

P.E.R.C. NO. 2000-85

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GREATER EGG HARBOR  
REGIONAL BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2000-40

OAKCREST-ABSEGAMI TEACHERS'  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Greater Egg Harbor Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Oakcrest-Absegami Teachers' Association. The grievance contests the withholding of a teaching staff member's salary increment for the 1999-2000 school year. The Commission concludes that the reasons for this withholding include comments on teacher evaluation reports which relate to an evaluation of teaching performance and must be reviewed by the Commissioner of Education.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Louis J. Greco, attorney

For the Respondent, Myron Plotkin, NJEA UniServ  
Representative

DECISION

On October 14, 1999, the Greater Egg Harbor Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Oakcrest-Absegami Teachers' Association. The grievance contests the withholding of a teaching staff member's salary increment for the 1999-2000 school year.

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

The Association represents all certified teaching staff. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1997 to June 30,

2000. The grievance procedure ends in binding arbitration. Article IV, entitled "Teacher Rights," states that just cause is necessary for disciplinary actions against teachers. Article VII, entitled "Salaries and Benefits," details the procedures for withholding or adjusting increments.

Joseph Vastano is an English teacher at Oakcrest High School. He has been teaching for about 25 years. On July 12, 1999, the Board voted to withhold his salary increment for the 1999-2000 school year. The Board's stated reasons for the withholding, according to a letter from the Superintendent notifying Vastano of the action, are as follows:

1996-97 Teacher Evaluation: Needs improvement in communicating effectively with pupils, parents, co-workers, supervisors, etc.

1997-98 Teacher Evaluation: Improvement noted but action to continue.

1998-99 Teacher Evaluation: Needs improvement in Job Task D: Meets Professional Responsibilities; as noted in the memo of October 20, 1998. Vastano continues to communicate ineffectively. There has been little significant improvement as evidenced by the incident of October 1, 1998, which commenced during classroom instruction.

This incident began in the classroom with a request for an attendance sheet and escalated to a main office outburst as described by Ms. Lovie Lilly in her comments made on July 12, 1999.

1996-97 Teacher Evaluation: Needs improvement in Job Task E: Maintain Appropriate Student Relationship. More specifically maintains an atmosphere of mutual respect in classroom relationships with pupils; uses classroom procedures which encourage and develop pupil self-discipline and self-confidence; provides fair, firm, and consistent discipline. All are noted as needs improvement.

1997-98 Teacher Evaluation: All areas indicated "meets expectations" with the following comments by the Supervisor, "Strive to avoid conflict and confrontations and remain detached."

1998-99 Teacher Evaluation: In Job Task E: needs improvement and the Supervisor states, "We have discussed the need for presenting a more positive atmosphere to encourage students to develop self-confidence."

Further evidence of this area of deficiency was presented by Dr. Foreman concerning inappropriate physical conduct during class time, and as stated by Mr. Vastano, twenty-five years of use of inappropriate nomenclature specifically referring to students as "ugly" in the classroom setting.

The Board has submitted Vastano's evaluation reports for the last three years. In the 1996-1997 evaluation, Vastano received "Satisfactory" ratings in most categories, but received "Needs Improvement" ratings in the areas of "Meets Professional Responsibilities" and "Maintains Appropriate Teacher-Student Relationships." It was noted on the evaluation that Vastano had difficulty communicating with pupils, parents, and co-workers. It was further indicated that this problem had been noted in previous evaluations and discussed with Vastano. The evaluating supervisor also commented that unless significant improvement was shown in the next year, a recommendation would be made to withhold his increment. Vastano disagreed with the evaluation and submitted a rebuttal. The rebuttal asserts that he has numerous documents showing communications to parents and co-workers including 22 progress reports to parents to advise them of their children's status in class. The employment recommendation made by the

evaluating supervisor included a contract with increments for 1997-1998.

The 1997-1998 evaluation indicated that Vastano received "Meets Expectations" ratings in all areas. It also noted that he had improved communications with students and parents and he was urged to continue striving for improvement in that area. Again he was recommended for a contract of employment with increments for 1998-1999.

