

P.E.R.C. NO. 93-107

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WAYNE TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-37

WAYNE TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Wayne Township Education Association against the Wayne Township Board of Education. The grievance contests the withholding of a teacher's increments. The Commission finds that the reasons for the increment withholding predominately involve an evaluation of teaching performance.

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Appearances:

For the Petitioner, Fogarty & Hara, attorneys
(Stephen R. Fogarty, of counsel; Deborah Ustas, on the
brief)

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

DECISION AND ORDER

On November 17, 1992, the Wayne Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of arbitration of a grievance filed by the Wayne Township Education Association. That grievance contests the withholding of a teacher's increments.

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

The Association represents the Board's teachers and certain other personnel. The parties entered into a collective negotiations agreement effective from July 1, 1990 through June 30, 1993.

N.J.S.A. 34:13A-29 provides for binding arbitration of disciplinary

increment withholdings. The contract states that written notice of the reasons for recommending a withholding must be given to an employee by April 30.

Dorothy Carey is a third grade teacher at Pine Lakes School. The principal of her school is Albert Zanetti.

In June 1992, a parent complained to Zanetti that Carey had kissed her son to discipline him for classroom misbehavior. Zanetti met with Carey and then wrote a memorandum to her confirming their conversation. He reminded Carey that they had discussed this disciplinary practice years ago and he had assumed that it had stopped. He advised Carey that she could be charged with assault, child abuse, or possibly harassment; and he stated his expectation that the practice would not recur.

On June 23, 1992, Zanetti wrote a memorandum to the assistant superintendent describing the parent's complaint and his meeting with Carey. He stated that Carey had admitted kissing three students; he had reprimanded her and warned her that she could lose her certification and pension; and Carey should be immediately suspended if another incident occurred.

On July 8, 1992, Carey was advised that the superintendent wanted to meet with her to discuss the pupil disciplinary incident. She was encouraged to obtain Association representation.

On July 10, 1992, a meeting was held. Carey, an Association representative, Zanetti, and the superintendent attended.

On July 24, 1992, the superintendent wrote Carey a letter. He advised her that the principal and he would recommend that the Board withhold her employment and adjustment increments for the 1992-1993 school year "as a result of your actions which involve your practice of kissing students and desk dumping to improve discipline in your classroom."^{1/} The superintendent specified that her actions demonstrated:

- (1) Poor classroom management and climate;
- (2) Inappropriate classroom discipline which presents a threatening environment to students;
- (3) Failure to implement appropriate classroom teaching skills; and
- (4) Conduct unbecoming a teacher.

On August 20, 1992, a Board meeting was held. Carey declined an invitation to appear and to have a representative speak on her behalf. The Board voted to withhold her employment and adjustment increments for the 1992-1993 school year. The Board found that her practices of kissing students and desk dumping as forms of pupil discipline in her classroom were outrageous and unacceptable. It accepted the superintendent's findings listed above.

On September 16, 1992, the Association requested a step three grievance hearing. It asserted that the withholding lacked just cause and that Carey's behavior was not grievous enough to warrant such extreme discipline. It demanded restoration of the increments.

^{1/} It appears that allegations of desk dumping were discovered when the allegations of kissing students were investigated.

On September 28, 1992, the Board denied the Association's request for a step three grievance hearing. It asserted that its August 20 resolution was final and that Carey's only recourse was to file a petition with the Commissioner of Education.

On October 13, 1992, the Association requested advisory arbitration. This petition ensued. In its brief, the Association asserts that the reasons for the withholding were disciplinary so it is entitled to submit its grievance to binding arbitration under N.J.S.A. 34:13A-26 and N.J.S.A. 34:13A-29.

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]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Board may have.

Under N.J.S.A. 34:13A-26, increment withholdings of teaching staff members for predominately disciplinary reasons shall be reviewed through binding arbitration. But not all withholdings can go to arbitration. Under N.J.S.A. 34:13A-27(d), if the reason for a withholding is related predominately to an 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, we must make that determination. N.J.S.A. 34:13A-27(a). 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 App. Div. Dkt. No. A-2053-8678 (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]

We now address the withholding of Carey's increments. The Board's reasons center on its subjective educational judgments about her allegedly inappropriate techniques for managing the classroom and maintaining student decorum. Such reasons predominately involve

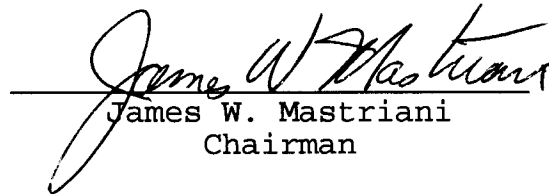
an evaluation of teaching performance. Southern Gloucester Cty. Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 93-26, 18 NJPER 479 (¶23218 1992); Bergen Cty. Voc. Schools Bd. of Ed., P.E.R.C. No. 91-70, 17 NJPER 150 (¶22060 1991); Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991); Tenafly Bd. of Ed., P.E.R.C. No. 91-68, 17 NJPER 147 (¶22058 1991); cf. Lincoln Park Bd. of Ed., P.E.R.C. No. 87-45, 12 NJPER 829 (¶17318 1988) (document criticizing teacher's classroom disciplinary techniques was evaluative and not arbitrable). Contrast Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991) and South River Bd. of Ed., P.E.R.C. No. 92-70, 18 NJPER 61 (¶23026 1991) (permitting binding arbitration of withholdings based solely on true or false allegations of illegal corporal punishment). We will therefore restrain binding arbitration over the decision to withhold Carey's increments.^{2/}

^{2/} The grievance may legally be submitted to advisory arbitration if the contract so provides. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979).

ORDER

The request of the Wayne 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. None opposed. Commissioner Smith abstained. Commissioners Bertolino and Regan abstained from consideration.

DATED: May 20, 1993
Trenton, New Jersey
ISSUED: May 21, 1993