

P.E.R.C. NO. 93-76

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FLORHAM PARK BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-31

FLORHAM PARK EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Florham Park Education Association against the Florham Park Board of Education to the extent the grievance challenges the withholding of a teacher's increments. The Commission declines to restrain binding arbitration to the extent the grievance challenges the refusal to reappoint the teacher to his extracurricular positions.

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Appearances:

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

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

DECISION AND ORDER

On October 16, 1992, the Florham Park Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Florham Park Education Association. The grievance asserts that the Board disciplined a teacher without just cause when it withheld his increments and denied him reappointment to his extracurricular positions.

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

The Association represents the Board's teachers and other personnel, with certain immaterial exceptions. The parties entered

into a collective negotiations agreement effective for the 1989-1990, 1990-1991, and 1991-1992 school years. That contract lists girls' soccer coach and student council advisor as extracurricular positions. The grievance procedure ends in binding arbitration.

Jeffrey Gruenwald is an eighth grade social studies teacher at Ridgedale Middle School. On May 14, 1992, the principal observed Gruenwald teach a class on the Holocaust. The classroom observation report was generally favorable, noting that Gruenwald was knowledgeable and well-prepared. It also suggested, however, that the class would have been enhanced by clearly stating the purpose of the lesson, reinforcing note-taking skills, and interacting with students who are not active participants.

On June 5, 1992, a Friday, Gruenwald attended an in-service workshop outside the district. His principal, Frank Markowick, covered his fifth and sixth period classes. On June 8, a Monday, Gruenwald resumed teaching his classes.

On June 11, a parent of one of Gruenwald's students wrote a letter to the principal. The letter alleged that Gruenwald had acted inappropriately and unprofessionally in a June 8 class. The letter states, in part.

The students told Mr. Gruenwald that comments were made by you during the Friday's class. Mr. Gruenwald asked the students for more information and proceeded to comprise a list. All of this during teaching time. He then began to give his personal opinion on the job you are doing as Principal. He told the students that the reason

that Ms. Gonnella is leaving is because of you. The students were told that the staff doesn't like the way you are running the school and that he himself questions your competence. Mr. Gruenwald continued this discussion and told the class that you harass female staff members. One of them sexually.

After this class ended, the conversation and speculation continued on the part of the students. This incident spilled over into the next class where more conversation on the part of students continued. More lost learning time. I feel that this sort of behavior by a teacher, a so called professional, was anything but professional.

The action also stated that the parent had spoken to Gruenwald who admitted that he was wrong to involve students in his disagreements with the principal.

On June 19, the parent wrote a follow-up letter to the Superintendent. She expressed her concern "that this incident will not be looked into in a timely manner."

On June 22, the principal issued Gruenwald's yearly supervision report. Under Instructional Effectiveness, the report praised Gruenwald's skills and knowledge and under Personal Qualities, the report praised Gruenwald's activeness in the school community during the 1991-1992 school year. The report singled out for praise "the large number of student council activities and resulting opportunities for student participation."

On July 1, the superintendent wrote Gruenwald a letter listing these allegations of unprofessional behavior:

1. Use of class time to interrogate the students regarding Mr. Markowick's behavior, when he covered your class on June 5, 1992. At this time, you were out of the district at a professional in-service workshop.

2. You gave your personal opinion on the job Mr. Markowick is doing as Principal of the Middle School.

3. You told the students the reason a fellow teacher was leaving the district at the end of the 1991-92 school year was because of Mr. Markowick.

4. The students were told by you that the staff doesn't like the way Mr. Markowick is running the school, and you personally questioned Mr. Markowick's competence.

5. You advised the class that Mr. Markowick harasses female staff members; one of them sexually.

The letter confirmed the scheduling of a meeting to discuss these allegations. Gruenwald was advised that he was entitled to have a union representative at the interview and that the principal would also be invited.

On July 6, the superintendent and the principal met with Gruenwald and an Association representative. After the meeting the superintendent prepared a memorandum entitled Fact-Finding Conference. The memorandum tracked the conversation among the participants. Gruenwald admitted making some inappropriate comments, but he denied accusing the principal of sexual harassment and he asserted that his comments had been triggered by his students telling him that the principal had criticized him and the lack of work and notetaking in his class. At the end of the interview, the

superintendent listed these possible outcomes: no action, a letter of reprimand, an increment withholding, and tenure charges.

Gruenwald stated that he would settle for a letter of reprimand.

On July 17, the superintendent sent Gruenwald a letter stating that he would recommend withholding Gruenwald's employment and adjustment increments for the 1992-1993 school year. The superintendent based this recommendation on the June 8, 1992 incident. He stated that this incident demonstrated:

1. Inappropriate classroom discussion;
2. Lack of control over classroom discussion;
3. Poor classroom management and climate;
4. Failure to implement appropriate classroom teaching skills;
5. Improper lesson presentation; and
6. Conduct unbecoming a teacher.

