

P.E.R.C. NO. 93-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RAMSEY BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-92-91

RAMSEY TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the requests of the Ramsey Board of Education to restrain binding arbitration of two grievances filed by the Ramsey Teachers Association. The two grievances contested two memoranda concerning a physical education teacher's teaching performance and an increment withholding based on those two memoranda and a third incident of allegedly inappropriate behavior towards a student during class.

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Appearances:

For the Petitioner, Winne, Banta, Rizzi, Hetherington & Basralian, P.C., attorneys (Robert M. Jacobs, of counsel)

For the Respondent, Bucceri & Pincus, attorneys
(Gregory T. Syrek, of counsel)

DECISION AND ORDER

On March 19, 1992, the Ramsey Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of two grievances filed by the Ramsey Teachers Association. One grievance contests the withholding of a physical education teacher's increment and the other grievance contests the issuance of two memoranda which the Association characterizes as disciplinary and the Board characterizes as evaluative.

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

The Association represents the Board's certificated personnel including teachers. The parties have entered into a collective negotiations agreement effective from July 1, 1991 to June 30, 1993. Binding arbitration is the terminal step of the grievance procedure with respect to reprimands and increment withholdings that are predominately disciplinary. N.J.S.A. 34:13A-29.

Bruce Stead has been employed by the Board for 24 years. For the last several years, he has been assigned to teach physical education at an elementary school.

At the end of the 1989-90 school year, a Professional Improvement Plan was presented to Stead. That plan called upon him to meet certain goals in the next school year. In particular, he was to eliminate classroom situations which impact negatively upon the self-image and safety of his students and the image of his department. To accomplish this goal, Stead was to apply a specified process for making decisions, use appropriate waiting time in class before making decisions, and identify areas within each activity which call for situational decisions.

On February 1, 1991, principal Lynn Mintz met with Stead and issued a memorandum to him. This memorandum described an incident which had occurred during a class the day before. The students had played "Medical War," a dodge ball game in which students who are hit are carried to the "hospital" by other students to recover. One fifth grade student was hit. Two teammates carried

him by his hands and feet, but he either squirmed or one of his teammates was about to be hit by a ball. As a result, he was dropped. Stead was watching other students at the time. When the child complained that he could not move his leg, Stead reported the injury and the student was taken to the hospital. The student returned to school the next day.

On February 5, 1991, Mintz sent Stead a memorandum notifying him that a meeting would be held on February 8 to discuss the accident in relation to his Professional Improvement Plan. This memorandum noted that the meeting could result in action regarding Stead's salary increment or employment and that Stead could have an Association representative present at the meeting.

On February 8, Stead and his representative met with Mintz. According to Stead, Mintz disregarded what he had to say and spent most of the meeting blaming him and accusing him of not supervising his class. At the end of the meeting Mintz handed Stead a memorandum dated February 4, 1991. This memorandum repeated the description of the incident set forth in the first memorandum; questioned Stead's judgment in having students carry other students, and suggested that the decision-making process required by Stead's Professional Improvement Plan had been designed to avoid such situations. The memorandum also stated that had Stead been in a position allowing him an unobstructed view of all students, he would have observed the student's squirming. The memorandum concluded:

You will recall that, in a May 31, 1990 memo, Tony Kemps indicated that the District was

extremely concerned about incidents which reflected poor judgment and poor decision-making on your part. That memo also pointed out that a repetition of similar incidents this school year could lead to action affecting your salary increment or your future employment with the District. To date, there has been a repetition of incidents demonstrating inappropriate judgment. This incident, following closely after the incident with [C.N.] (see memo of 1/29/91), gives proof of that statement. It is inarguable, that there has been a lack of satisfactory improvement to date.

On February 15, 1991, Mintz met with Stead and his representative because two students had complained about class the day before. At the end of the meeting Mintz issued Stead a memorandum, dated February 15, 1991. According to that memorandum, one student was upset because, after he made a basketball throw, Stead took him aside and said "[O.], do you remember when you were such a clod in second grade?" The memorandum also stated that both students were upset by a game which they believed was "gross" and mimicked sexual activity. That game was a relay race in which a team of girls and boys sat in a line, with each student putting his or her legs on both sides of the student ahead and placing his or her hands on the waist of the student ahead. The team would then bounce across the gym. The memorandum stated that the comment and the relay race showed poor judgment. Stead was directed to stop using the relay race and describe in detail the components of each lesson in his planbook. The memorandum concluded:

The District continues to be extremely concerned about incidents which reflect poor judgment and poor decision-making on your part. This incident follows closely on the incident described in the

memo dated February 4, 1991. It is inarguable that you have made a lack of satisfactory improvement as required by your Professional Improvement Plan for the 1990-1991 school year.

