

P.E.R.C. NO. 2001-64

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN TOWNSHIP BOARD  
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2001-27

FRANKLIN TOWNSHIP EDUCATION  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Franklin Township Board of Education for a restraint of binding arbitration of a grievance filed by the Franklin Township Education Association. The grievance contests the withholding of a teacher's increments for the 2000-2001 school year. The Commission concludes that this withholding is not based predominately on an evaluation of teaching performance but is limited to an alleged violation of Board policy prohibiting teachers from leaving students alone and general directives and policies concerning student supervision.

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, B. Michael Borelli, attorney

For the Respondent, Selikoff & Cohen, P.A., attorneys  
(Keith Waldman, on the brief)

DECISION

On December 1, 2000, the Franklin 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 Franklin Township Education Association. The grievance contests the withholding of a teacher's increments for the 2000-2001 school year.

The parties have filed briefs and exhibits. The Board has submitted affidavits of the superintendent and the principal. These facts appear.

The Association represents teachers. The Board and the Association are parties to a collective negotiations agreement

effective from September 1, 2000 through August 31, 2003. The grievance procedure ends in binding arbitration.

Before March 22, 2000, Board policy 5142, entitled Student Safety: Personal and Possessions, provided, in part:

The Board of Education recognizes the safety of its students as a consideration of utmost importance. In development of courses, the safety of participating students shall be a primary consideration. The Superintendent and School Business Administrator/Board Secretary shall maintain all facilities and equipment to provide a safe learning environment. The curriculum shall include courses in safety as required by state law.

The Superintendent shall oversee development of a district-wide safety program with emphasis on accident prevention. All teachers shall be familiar with the provisions of this program that particularly concern them. Regulations concerning use and maintenance of eye protective devices shall be scrupulously enforced by all staff.

The staff must maintain complete classroom and playground supervision during regular school hours. The Superintendent shall seek the cooperation of parents/guardians to prevent any children being unsupervised on school property during morning arrival and afternoon dismissal times. Further, the Superintendent shall seek the cooperation of the police and other appropriate agencies in providing for the safety of pupils on or around school property.

The principal shall inform all staff of school safety rules and regulations at the beginning of the school year and shall post copies of the rules in a prominent place in each school. Special emphasis shall be given to accident prevention and precautionary measures in case of fire.

The policy also covers the rules and procedures concerning early departure of students and students' personal items.

On December 15, 1999, a memorandum was issued to all sixth grade teachers concerning student supervision. It stated that students are not permitted to go to the lavatory on their own and that teachers should schedule times when they can be taken as a class. It also stated that students should be supervised in all areas to ensure the safety and well-being of the students, personnel and visitors and that students should not be left alone in classrooms. The memorandum continued that if teachers need to leave their classrooms for an emergency, they should make arrangements with a colleague or inform the front office. Finally, the memorandum listed "Two important issues: These are litigious times and student safety is a priority" and "[t]he bar has been raised--student contact time is at a premium."

Arlene Garofalo is a sixth grade teacher at the Main Road School. The Board alleges that on January 5, 2000, at about 2:00 p.m., Garofalo left her sixth grade class unattended and went to another part of the school to telephone a parent. She was absent for approximately 10 minutes. During that time, one student assaulted and injured another student. The student who committed the assault was suspended. The principal, Judith Thourot, wrote to Garofalo about the incident. She wrote:

On January 5, 2000 at approximately 2:00 p.m. you left students in your classroom unsupervised. You left the classroom to make a telephone call to a parent. During your absence of approximately 10 minutes an incident occurred in the classroom resulting in one of your students being assaulted by another student. Your presence in the classroom would have prevented this situation from occurring.

In accordance with the job description of Elementary School Teacher as provided to you in the 1999-2000 Teacher Handbook, each teacher is responsible to supervise pupils in all areas of the school and on the school grounds so as to insure the safety and well being of students, school personnel, and visitors. Furthermore, the attached December 15, 1999 memo reminded you that students should not be left unsupervised. They are to be supervised by a certified staff member.

You are directed to adhere to all rules, regulations, policies and procedures of this school district as well as any directives from the administration. Should you wish to discuss this matter further, please contact me to schedule a convenient time.

