

P.E.R.C. NO. 94-106

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RED BANK REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-94-17

RED BANK REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Red Bank Regional Education Association against the Red Bank Regional Board of Education. The grievance contests the withholding of a teacher's increment. The Commission finds that the withholding was based predominately on an evaluation of teaching performance. The request for a restraint of arbitration of a reprimand is denied.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RED BANK REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-94-17

RED BANK REGIONAL
EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Crowell and Otten, attorneys
(Robert H. Otten, of counsel)

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

DECISION AND ORDER

On September 3, 1993, the Red Bank Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of grievances filed by the Red Bank Regional Education Association. Those grievances contest a reprimand issued to a teacher and a subsequent increment withholding.

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 July 1, 1990 through June 30, 1993. The grievance procedure

ends in binding arbitration of disciplinary reprimands and increment withholdings. See N.J.S.A. 34:13A-26 and 29.

Joel Kahn is a high school mathematics teacher. Robert M. Nogueira is his principal

On January 29, 1993, Nogueira wrote Kahn a memorandum concerning a parent's recent complaint and an alleged pattern of "poor decisions concerning verbal behavior." The memorandum cited alleged incidents in which Kahn told students an off-color joke; asked a student when she started sleeping with her boyfriend; asked about the paternity of an expectant student's baby; publicly compared students asking him to write recommendations and suggested ability differences in a way that elicited feelings of sexism and racism; cursed the Athletic Director; discussed an individual student in front of a classroom of parents; offended a parent by saying that women were inferior and that "I am not patient with students like her as they take up much of my time," and by announcing that he was not available for extra help after school because he explained everything in school; and confronted another teacher in discussing the parent's complaints. The memorandum further stated that Nogueira had investigated the parent's recent complaint and concluded that it was justified. He stated:

In the matter of the recommendation you indeed have a right to choose to write a recommendation or not write a recommendation. The manner, however, in which you as the teacher handle requests, demands a sensitivity to the youngster, her situation, and her peer group. Your comments in front of the class did not appear to reflect such sensitivity.

Perhaps it would have been best to ask [student] to stay after class to discuss the recommendation and your reason/reasons for not agreeing to recommend her for the program she was interested in attending.

Your linking of another student's application or acceptance from the culinary school with the request for a recommendation for a math/science summer program was indeed unfortunate. This can be viewed as both a sexist and a racist comment.

Your questioning the paternity of [student's] baby clearly fueled an already uncomfortable situation. Both comments are inappropriate and unacceptable.

Suggesting to [student's] mother that you were only joking can not repair the emotional damage and pain undoubtedly experienced by the student as a result of your poor judgment.

The memorandum concluded with a statement that it represented a "formal reprimand for your inappropriate comments, lack of sensitivity, and poor judgment," a warning that future incidents could result in additional investigation and possible discipline, and a suggestion that Kahn contact an employee assistance program.

On February 18, 1993, the Association filed a grievance on Kahn's behalf. It asserted that Kahn had been reprimanded without just cause and asked that the letter be expunged from his personnel file. The principal, the superintendent, and the Board denied this grievance.

Sometime during the 1992-1993 school year, Kahn received his Annual Performance Report. He received positive comments in subject knowledge, classroom setting, group control, lesson development, teacher/student rapport, and additional duties. However, the report also referenced the January 29 reprimand and

stated that Kahn needed to improve in professional behavior and in sensitivity to immature adolescent emotional development and the difficulty lower ability children had in learning concepts. The report rated Kahn "unsatisfactory" and recommended that Kahn's increments be withheld and that he contact an employee assistance program. According to the Association, a prior draft had rated Kahn "satisfactory" and recommended payment of increments.