The letter also stated that the superintendent would recommend that Gruenwald not be reappointed to the positions of coach of the girls' soccer team and student counsel advisor. It stated:

Since you have demonstrated an inability to portray an appropriate role model for students in the classroom, I cannot recommend that you be appointed to any co-curricular positions where you are required to supervise students in a less structured and largely unsupervised environment.

The letter enclosed copies of the documents the superintendent considered in reaching his recommendations -- the observation report, the parent's letters, the superintendent's July 1 letter to Gruenwald and summary of his telephone conversation with Gruenwald

that day, his "fact-finding" memorandum, and the principal's July 8 summary of the incident.^{1/}

On July 28, Gruenwald was notified that the Board would discuss his employment status and the superintendent's recommendations at its August 11 meeting. He and the Association were both notified that he could have a representative present.

On August 11, the Board held a meeting. After Gruenwald presented his case, the Board concluded that Gruenwald's June 8 actions "were outrageous and unacceptable" and it voted to accept the superintendent's recommendations based on his findings and reasons.

On August 13, the Association demanded binding arbitration. It asserted that Gruenwald had been disciplined without just cause and it requested that the Board restore Gruenwald's increments and reinstate him to his extracurricular positions. This petition ensued.^{2/}

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

^{1/} This last document has not been submitted. Nor do we know whether any action was taken against the principal.

^{2/} The Board also requested an interim restraint of arbitration pending this decision. A Commission designee restrained arbitration of the increment withholding dispute, but declined to restrain arbitration of the extracurricular activities dispute. I.R. No. 93-13, ___ NJPER ___ (¶_____ 1993).

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 grievance or any defenses the Board may have. Nor do we consider whether the Board had good or just cause to withhold Gruenwald's increments.

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. [Id. at 146]

We now assess the nature of the reasons for withholding Gruenwald's increments. All the cited reasons stem from his interactions with students during a social studies class he taught on June 8. We therefore conclude that the reasons for this withholding were related predominately to an evaluation of Gruenwald's teaching performance. We restrain binding arbitration of the increment withholding portion of the grievance.

Before 1990, extracurricular appointments and retentions were not mandatorily negotiable or legally arbitrable. Teaneck Teachers Ass'n v. Teaneck Bd. of Ed., 94 N.J. 9 (1983); Mainland Reg. Teachers Ass'n v. Mainland Reg. School Dist. Bd. of Ed., 176 N.J. Super. 476 (App. Div. 1980), certif. den. 87 N.J. 312 (1981). But in 1990, the Legislature amended N.J.S.A. 34:13A-1 et seq. to overrule that case law. N.J.S.A. 34:13A-23 now states:

All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities

shall be deemed mandatory subjects for collective negotiations between an employer and the majority representative of the employees in a collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations. If the negotiated selection procedures fail to produce a qualified candidate from within the district the employer may employ from outside the district any qualified person who holds an appropriate New Jersey teaching certificate. If the employer is unable to employ a qualified person from outside of the district, the employer may assign a qualified teaching staff member from within the district.

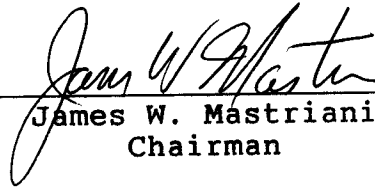
In Holmdel Tp. Bd. of Ed., P.E.R.C. No. 91-62, 17 NJPER 84 (¶22038 1991), we refused to restrain binding arbitration of a grievance challenging the non-retention of a basketball and baseball coach since the amendment expressly permits an employer to agree to arbitrate disputes over the non-retention of an employee in an extracurricular position. The amendment and Holmdel control this case.

The Board argues that the amendment should not be construed to permit arbitration of this grievance, asserting that it has acted in good faith and prudently and that it has a statutory right to set qualifications. But the amendment makes retention decisions mandatorily negotiable and permits agreements to submit particular non-retention decisions to binding arbitration. While a board may set the necessary qualifications, a grievant may contest a determination that he or she has not met those qualifications. The Board must therefore address its arguments to the arbitrator. We decline to restrain binding arbitration of the extracurricular activities portion of the grievance.

ORDER

The request of the Florham Park Board of Education for a restraint of binding arbitration is granted to the extent the grievance challenges the withholding of increments from Jeffrey Gruenwald.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting and Grandrimo voted in favor of this decision. Commissioner Smith voted for the decision except to the extent it restrained arbitration of the increment withholding dispute. Commissioners Bertolino and Regan abstained from consideration. Commissioner Wenzler was not present.

DATED: February 22, 1993
Trenton, New Jersey
ISSUED: February 23, 1993