On March 28, 1991, Mintz prepared Stead's Annual Performance Report for the 1990-91 school year. The report noted many areas in which Stead had performed well, but criticized him for not making progress towards the goals specified in his Professional Improvement Plan. Among other examples, the report noted the Medical War and relay race incidents. Mintz recommended that Stead's increment be withheld.

Stead filed a rebuttal. With respect to the Medical War incident, Stead asserts that the Supervisor of Health and Physical Education reviewed all aspects of the game and concluded that the game was appropriate and a previous supervisor had also approved the game. With respect to the relay race, Stead asserts that this activity was recommended at a physical education workshop; he discussed the activity with many physical education teachers who saw nothing wrong with it; and he believed the students who complained were displeased with him for denying their request to play a certain game.

On May 28, 1991, the Board voted to withhold Stead's increments for the 1991-92 school year. The letter notifying Stead of this action stated that the reason was that Stead had made inadequate progress towards achieving the goals in his Professional Improvement Plan. The letter stated that the subjects in which Stead had not made progress were set forth in the Annual Performance

Report, which was attached. As evidence of insufficient progress, the letter described three incidents: (1) a January 25, 1991 class, (2) the January 31, 1991 accident, and (3) the February 14, 1991 relay race. With respect to the January 25 class, the letter stated that Stead had become angry at a student and had used inappropriate language.

The Association filed grievances contesting the increment withholding and the inclusion of the February 4 and February 15 memoranda in Stead's personnel file. The Board denied the grievances and the Association demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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 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. [Id. at 154]

We thus do not consider the contractual merits of the grievances or any defenses the Board may have.

Under N.J.S.A. 34:13A-26, disputes involving the withholding of a teacher's increment for predominately disciplinary reasons shall be subject to binding arbitration. But not all

withholdings can go to arbitration. Under N.J.S.A. 34:13A-27(a), 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. Under N.J.S.A. 34:13A-27(a), we must resolve disputes over whether the reason for a withholding is predominately disciplinary. Our power is limited to determining the appropriate forum for resolving an increment withholding dispute. We do not and cannot consider whether an increment 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 explained the analysis we will follow in determining the appropriate forum for resolving an increment withholding dispute. 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 App. Div. Dkt. No. A-2053-86T8 (10/23/87), 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]

Under the discipline amendment to N.J.S.A. 34:13A-5.3, reprimands may be contested through binding arbitration. But evaluations of teaching performance may not be. In Holland Tp., we explained the analysis we used in distinguishing between reprimands and evaluations:

We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore non-negotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary. [Id. at 826].

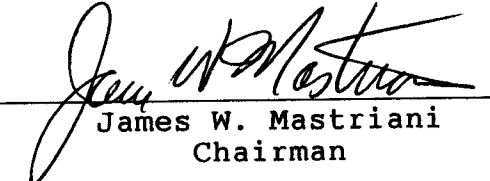
Under all the circumstances of this case, we are persuaded that the increment withholding and the memoranda underlying the withholding predominately involve an evaluation of teaching performance. The memoranda concern classroom activities which the principal believes were educationally inappropriate. The memoranda

assert that Stead's judgment in selecting these activities conflicted with the goals of his Professional Improvement Plan concerning classroom situations. The increment withholding was based on the Board's conclusion, given these two memoranda concerning Stead's teaching performance and a third incident of allegedly inappropriate behavior towards a student during class, that Stead had not made satisfactory progress towards meeting the goals of his Professional Improvement Plan. See Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991); Tenafly Bd. of Ed., P.E.R.C. No. 91-68, 17 NJPER 147 (¶22058 1991); Ridgefield Park Bd. of Ed., P.E.R.C. No. 90-70, 16 NJPER 139 (¶21054 1990). We therefore restrain binding arbitration of the two grievances.

ORDER

The request of the Ramsey Board of Education for restraints of binding arbitration of the two grievances contesting the withholding of Bruce Stead's increment for the 1991-1992 school year and the memoranda dated February 4, 1991 and February 15, 1991 are granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Regan and Bertolino abstained from consideration.

DATED: December 17, 1992
Trenton, New Jersey
ISSUED: December 18, 1992