

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2001-44

WILLINGBORO EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Willingboro Board of Education for a restraint of binding arbitration of a grievance filed by the Willingboro Education Association. The grievance contests the withholding of a teaching staff member's increment predominantly for allegedly inappropriate statements made to students in class. The Commission concludes that this withholding was based predominately on the evaluation of teaching performance and restrains arbitration over the substantive decision to withhold the increment. The Commission denies a restraint to the extent the grievance contests alleged procedural violations associated with the teacher's rights to be notified of and respond to complaints.

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.

P.E.R.C. NO. 2001-68

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Appearances:

For the Petitioner, Parker McCay & Criscuolo, P.A.,  
attorneys (James F. Schwerin, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys  
(Carol H. Alling, on the brief)

DECISION

On March 1, 2001, the Willingboro Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Willingboro Education Association. The grievance contests the withholding of a teaching staff member's increment.

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

The Association represents teachers and certain other employees of the Board. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1997 through June 30, 2000. The parties' grievance procedure ends in binding arbitration.

On August 24, 2000, the Business Administrator/Board Secretary advised the teacher that the Board acted on August 21 to withhold his employment and adjustment increments. The letter states, in part:

Your unprofessional behavior and unbecoming conduct involving inappropriate comments you have made to students, both as a teacher, a coach, in the cafeteria and in the halls of Willingboro High School do not reflect the caliber of professionalism the district requires from its teaching staff. A copy of the Board's resolution is enclosed.

The Association grieved the withholding. The grievance alleges that the Board violated Article IV B of the agreement. That provision states that no employee shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage without just cause. The grievance also alleges a violation of Article XV, A.6. That provision states:

No complaint made by an individual shall be retained in the file or otherwise used against the teacher charged unless on reasonable notice to the teacher and to the Association, opportunity is given to the teacher and to his or her representative to meet the accuser in the presence of the principal. As in the past, in the event that any such complaint is made by an individual, regardless of the disposition thereof, no action of a retaliatory nature shall be taken by any teacher or other unit member against the student involved.

The grievance asserts that the teacher was not advised of the incidents asserted for the withholding and is not able to defend the charges. It also asserts that the increment was withheld without just cause.

On October 24, 2000, the superintendent denied the grievance. She stated that the complaints against the teacher arose from students, that the teacher was represented at various conferences with the principal and the superintendent, and that the teacher and his representative met with a parent who complained about an October 18, 1999 incident. The superintendent further stated that the teacher's actions involved his role as a teacher, coach and supervisor of students in the classroom, hallways and athletic events and is therefore performance related, not disciplinary. The superintendent attached an undated summary of the events supporting the withholding. The record does not indicate who prepared the document. It states:

Early this year there was consideration given to filing tenure charges against ... a teacher at Willingboro High Schools for unbecoming conduct by a teaching staff member. The substance of the charge was that [the teacher] made inappropriate and suggestive comments to students, that he did not properly supervise students, and that despite verbal and written warnings he received from his supervisors the inappropriate comments continued. In addition to receiving warnings from his principal, at a meeting with the Superintendent, he was unrepentant despite the warnings.

The attached summarizes the incidents reviewed when the charges were being considered. It was decided at that time not to file tenure charges.

In May and June there were repeated incidents of the same nature. It was reported by students in [the teacher]'s class that he made inappropriate sexual comments in class. He commented on the dress of an individual by stating that her "titties" were "hanging out" of a low-cut dress. While showing the class a movie on pregnancy, he commented, "look at this

girl's titties and butt." On another occasion he was discussing the heroin addiction of his best friend's daughter and told the class she would be better off being a "crackwhore."

He told the class about a personal sexual experience he had while he was in college and also discussed with the class his personal sex life with his wife.

[The teacher] denies making the above statements and when confronted by the principal, [the teacher] claimed that he had called the mother of one student who made statements about him to advise the mother that the student was not in school when she should have been. The mother went to school and found the daughter in school and the records indicate she was present in a class during the time [the teacher] stated he saw her outside of school. There was no explanation of why [the teacher] would have been in the location where he would have observed the student. In some of the incidents in the past when students reported on inappropriate comments made by [the teacher], he responded by claiming the students were retaliating against him for something [the teacher] had reported on them.

Early in June [the teacher] commented about a girl as she was walking away from his class: "I like your pink polka dot panties." Several students gave statements on that incident.

The enclosure, together with the above constitute unprofessional conduct wherein the withholding of an increment should be sustained.

Since the comments involve interaction with students as a teacher and coach, withholding his increment would be an educational and not disciplinary action.

The attached document is entitled "Charge of Unprofessional Conduct." It is also undated and there is no indication of who prepared the document. The document chronicles incidents that allegedly took place during the 1998-99 school year and on October

18, 1999. Of the 11 items listed, most involve allegedly inappropriate comments made by the teacher to students. An incident on May 18, 1998 alleges that the teacher attended a track meet and did not provide coverage for his class from 11:30 to 12:30 p.m., but gave all of the students passes to the cafeteria where they were unsupervised during that time. The October 18, 1999 incident allegedly involved the teacher's conversation with a student about trading "Dragon Ball Z" videos, which are Japanese videos that are not available publicly which the teacher trades with his students. When another student told them they were late for class, the teacher allegedly made two inappropriate sexual comments to the student. The student's mother complained to the principal and the principal met with the teacher and his representative about the issue.

