

P.E.R.C. NO. 98-153

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PARSIPPANY-TROY HILLS
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-98-58

PARSIPPANY-TROY HILLS
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Parsippany-Troy Hills Board of Education for a restraint of binding arbitration of a grievance filed by the Parsippany-Troy Hills Education Association. The grievance contests the withholding of a school psychologist's salary increment for the 1997-1998 school year. The Commission finds that this increment withholding predominantly relates to the evaluation of the teaching staff member's performance as a school psychologist and child study team member. Accordingly, any appeal must be made to 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, Schwartz, Simon, Edelstein, Celso & Kessler, P.C., attorneys (Nathanya G. Simon, on the briefs)

For the Respondent, Balk, Oxfeld, Mandell & Cohen, P.C., attorneys (Gail Oxfeld Kanef, on the brief)

DECISION

On January 21, 1998, the Parsippany-Troy Hills Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Parsippany-Troy Hills Education Association. The grievance contests the withholding of a school psychologist's salary increment for the 1997-1998 school year.

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

The Association represents teaching staff members employed by the Board. The parties entered into a collective

negotiations agreement effective from July 1, 1995 through June 30, 1998. The grievance procedure ends in binding arbitration.

John Brandi is a tenured school psychologist. The job description for that position divides its duties into six categories: (1) evaluation to ascertain the student's intellectual and personality status; (2) the diagnosis which analyzes and synthesizes all information collected in the evaluation process to ascertain the level of intellectual functioning, as well as emotional competency on the functional level; (3) educational planning - based on evaluation and diagnosis, assist in the development of Individual Education Plan (IEP) for classified students in consultation with the Child Study Team, appropriate staff members and/or outside consultants; (4) follow-up to assess the effectiveness of the IEP and the student's overall adjustment; (5) consultation with teachers, parents, staff members and/or outside consultants concerning these students; and (6) counseling - provide counseling to students, parents, teachers and staff members, individually or in a group.

Federal and state regulations require that students identified as potentially having disabilities must be evaluated by a child study team (CST). CST evaluations must be completed within 30 days after receipt of consent by the parents, and an IEP must be completed and implemented within 90 days of the consent date. Students previously classified must be re-evaluated every three years.

During the 1993-94 school year, Brandi was assigned to the high school. On April 8, 1994, the vice-principal sent him a memorandum advising that his weekly reports still had not been received despite Brandi's having received notices of his failure to submit the reports in a timely fashion. Brandi's evaluation for that school year rated his performance as "Conditionally Acceptable" under "Evaluation & Record Keeping." The evaluation contained comments on his attendance, the timeliness of his reports, and his adherence to policies in crisis situations.

Brandi was assigned to three elementary schools during the 1994-95 school year and was rated as "Conditionally Acceptable" in "Planning & Organizing" and "Evaluation & Record Keeping." In "Areas Needing Improvement/Development," Brandi's evaluation stated that he needed to ensure that reports are done on time and his work is organized so that cases could be completed within timelines. On August 2, 1995, the director of special services had to contact Brandi concerning psychological evaluations performed on four students for whom he had not received Brandi's completed reports.

Brandi was assigned to the same schools during the 1995-96 school year. He received an "Acceptable Performance" rating under "Planning & Organizing" and "Evaluation & Record Keeping." However, under "Performance Areas Needing Improvement/Development," the report stated that Brandi needed to facilitate faster return of his reports and pay more attention to time management in coordinating testing with team members.

During the 1996-97 school year, the principal of the Littleton Elementary School sent Brandi a memorandum concerning reports which had not yet been returned on five students Brandi had evaluated during the 1995-96 school year. In January 1997, Brandi was observed participating in a CST conference with parents. The Teacher Observation Form stated, in part:

Conference was true to course and Mr. Brandi did an excellent job in focusing parents and CST on purpose of meeting. He presented himself in a professional manner and was able to communicate clearly and definitively. The discussion at times diverted from the purpose and Mr. Brandi reminded parents of his role as child advocate and concern to bring consensus to the decision-making process. His interaction with CST members was professional and indicated a working knowledge of the team process.

There are some concerns, however, about Mr. Brandi's performance in general. One area which needs to be addressed is absence and tardy to school. This area will be addressed at conference.

Another concern of great importance is the actual test procedure (number of students) as well as the formal written reports. Deadlines have been established and close supervision is required to perform tasks.

Mr. Brandi needs to be focused on specific designated tasks and not allow spontaneous needs to alter the testing function with such frequency.

