and Scotch Plains-Fanwood Ed. Ass'n, 139 N.J. 141 (1995).

coaching assignment are disciplinary and the Commission has allowed such disputes to be resolved through binding arbitration rather than review by the Commissioner of Education. It notes that the Board's argument that the physical education teacher's increment was withheld for failing to supervise students on the trip in violation of a specific Board policy, was not part of the charges listed in the Superintendent's June 10, 2011 letter.

The reasons for this withholding are not based on an evaluation of teaching performance. They clearly stem from the alcohol consumption by the head coach, the teachers, coaches and parent chaperones on the trip. Given the detailed statements and allegations in the Superintendent's June 10, 2011 letter and the absence of any reference to an alleged violation of Board policy 3280 (Liability for Pupil Welfare), the focus of the increment withholding was not whether teaching staff and coaches, as opposed to parent chaperones, were supervising the team members on their trips to the mall.^{6/}

Our conclusion comports with prior increment withholding decisions. In Bergen Cty. Voc. & Tech. Schools Dist. Bd. of Ed.,

^{6/} While the certification of the HR director, filed with the Board's brief, refers to policy 3280, we decide these cases based upon the statement of reasons given to the teacher at the time the increment is withheld. See N.J.A.C. 19:13-2.2(a)3; Readington Tp. Bd. of Ed., P.E.R.C. No. 2012-26, 38 NJPER 210, 211 (¶72 2012). In any event, had the teacher been cited for violating that policy at the time his increment was withheld, we would still conclude that the Board's action was predominantly disciplinary.

P.E.R.C. No. 2004-73, 30 NJPER 145 (¶58 2004), the Board certified tenure charges against a tenured culinary arts teacher and also withheld his salary increment for unprofessional behavior while serving as a stipended chaperone on a cruise with students to the Bahamas. Among his actions was "Consuming alcoholic beverages in the presence of students and staff."^{7/} We wrote (30 NJPER at 147):

This case does not involve any aspect of teaching or classroom conduct. The alleged failure to model the behavior expected of teaching staff members may warrant concern, but that alleged failure in this case is not a question of teaching performance that must be assessed by the Commissioner of Education but an allegation of professional misconduct that can be reviewed by an arbitrator.

Also pertinent is Boonton Bd. of Ed., P.E.R.C. No. 99-101, 25 NJPER 288, 291 (¶30121 1999) involving improper behavior by a coach during a school sporting event. We explained that:

When the Legislature enacted N.J.S.A. 34:13A-27 permitting teachers to arbitrate withholdings not predominately based on teaching performance, it simultaneously enacted N.J.S.A. 34:13A-23 making negotiable all aspects of assignment to, retention in, dismissal from and any terms and conditions of employment concerning extracurricular activities, except the establishment of qualifications. The Legislature thus distinguished extracurricular assignments from regular teachers assignments; the latter remain non-negotiable under Ridgefield Park. Given the Legislature's differentiation

^{7/} That teacher also had evaluations rating his teaching as effective and deserving of praise.

between extracurricular assignments and teaching assignments, we would ordinarily expect that a coaching incident would not be equated with teaching performance concerns under N.J.S.A. 34:13A-27.

This dispute has aspects of both Bergen Cty. Voc. & Tech. and Boonton and comports with our independent conclusion that this withholding was not based on an evaluation of teaching performance.^{8/} Under either mode of analysis, we decline to restrain binding arbitration. Our order does not prevent the Board from arguing to an arbitrator that the incident gave it just cause to withhold the teacher's increment.

ORDER

The request of the Summit Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Chair Hatfield recused herself.

ISSUED: January 31, 2013

Trenton, New Jersey

8/ The cases cited by the Board involve increment withholdings prompted by the alleged failure of teaching staff to satisfactorily accomplish their professional or classroom objectives or to properly supervise students while in school or manage student behavior in class. The extra-curricular context of this dispute and the absence of any teaching performance issues makes those cases distinguishable.