This memorandum was placed in Garofalo's personnel file.

A copy was sent to the superintendent.

According to the Association, Garofalo did not leave her classroom unattended. She allegedly alerted a colleague in another classroom that she was leaving the class and had a good reason to make a telephone call to a parent. The Association also asserts that the Board's policy at the time was unclear.

On the night of March 22, 2000, the Board approved a resolution withholding Garofalo's 2000-2001 employment and adjustment increments." The Resolution stated, in part:

It is hereby resolved by the Township of Franklin Board of Education on this 22nd day of March 2000, with the recommendation of the Superintendent, that the employment and adjustment increments of Arlene Garofalo shall be withheld for the 2000-2001 school year commencing September 1, 2000 pursuant to N.J.S.A. 18A:29-14 for the following reasons:

1. On January 5, 2000 at approximately 2:00 p.m., Mrs. Arlene Garofalo left her

classroom of students unsupervised for approximately ten (10) minutes to make a telephone call to a parent.

2. During the time period that the students were unsupervised, one of the students in the classroom physically assaulted another student.
3. The job description of Elementary School Teacher as provided to Mrs. Garofalo in the 1999-2000 Teacher Handbook assigns each teacher the responsibility of supervising pupils to insure their safety and well being.
4. The memo to Sixth Grade Teachers from the Principal dated December 15, 1999 states that "Students should not be left alone in the classroom unattended."
5. Mrs. Garofalo has on other occasions failed to properly supervise students and has failed to recognize the importance of, and to abide by administrative directives and/or Board policy.
6. The conduct of Mrs. Garofalo not only has a detrimental effect upon the safety and well-being of students, but also has a detrimental effect upon the quality of education provided.

In his certification, the superintendent stated that he also discussed with the Board, the night of the meeting, a second incident that had occurred earlier that day.

The second incident occurred when the principal was investigating the possession and/or distribution of prescription medication by one of Garofalo's students. A police officer was brought in to assist. When the principal arrived at Garofalo's classroom to speak with the student, the students were not in the room and Garofalo was talking to another teacher in the hallway.

Garofalo told the principal that she had divided the students among four other sixth grade classrooms because she had to make a telephone call. The students were then brought back to the classroom. When the principal returned, Garofalo was again speaking with another teacher in the hallway while her students were in their classroom. She was told to return to the classroom.

At the March 22 meeting, the Board also revised Policy 5142, apparently in response to the second incident. The revised policy states:

School personnel are required to supervise students at all times while they are in school. No student is to be left unsupervised at any time. Teachers are directly responsible for each student who is assigned to them at any designated time. When teachers are assigned specific teaching and/or supervisory duties they have a legal responsibility to be present.

Should an emergency (an urgent need for assistance or relief) occur which adversely affects the health, safety, or welfare of a student(s) or the teacher and would require a teacher to leave a student(s) unsupervised, the teacher must secure supervision coverage for the student(s) prior to leaving. The use of another teacher who currently has teaching responsibilities for another student(s), (i.e. teacher directly across the hallway or next door) is an acceptable procedure.

Should a nonemergency situation occur which would require a teacher to leave a student(s) unsupervised, they must secure supervision coverage for the student(s) prior to leaving. The use of another teacher who currently has teaching responsibilities for another student(s) is not acceptable. However, in instances when two teachers are present in a classroom for instruction and/or supervision responsibilities and a situation occurs which requires one of the teachers to leave the

classroom it is acceptable for the teacher to do so. (ex. Computer literacy, health/family life, etc.) Also, upon arranging supervision coverage and prior to leaving the student(s), the teacher must notify the Principal's Office of the situation. The Principal shall maintain a log summary of all occasions of supervision coverage reported to the Principal's Office.

It is permissible and encouraged that a teacher excuse 3-5 students at a time to use the restroom rather than taking an entire class to the restroom at one time. This procedure would minimize the disruption of instructional time.