On April 21, 1993, the Board voted to withhold Kahn's increments for the next school year. These reasons were given:

1. Three incidents involving interactions with staff and parents now suggest a pattern of behavior which is inappropriate for a professional (e.g. athletic director, Back-to-School Night, Parent/Guidance Counselor/English Teacher).
2. Four incidents involving interactions with students now suggest a pattern of behavior which is inappropriate for a professional (e.g. off-color joke, personal comment to student, inappropriate comments concerning a recommendation for a student and an application for a culinary school and open discussion of the paternity of an expectant student's baby).
3. You are providing students with mathematical knowledge, study habits and learning skills; however, as a professional, you must maintain a sensitivity to immature adolescent emotional development.
4. Be cognizant of the lower ability students who appear to be having some difficulty learning the specific math concepts. Reinforce the H.S.P.T. concepts wherever appropriate.
5. On January 29, 1993, a memorandum concerning a pattern of poor decisions concerning verbal behavior was placed in your personnel file.
6. Performance rating: unsatisfactory 1992-1993 school year.

On May 4, 1993, the Association filed a second grievance. This grievance asserted that Kahn's increments had been withheld without just cause and sought restoration of the increments. The principal, Superintendent, and the Board denied this grievance as well.

The Association demanded binding arbitration of both grievances and sought consolidation. The Board responded that the increment withholding properly belonged before the Commissioner of Education and that therefore consolidation was not possible. It asked whether the Association would voluntarily submit the withholding to the Commissioner. The Association declined because it believed that the withholding as well as the reprimand could go to 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 grievances or any contractual defenses the Board may have.

We begin with the reprimand. Disciplinary reprimands may be contested through binding arbitration. N.J.S.A. 34:13A-5.3. In Holland Tp. Bd. of Ed. and Holland Tp. Ed. Ass'n, P.E.R.C. No. 87-43, 12 NJPER 824, 826 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87), we articulated this approach for distinguishing between reprimands and mere evaluations:

We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore non-negotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary.

Nogueira's memorandum formally reprimanded Kahn for his "inappropriate comments, lack of sensitivity, and poor judgment." It urged that Kahn make every effort to avoid future incidents of this nature and warned that such incidents could result in additional investigation and possible discipline. N.J.S.A.

34:13A-29 provides that binding arbitration must be the final step in the grievance procedure to review all forms of discipline except tenure charges and increment withholdings based predominately on an evaluation of teaching performance. The subject of the memorandum is only one factor among many that must be considered in determining whether the memorandum is disciplinary. And the fact that an increment was later withheld for substantially similar reasons does not insulate an earlier reprimand from review. See Englewood Bd. of Ed., P.E.R.C. No. 91-118, 17 NJPER 341 (¶22153 1991), aff'd App. Div. Dkt. No. A-6030-90T2 (4/3/92). This memorandum, although in part triggered by an alleged deficiency in teaching performance, is punitive and therefore reviewable by an arbitrator.

The mode of analysis for Kahn's increment withholding is different since it focuses on the reasons for the withholding, not on whether the withholding itself is a form of discipline. The fact that an increment withholding is disciplinary does not guarantee arbitral review. Under N.J.S.A. 34:13A-26, only increment withholdings of teaching staff members for predominately disciplinary reasons shall be reviewed through binding 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). We will review the facts of each case. We will then balance the competing factors and determine if the

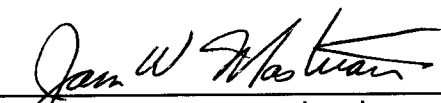
withholding predominately involves an evaluation of teaching performance. If not, then the disciplinary aspects of the withholding predominate and we will not restrain binding arbitration. Scotch-Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991).

Under all the circumstances, we conclude that this withholding was based predominately on an evaluation of Kahn's teaching performance. The cited reasons center on Kahn's interaction with staff, students and parents as well as his need to "be cognizant of the lower ability students who appear to be having some difficulty learning the specific math concepts." In a similar case, Southern Gloucester Cty. Reg. H.S. Dist., P.E.R.C. No. 93-26, 18 NJPER 479 (¶23218 1992), we restrained arbitration and we do so here as well.

ORDER

The request of the Red Bank Board of Education for a restraint of arbitration of Joel Kahn's increment withholding is granted. The request for a restraint of arbitration of Joel Kahn's reprimand is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: April 28, 1994
Trenton, New Jersey
ISSUED: April 29, 1994