

P.E.R.C. NO. 94-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROCKAWAY TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-93-102

ROCKAWAY EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Rockaway Education Association against the Rockaway Township Board of Education. The grievance seeks restoration of an art teacher's employment increments originally withheld in 1987. The Commission finds that nothing in the text or legislative history of the 1990 amendments to the Public Employment Relations Act suggests that the Legislature meant to permit arbitration over this decision not to restore increments previously withheld.

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Appearances:

For the Petitioner, Anthony P. Sciarrillo, attorney

For the Respondent, Klausner, Hunter, Cige & Seid, attorneys
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On April 30, 1993, the Rockaway 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 Rockaway Education Association. The grievance seeks restoration of an art teacher's employment increments originally withheld in 1987.

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

The Association represents the Board's teachers. The parties entered into a collective negotiations agreement effective from June 1, 1992 to June 30, 1995.

Joseph Santucci is a tenured art teacher. During the 1986-1987 school year, Santucci was absent 50 or more days because

of a back injury. On April 3, 1987, his supervisor completed an annual evaluation recommending that Santucci's increments be withheld because of his extended absences and his poor overall performance. The evaluation specified problems caused by Santucci's absences, his tardiness in picking up classes, and his uncooperative relations with other staff members.

On May 26, 1987, the Board voted to withhold Santucci's employment and adjustment increments for the 1987-1988 school year. The Board based this withholding on Santucci's excessive absenteeism and unsatisfactory teaching performance. The letter did not state whether or not the withholding would have a continuing effect.

Santucci did not appeal the withholding. Since 1987, his salary guide placement has remained a step behind teachers with the same years of experience.

On March 26, 1991, his supervisor filled out Santucci's annual evaluation for the 1990-1991 school year. Santucci was rated "successful" or "exceptional" in every category.

On July 6, 1991, Santucci wrote the assistant superintendent a letter stating that he had eliminated the original reasons for withholding his increments and requesting that the Board reconsider the 1987-1988 withholding and restore him to the appropriate salary guide step for the 1991-1992 school year. This request was denied.

On April 24, 1992, his supervisor filled out Santucci's annual evaluation for the 1991-1992 school year. Santucci was again rated "successful" or "exceptional" in every category.

On October 13, 1992, Santucci wrote a letter to the superintendent again requesting that the previous withholding be reconsidered. He again stressed that he had eliminated the original reasons for the withholding and he added that he had also received an additional Masters degree.

On November 17, 1992, the superintendent notified Santucci that his request had been denied. While commending Santucci's recent evaluations, activities, and contributions, the superintendent concluded that "this Board of Education and this superintendent do not feel it would be appropriate to overturn the actions of a prior Board of Education and prior superintendent."

On December 17, 1992, the Association filed a grievance asserting that the denial of Santucci's request was "punitive in nature and failed to address improvements made by Mr. Santucci over the years." Agreeing with the superintendent, the Board denied the grievance.

On March 23, 1992, the Association demanded binding arbitration. It asserted that the rejection of Santucci's request was "arbitrary and capricious, and constitutes discipline without just cause." This petition ensued.

The Board asserts that N.J.S.A. 18A:29-14 prohibits mandatory restoration of previously withheld increments. The Association asserts that N.J.S.A. 34:13A-26 permits binding arbitration when increments are withheld for disciplinary reasons, including excessive absenteeism, and that the refusal to restore

Santucci's employment increment, in deference to a previous board's judgment, should also be considered disciplinary.

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 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 the contractual merits of the Association's grievance or any contractual defenses the Board may have.

N.J.S.A. 18A:29-14 provides:

Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education.... The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid.... It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

Teachers cannot recover increments in future years absent a local board's affirmative action. Cordasco v. City of E. Orange Bd. of Ed., 205 N.J. Super. 407 (App. Div. 1985). A board has discretion to restore increments, but is not compelled to do so. Probst v.

Haddonfield Bd. of Ed., 127 N.J. 518 (1992). While a teacher losing an employment increment will always lag one step behind other teachers with the same experience, that fact is simply the effect of an earlier employment decision. North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed., 96 N.J. 587 (1984).

In 1979, our Supreme Court held that disputes over increment withholdings of teaching staff members could not legally be submitted to binding arbitration. Bernards Tp. Bd. of Ed v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979). The Court concluded that by enacting N.J.S.A. 18A:29-14, the Legislature had delegated to the Commissioner of Education the authority to review increment withholdings for inefficiency or other good cause.

Effective January 4, 1990, the Legislature amended the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., to modify the holding of Bernards Tp. Under N.J.S.A. 34:13A-26, withholdings "for predominately disciplinary reasons" may be contested through binding arbitration. But under N.J.S.A. 34:13A-27, withholdings related "predominately to a teaching staff member's teaching performance" must still be appealed to the Commissioner of Education. In the event of a dispute, it is up to us to determine whether a withholding is predominately disciplinary or related to an evaluation of teaching performance.

Applying the 1990 amendments, we have held that withholdings based upon excessive absenteeism were predominately disciplinary. Hillside Bd. of Ed., P.E.R.C. No. 92-124, 18 NJPER

358 (¶23155 1992); Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991). However, the withholding based upon Santucci's absenteeism took place during the 1986-1987 school year, before the 1990 amendments and while Bernards Tp. still governed all increment withholding disputes. Thus, the original withholding could not have been contested through binding arbitration.

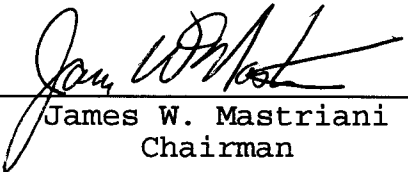
Even though the original decision to withhold the employment increments was not legally arbitrable, the Association contends that the subsequent decision not to restore the employment increment is legally arbitrable. We do not agree.

Before the 1990 amendments, we had held that contractual provisions requiring the restoration of increments were not mandatorily negotiable. Upper Saddle River Bd. of Ed., P.E.R.C. No. 88-58, 14 NJPER 119 (¶19045 1987); Greater Egg Harbor Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987). Nothing in the text or legislative history of the 1990 amendments suggests that the Legislature meant to permit arbitration over this decision not to restore increments previously withheld. Cf. Fieseler v. South River Bd. of Ed., Comm'n of Ed. Decision 4-93 (1/7/93). We therefore restrain binding arbitration.

ORDER

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

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

DATED: October 25, 1993
Trenton, New Jersey
ISSUED: October 26, 1993