The principal met with Garofalo on March 24 concerning the March 22 incident. She followed-up the meeting with a memorandum dated March 28 in which she reiterated her position concerning that incident. The principal stated how upset she was with Garofalo and disappointed that she put her personal concerns above the needs of her students and the students in the other four classes to which she had distributed her students. The principal reminded Garofalo of the importance of student supervision and that she is responsible for each student. The principal also cited Board Regulation 5142.

On April 5, 2000, the Association filed a grievance alleging that Garofalo's increment withholding violated Article IV(C). That article states that no teacher shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause.

On April 19, 2000, the superintendent denied the grievance. His response stated:



Mrs. Garofalo was neither disciplined nor reprimanded. In accordance with N.J.S.A. 18A:29-14 Mrs. Garofalo's increment for 2000-2001 was withheld based upon an assessment of her professional performance. The Board of Education complied completely with the statute, including providing reasons for their action. Mrs. Garofalo, under the provisions of N.J.S.A. 18A:29-14, has the right to appeal the Board's action to the Commissioner of Education. The grievance procedure is not the proper forum for appeal. Furthermore, Article III-C6(b) states, "Grievances over statutory and regulatory terms and conditions of employment may be appealed to the appropriate agency."

On June 13, 2000, the Association demanded arbitration. This petition ensued.

The Board argues that we have consistently held that withholdings based on poor student discipline, poor classroom management, and conduct that has resulted in student injury are predominately related to the evaluation of teaching performance. The Board further asserts that although the March 22 incident occurred on the day the Board voted to withhold Garofalo's increments, the details of that incident were reported to the Board before it acted. The Board states that this case in part involves a failure to follow administrative directives and procedures relating to proper classroom management, loss of instructional time, and student discipline.

The Association argues that the reason for this withholding involves a single isolated incident of an alleged violation of Board policy and is disciplinary, not evaluative. The Association objects to the Board's reliance on the March 22

incident because it took place the same day as the Board's decision to withhold and the principal had not yet concluded her investigation of that incident. The Association notes that the Board's resolution is significant because it mentions only the January 5 incident and specifies no other occasions where Garofalo has failed to properly supervise students.

The Board responds that it had a right to consider all relevant information before it took action.

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 this dispute or any contractual defenses the Board may have.

Student safety is major responsibility and the Board has a managerial prerogative to set policy in this area. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 25 (App. Div. 1977). The Board has a right to decide that teachers may not leave students alone in the classroom while the teachers telephone parents and other teachers. It also has a right to decide when students can

be placed under the supervision of other teachers. Finally, the Board may initiate discipline against teachers for violating its safety policies. But teachers may seek review of such discipline through statutory review procedures.

Minor discipline, including various forms of fines or suspensions that may be negotiated with the majority representative, may be reviewed in binding arbitration. N.J.S.A. 34:13A-24. Tenure charges may only be reviewed by the Commissioner of Education. N.J.S.A. 18A:6-10. Increment withholdings of teaching staff members may be submitted to binding arbitration unless they are based predominately on the evaluation of teaching performance. N.J.S.A. 34:13A-26 et seq.; 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. This case involves a dispute over whether the reason for Garofalo's 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 the withholding dispute. We do not and cannot consider whether the 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]

We have consistently restrained arbitration in cases in which the primary basis for the withholding was lack of classroom management or control or poor disciplinary techniques. See, e.g., Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991) (teacher's increment withheld based on allegedly poor disciplinary techniques, including incident where he threatened to wrap trumpet around a student's neck); Wayne Tp. Bd. of Ed., P.E.R.C. No. 93-107, 19 NJPER 272 (¶4137 1993) (teacher allegedly used inappropriate disciplinary techniques such as kissing students and dumping out their desks). These

withholdings, however, were generally based on a series of incidents or observations and the staff member's problems were usually detailed in evaluation and observation reports. Where a withholding flows from a board's subjective educational judgment about what type of interaction should take place in a classroom, it is predominately related to an evaluation of teaching performance. By contrast, we have generally declined to restrain binding arbitration over withholdings that involve alleged violations of administrative procedures. See, e.g., Willingboro Bd. of Ed., P.E.R.C. No. 98-51, 23 NJPER 607 (¶28298 1997) (increments withheld because teachers, acting as administrators and proctors, allegedly did not follow administrative directive concerning security procedures in connection with State-mandated test); see also Mansfield Tp. Bd. of Ed., 23 NJPER 209 (¶28101 App. Div. 1997), rev'g and remanding P.E.R.C. No. 96-65, 22 NJPER 134 (¶27065 1996) (withholding was for incident outside regular evaluation process of teaching performance).