In the 1998-1999 evaluation, Vastano received a "Meets Expectation" rating in the area of "Prepares For Instruction," and "Needs Improvement" ratings in the areas of "Carries Out Instruction," "Reviews the Effectiveness of Instruction," "Meets Professional Responsibilities," and "Maintains Appropriate Teacher-Student Relationship." Comments made in the evaluation report indicated that Vastano needed to better organize information presented so that students could understand it and to better structure his class with respect to pacing, timing, and constructive pupil involvement. The evaluation also suggested that Vastano be more timely with submission of emergency lesson plans and seating charts, and that he be more attentive to details of managing paper work. Moreover, it was noted that Vastano continues to communicate ineffectively. Finally, the comments stated that although the atmosphere maintained by Vastano was one of mutual respect, at least nine students had requested to transfer out of his class during that school year. Accordingly,

the evaluating supervisor recommended a contract without increment for the 1999-2000 school year. His stated basis was Vastano's continued communication problems, negativity, and lack of focus. His recommendation was in concurrence with that of the vice principal.

Vastano's response to the evaluation was that it was based on "distorted perceptions or outright fabrications created by him simply to demean my effectiveness as a teacher." He further stated that he had criticized his supervisor on several occasions, and that in reply, Vastano's supervisor threatened to use the evaluation process to punish Vastano by taking away his salary increment.

On October 1, 1998, an alleged verbal confrontation occurred in the main office between Vastano and a secretary regarding attendance slips. A memorandum to Vastano, dated October 9, 1998 from the vice principal details that on the day in question, a secretary interrupted Vastano's class to inquire about the whereabouts of the attendance sheet for his homeroom. At the end of his class period, Vastano located the attendance sheet and brought it to the main office. Upon entering the office, Vastano allegedly approached the secretary, threw the attendance sheet at her, and referred to her as "You witch!" A conversation allegedly ensued whereby the "tone and volume of Vastano's voice was reflective of a conflict." The vice principal sent a memorandum to Vastano, expressing her dismay about his "sudden outburst" and

his use of "unwarranted words." Vastano requested an explanation of the references in the memorandum to a "sudden outburst" and to use of unwarranted words. The vice principal subsequently sent him another memorandum, requesting a meeting with him in order to discuss the incident, and encouraged him to bring representation to the meeting.

A meeting took place on October 6, 1998 to discuss the incident. According to the October 9, 1998 memorandum from the vice principal, Vastano denied the following allegations: referring to the secretary as a "witch," raising his voice, and stating "[w]hat the hell is this?" He acknowledged referring to the number of times that the attendance sheet was requested, and he acknowledged commenting about having a child in a college preparatory class and the parental concerns over the number of interruptions made in such a class. The vice principal concluded her October 9 memorandum by setting forth her determination and recommendation to the principal that Vastano's increment be withheld for the 1999-2000 school year. She based this recommendation on the October 1 incident and the review of his personnel records, which allegedly indicate that this incident, demonstrating his "lack of effective professional communication to others, is not an isolated one."

On October 20, 1998, Vastano's evaluating supervisor sent a memorandum to the principal, concurring with the vice principal's recommendation that Vastano's increment be withheld

for the 1999-2000 school year. He stated that the October 1 incident indicated that Vastano's improvement in communication has not been significant. The supervisor refers to the 1996-1997 evaluation in which it was requested that Vastano improve his communication with pupils, parents, and co-workers. He further pointed to the 1997-1998 evaluation, in which he noted that communication had improved and urged Vastano "to continue to strive to improve in this area."

Based on these recommendations, on October 27, 1998, the principal sent a memorandum to Vastano, stating, "I am recommending to Dr. Adam Pfeffer, Superintendent, that he recommend to the Board of Education that your salary increment for the 1999-2000 year be withheld and/or otherwise disciplined as determined by the Board of Education." He then listed his reasons for this, which included the October 1 incident and the recommendations and supporting explanations of the supervisor and vice principal. The superintendent placed the withholding of Vastano's increment before the Board.

On August 4, 1999, the Association filed a grievance contesting the withholding. The grievance was denied at all levels of the grievance procedure. On September 28, the Association demanded arbitration. This petition ensued.

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 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 are to be reviewed through binding arbitration. But not all withholdings 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.

The Board asserts that this withholding was primarily based on Vastano's ineffectiveness as a teacher and not for any punitive reasons which might otherwise relate to discipline. The Board relies on the above-discussed evaluation reports.