Clearly Mr. Brandi performs in an excellent manner in CST meetings, parent and teacher conferences and with at risk students. Testing, writing or reports, details, etc., need to be a conscious priority.

Brandi's Performance Evaluation Report for the 1996-97 school year rated him as "Conditionally Acceptable" under "Planning & Organizing." However, he was rated "Consistently Unacceptable" under "Implementation & Interaction" and "Evaluation & Record Keeping." Under "Performance Areas of Strength" the evaluation stated:

Mr. Brandi continues to demonstrate a practice of not completing required reports in a timely fashion. There exists a continuing pattern over the past four years of significant time delays between the actual testing process, writing and/or dictating reports and submission to Word Processing. Additionally, concern about time management and the related effectiveness to the CST function has also been noted previously. This concern continues for the resulting impact on the team function for this year.

Another area which needs close attention this year is Mr. Brandi's attendance. This area also has been noted in previous end-of-year evaluation.

Based upon a continued pattern of ineffective use of time management as it relates to report completion and CST functions, re-employment without increment is the recommendation for 1997-98.

On June 27, 1997, the superintendent advised Brandi that the Board had adopted the superintendent's recommendation to withhold his salary and adjustment increments for the 1997-98 school year. The superintendent stated the reason for the withholding was Brandi's "unsatisfactory performance, evidenced by your persistent inability to perform certain duties of your position as a school psychologist on a timely basis."

Brandi asserts that he completed most of his reports on time, but that some confusion arose because he would type his reports at home rather than send them through the district's work processing department. Brandi contends that he had no quiet, private area to work on them at school. He also claims that the Board did not promptly notify him of his alleged failure to complete reports from the prior school year and thus did not use the evaluation process properly. The director of special services responds that other CST members complete their reports at home, but that none has as many untimely reports as Brandi. Brandi's certification also asserts that his increment was withheld to retaliate for his filing of a harassment lawsuit and because he did not follow the Board's procedure for preparing reports. The director of special services responds that, at the time he recommended the withholding, he was not aware of any lawsuit.

On July 9, 1997, the Association demanded arbitration. This petition ensued.

The Board asserts that this increment withholding is based on the evaluation of Brandi's performance as a school psychologist and that arbitration should be restrained. It relies on the Commission's decisions in Mansfield Tp. Bd. of Ed., P.E.R.C. No. 96-65, 22 NJPER 134 (¶27065 1996); Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 96-52, 22 NJPER 65 (¶27029 1996) and Readington Tp. Bd. of Ed., P.E.R.C. No. 95-38, 21 NJPER 34 (¶26022 1994).

The Association asserts that the Board has used the evaluation process to discipline Brandi. The Association notes that the Commission's decision in Mansfield Tp. was reversed by the Appellate Division which found that dispute unrelated to teaching performance and subject to arbitration. Mansfield Tp. Ed. Ass'n, 23 NJPER 209 (¶28101 App. Div. 1997). The Association further asserts, based upon Brandi's certification, that the Board's action was taken in retaliation for a pending lawsuit filed by Brandi and is, in essence, an attempt to discipline the psychologist for alleged insubordination because he did not use the school's word processing department to type all his reports.

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 merits of this dispute.

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-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 [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]

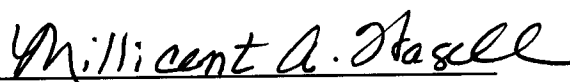
This dispute predominantly relates to the evaluation of Brandi's performance as a school psychologist and CST member. Readington Tp. Bd. of Ed., P.E.R.C. No. 95-38, 21 NJPER 34 (¶26022 1994) and Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 96-52, 22 NJPER 65 (¶27029 1996) both involved increment withholdings of CST members for reasons which were substantially similar or comparable to those given by the Board. Mansfield involved different facts and was essentially based on an incident outside the evaluation process; this withholding, by contrast, was allegedly based on a pattern of failure to submit reports on time, a concern noted on observation reports and performance evaluations.^{1/} Brandi's apparent skill in interacting with students and their parents does not mean that comments critical of his performance of other vital job duties are unrelated to an evaluation of his performance as a CST member.

^{1/} We will not look behind the cited reasons to see if they are pretextual. That is not a proper role for us in our function as forum gatekeeper. Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996). The Commissioner of Education may review Brandi's claim that the withholding was a form of retaliation against him for his lawsuit.

ORDER

The request of the Parsippany-Troy Hills Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Millicent A. Wasell
Chair

Chair Wasell, Commissioners Finn, Klagholz and Ricci voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioners Boose and Wenzler were not present.

DATED: June 25, 1998
Trenton, New Jersey
ISSUED: June 26, 1998