

P.E.R.C. NO. 92-124

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSIDE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-92-77

HILLSIDE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Hillside Board of Education's request for a restraint of binding arbitration of a grievance filed by the Hillside Education Association. The grievance contests the withholding of a teacher's employment increment for absenteeism. The Commission determines that the increment withholding was predominately disciplinary rather than an evaluation of teaching performance.

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Appearances:

For the Petitioner, Gill & Cohen, P.C., attorneys
(Neil M. Cohen, of counsel)

For the Respondent, Balk, Oxfeld, Mandell & Cohen, attorneys
(Arnold S. Cohen, of counsel)

DECISION AND ORDER

On February 14, 1992, the Hillside Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by a teacher represented by the Hillside Education Association. The grievance contests the withholding of the teacher's employment increment for absenteeism.

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

The Association represents the Board's classroom teachers and certain other personnel. The parties entered into a collective negotiations agreement effective from July 1, 1988 through June 30, 1991. Binding arbitration is the terminal step of the grievance

procedure for increment withholdings that are predominately disciplinary. N.J.S.A. 34:13A-29.

Steven Serafino is an English teacher. He has been employed by the Board since 1972.

The Board's Improvement and Evaluation Guide has two headings: "Personal Characteristics" and "Instructional and Guidance Skills." Maintaining good attendance is a criterion under "Personal Characteristics."

Since the 1975-76 school year, Serafino has been absent 174 days, or an average of 11.6 days per school year. Administrators have discussed Serafino's absenteeism with him. On March 1, 1985, Serafino's principal wrote the superintendent a memorandum stating that he had told Serafino that he must improve his attendance or have his increment withheld. The superintendent then wrote Serafino a memorandum stating that his attendance record from 1982-1985 had been horrendous and his concern for the welfare of his students minimal. Nevertheless, the superintendent, based on a discussion with Serafino and other factors related to his attendance problems, recommended that Serafino receive an increment for the next school year. The superintendent warned, however, that Serafino would be disciplined if he did not improve his attendance.

On February 1, 1990, Serafino's principal wrote him a letter. The principal noted that Serafino had been injured and hoped he would recover quickly. He then listed three serious concerns:

- Concern #1: You have not followed school procedures for updating your substitute lesson plan folder.
- Concern #2: You did not telephone the substitute service on the 29th and 30th to report your absence.
- Concern #3: Your over-all school attendance to date is very poor.

This letter was placed in Serafino's personnel file. The principal regretted the necessity of this action, but stated that "continuity of instruction must exist."

On April 25, 1990, Serafino received his annual evaluation. Under "Personal Characteristics," it stated: "Chronic absenteeism during the past 18 years. (School accidents and Jury Duty not included)." The evaluation recommended that Serafino's increment be withheld.

On April 26, 1990, the Board resolved to withhold Serafino's employment salary increment for the 1990-91 school year "due to chronic absenteeism during his nineteen (19) years employment with the Board and his failure to take corrective action upon receipt of written notice from the superintendent of schools in April 1985, in regard to the matter of excessive absences."

On May 16, 1990, Serafino filed a grievance contesting the increment withholding. The grievance was denied in a memorandum written by the Board's attorney. The memorandum stated:

The Grievance Committee concluded that Mr. Serafino's attendance records, which included absent days in excess of permitted sick leave, was a legitimate consideration in evaluating the overall performance. Particularly, where

previous administrators had issued warnings which went unheeded. Moreover, the Administrators felt that the excessive sick days, and poor attendance record impacted upon the students, and [caused] lack of continuity in instruction.

The Association demanded binding arbitration. This petition ensued.

Under N.J.S.A. 34:13A-26, disputes involving the withholding of an employee's increment by a school board 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 a teaching staff member's 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.

In Scotch Plains-Fanwood, we applied this analysis to an increment withholding dispute materially indistinguishable from this one. There, we found that an increment withholding was disciplinary because it was intended to penalize a teacher for absenteeism and to induce her to improve her attendance. We stated:

We recognize that excessive absenteeism can adversely affect students. But a concern for that effect, while legitimate, does not predominately involve an evaluation of teaching performance. Absenteeism can also affect other aspects of job performance. None of these concerns need go unaddressed. Whether an employer imposes minor discipline pursuant to a negotiated schedule of penalties or chooses to withhold an increment, the choice of forum for reviewing the employer's determination does not limit the employer's right to raise its legitimate concerns. Id. at 146 [footnote omitted].

See also Pollard v. Teaneck Tp. Bd. of Ed., State Bd. of Ed. #50-90 (3/6/91) (increment withholding may be appropriate disciplinary response to absenteeism, but discipline not appropriate in that case).

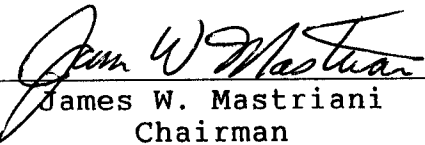
The Board has not distinguished Scotch Plains-Fanwood. We hold that this withholding was predominately disciplinary rather

than an evaluation of teaching performance. We therefore decline to restrain binding arbitration.

ORDER

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: June 25, 1992
Trenton, New Jersey
ISSUED: June 26, 1992