The Association asserts that the withholding is a form of discipline or punishment for the incident that occurred on October 1, 1998. The Association argues that whether Vastano used improper language to a secretary or had an out of classroom outburst towards a secretary is not predominantly related to his teaching performance. It further argues that the recommendations to withhold the increment for the following year were made in October, only a few weeks after school had begun, and thus, could not be based upon his teaching performance for that year. Instead, it argues that the withholding was a disciplinary measure predominantly related to the October 1 incident.

The Association points to the fact that no evaluations of teaching performance were conducted from September to November of 1998 and that there was no other correspondence regarding any problems with Vastano's teaching performance. It argues that, therefore, the withholding could only be based on the October 1 incident and was therefore disciplinary in nature. The Association also alleges that Vastano's 1998-1999 evaluation was prepared to substantiate the withholding of his increment.

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 NJPER Supp.2d 183 (¶161 App. Div. 1987), we will review the facts of each case. We will then balance the competing factors and determine if the withholding predominantly 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.

In Paterson School Dist., P.E.R.C. No. 95-39, 21 NJPER 36 (¶26023 1994), we declined to look behind a board's stated reasons to see if a discriminatory or improper motive was at work. In Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996), we held that our limited gatekeeping function did not warrant an investigation into whether a school board's cited reasons for a withholding were pretextual. We determined that the Commissioner of Education could evaluate the veracity of the Board's claims of deficient teaching performance. See Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 296-297 (App. Div. 1960) (in reviewing increment withholding, Commissioner should determine whether facts were as asserted by evaluator and whether withholding was reasonable in light of the facts). The Kopera standard of review assumes the absence of any bias or animosity toward the teacher and recognizes the Commissioner's power to set aside a withholding "induced by improper motives." Id. at 294.

See North Bergen Fed. Teachers v. North Bergen Bd. of Ed., 141 N.J. Super. 97, 101 (App. Div. 1976) (arbitrary personnel action bearing no relationship to educational goals will not be tolerated). The Commissioner can consider the questions raised by the Association in determining whether the withholding should be sustained.

The Association argues that this case is like Greater Egg Harbor Reg. H.S. Bd. of Ed., P.E.R.C. No. 92-9, 17 NJPER 384 (¶22181 1991), in which it was found that the major thrust of the recommendation to withhold the increment of a band instructor was based on alleged violations of Board policies and procedures and on engaging in questionable non-teaching practices. Such violations included interruptions of instruction to make and receive telephone calls, failure to follow procedures for depositing funds and for paying expenses, purchasing personal items in the name of the school, and failing to account for all items in band inventory. Id. We found that these bases were not predominantly related to teaching performance and therefore denied the request for a restraint of binding arbitration.

In this case, the Board asserts that the withholding was based on Vastano's conduct on October 1, 1998 and on negative evaluations of Vastano's teaching performance. They argue that the October 1 incident was indicative of Vastano's failure to significantly improve his communication with pupils, co-workers, and parents as was requested in prior teaching performance evaluations.


The reasons cited for the withholding include comments on Teacher Evaluation Reports for the years 1996-1997, 1997-1998, and 1998-1999. Although the catalyst for the recommendations may have been the October 1 incident, the cited reasons include: the need to improve communications with pupils, co-workers, and parents; presenting a more positive atmosphere to encourage students to develop self-confidence; inappropriate physical conduct during class time; use of inappropriate nomenclature specifically referring to students as "ugly" in the classroom; the need to avoid conflict and confrontations and remain detached; and the need to maintain an atmosphere of mutual respect in classroom relationships with pupils and to provide fair, firm, and consistent discipline. These reasons all relate to teaching performance. Whether or not the cited reasons are pretextual is for the Commissioner of Education to determine. See East Orange Bd. of Ed., P.E.R.C. No. 99-102, 25 NJPER 292 (¶30122 1999) (arbitration restrained where cited basis for increment withholding included negative teaching performance evaluations, despite allegations that the negative evaluations were pretextual and in response to grievances).

The Board's cited reasons for withholding Vastano's salary increment for 1999-2000 predominately relate to evaluations of his teaching performance. We therefore restrain arbitration.

ORDER

The request of the Greater Egg Harbor Regional Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: April 27, 2000  
Trenton, New Jersey  
ISSUED: April 28, 2000