If this were a case of alleged poor judgment in how to supervise students in the classroom, it would most likely involve an evaluation of teaching performance. Any dispute about the appropriateness of the teacher's action would have to be reviewed by the Commissioner of Education.

Instead, this case involves a teacher whose increment was withheld because she allegedly violated the Teacher Handbook and a December 15, 1999 memorandum that specifies that students should

not be left unsupervised. A letter criticizing Garofalo for leaving her class unsupervised and directing her to adhere to all rules, regulations, polices, procedures and directives was placed in her personnel file. The Board then voted to withhold her increment based on the incident and other unspecified occasions where she allegedly failed to properly supervise students and failed to recognize the importance of, and abide by, administrative directives and/or Board policy. Based on the superintendent's certification, we will also assume that the Board considered Garofalo's action on March 22 when it decided to withhold her increment that evening.

We recognize that these alleged violations of Board policy impact on students. In one incident, the students were left unsupervised and a student was assaulted by another student. In the other, students were sent to other classes so the teacher could make a telephone call. But we do not view this withholding as being based on the evaluation of teaching performance. Garofalo's teaching or even her ability to manage students in the classroom was not mentioned as a consideration. Her alleged infractions were violating a Board directive not to leave students unattended, thereby jeopardizing their safety, and failing to abide by administrative directives and Board policy concerning student supervision.

The Board's reliance on a number of our decisions is misplaced. Wood-Ridge Bd. of Ed., P.E.R.C. No. 98-41, 23 NJPER

564 (¶28281 1997), involved a withholding that was based on concerns stated in the teacher's professional improvement plan, his annual evaluation, and the superintendent's letter relating to his alleged ineffectiveness in such teaching performance matters as preparing lessons, instructing students, and maintaining classroom discipline. The teaching performance concerns of that case predominated.

Similarly, Bernardsville Bd. of Ed., P.E.R.C. No. 94-83, 20 NJPER 82 (¶25037 1994), involved a withholding based on a number of teaching performance concerns. While a few of the administration's concerns might have been characterized as disciplinary, its concerns overwhelmingly focused on teaching performance issues such as lesson plans and questioning techniques, supervision of students and interactions with them in the classroom, student progress, and the quality of student portfolios.

Hillside Bd. of Ed., P.E.R.C. No. 97-39, 22 NJPER 389 (¶27210 1996), also involved a withholding for several reasons, including an alleged failure to become familiar with equipment; manage and control students; follow hall pass procedures; demonstrate effective instruction; and deal with parents appropriately. We did not determine whether every reason related to teaching performance given that most of the reasons did.

Finally, Somerset Cty. Voc. and Tech. Schools Bd. of Ed., P.E.R.C. No. 95-55, 21 NJPER 112 (¶26068 1995), involved a

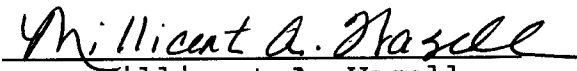
continuing concern about a teacher's classroom management, specifically his alleged failure to control students and ensure student safety during class. That concern had been reflected in an earlier annual evaluation and a formal observation report, but had not been alleviated. Contrast Mansfield. The scope of the instant case is more limited and focuses on an alleged violation of a specific Board policy prohibiting teachers from leaving students alone and more general directives and policies concerning student supervision.

Under these circumstances, we conclude that this withholding is not based predominately on the evaluation of Garofalo's teaching performance. Accordingly, we decline to restrain binding arbitration. We reiterate that an arbitrator cannot second-guess the Board's student safety or supervision policies. Jurisdiction is limited to reviewing the appropriateness of the discipline imposed.

ORDER

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

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

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

DATED: April 26, 2001  
Trenton, New Jersey  
ISSUED: April 27, 2001