On January 24, 2001, 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 (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 et seq., all increment withholdings of teaching staff members may be submitted to binding arbitration except those based predominately on the evaluation of teaching performance. Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), aff'g P.E.R.C. No. 97-40, 22 NJPER 390 (¶27211 1996). Under N.J.S.A. 34:13A-27d, if the reason for a withholding is related predominately to the 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, as defined by N.J.S.A. 34:13A-22, or related predominately to the evaluation of teaching performance, we must make that determination. N.J.S.A. 34:13A-27a. 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 [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 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]

The Board argues that we have held that inappropriate comments to students are predominately related to teaching performance and are not subject to arbitration.

The Association argues that the Board has failed to establish that this increment was withheld for primarily evaluative purposes. The Association contends that the Board is mixing a few events that allegedly occurred in the classroom with other events that allegedly occurred under a variety of circumstances. It asserts that not one of the events for which the increment was withheld was the subject of an evaluation, observation or professional improvement plan. The Association has provided copies of the teacher's three classroom observation reports for 1999, 2000 and 2001; none of these reports mention any inappropriate remarks to students or parents or comment negatively on his communications with parents or students.

The Association also asserts that the Board's failure to notify the teacher of allegations made against him, identify the



complaining parties, and provide an opportunity to meet with the teacher and the complaining parties violated the agreement and caused the withholding. The Association contends that procedural issues are mandatorily negotiable and legally arbitrable. The Association cites a previous Commission decision involving these same parties, Willingboro Bd. of Ed., P.E.R.C. No. 2000-68, 26 NJPER 117 (¶31050 2000), where we restrained arbitration of the grievance to the extent it contested the substantive decision to withhold an increment, but denied a restraint of arbitration to the extent the grievance contested alleged procedural violations associated with the rights to be notified of and respond to complaints.

We have long held that withholdings based on a teacher's allegedly inappropriate conduct or remarks made in class cannot be submitted to binding arbitration. See Greater Egg Harbor Reg. H.S. Bd. of Ed., P.E.R.C. No. 95-58, 21 NJPER 116 (¶26071 1995), recon. den., P.E.R.C. No. 95-84, 21 NJPER 175 (¶26110 1995) (teacher allegedly made repeated negative remarks about capabilities of blonde, female students); Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) (teacher allegedly made off-color jokes, made demeaning comments to and about students, and was insensitive to the needs of lower ability

students); Roxbury Bd. of Ed., P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994) (increment withheld because of allegedly improper remarks to female pupils and inappropriate physical contact with pupils). We have restrained arbitration in these cases on the theory that they -- like classroom control or disciplinary technique cases -- involve a board's subjective educational judgment as to what is appropriate in a classroom environment. That logic applies here where the incidents involve the teacher's interactions with students. That some may have taken place in a hallway or the cafeteria does not change the overall character of the interactions.

We distinguish cases where teaching staff members were accused of inappropriate conduct with students outside of the classroom. See North Arlington Bd. of Ed., P.E.R.C. No. 97-28, 22 NJPER 366 (¶27192 1996) (single incident where teacher questioned and allegedly upset a special education pupil -- who was not assigned to any of his classes -- about an incident involving another teacher); Morris Bd. of Ed., P.E.R.C. No. 93-50, 19 NJPER 50 (¶24023 1992) (increment withheld because sixth-grade teacher sent allegedly inappropriate Christmas card to ninth-grader and former student); Boonton Tp. Bd. of Ed., P.E.R.C. No. 99-101, 25 NJPER 288 (¶30121 1999) (incident during extracurricular coaching assignment did not involve teaching performance). Cf. Millville Bd. of Ed., P.E.R.C. No. 98-73, 24 NJPER 17 (¶29012 1997) (increment withheld because of allegedly inappropriate

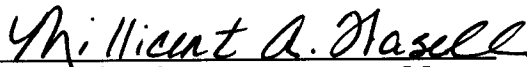
conversations with students about sex and dating as well as alleged deficiencies in instructional techniques, lesson planning, and classroom management; even if discussions with students occurred outside the classroom and did not involve teaching performance, the withholding predominately related to the evaluation of teaching performance). The alleged statements that this teacher made to students outside of class were not isolated or unrelated to the statements made inside class. Accordingly, we conclude that the withholding was based predominately on the evaluation of teaching performance. We therefore restrain arbitration over the substantive decision to withhold this teacher's increment.

An arbitrator may, however, determine the separate issue of whether the Board violated Article XV, Section A.6. The Board has not contested the legal arbitrability of such a claim. See, e.g., Willingboro Tp. Bd. of Ed., P.E.R.C. No. 2000-68, 26 NJPER 117 (¶31050 2000); Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997); Greater Egg Harbor Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987). Alleged violations of such procedural guarantees were legally arbitrable before the 1990 amendments and remain arbitrable after the 1990 amendments. Washington Bor. Bd. of Ed., P.E.R.C. No. 98-49, 23 NJPER 603 (¶28296 1997); Fair Lawn Bd. of Ed., P.E.R.C. No. 80-52, 5 NJPER 487 (¶10249 1979). We need not address any remedial issue at this juncture.

ORDER

The request of the Willingboro Township Board of Education for a restraint of binding arbitration is granted except to the extent the grievance contests alleged procedural violations associated with the rights to be notified of and respond to complaints.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Madonna, Muscato and Ricci voted in favor of this decision. Commissioners McGlynn and Sandman were not present.

DATED: May 31, 2001  
Trenton, New Jersey  
ISSUED: June 1, 2001