

P.E.R.C. NO. 2000-86

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2000-74

MIDDLESEX EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Middlesex Board of Education for a restraint of binding arbitration of a grievance filed by the Middlesex Education Association. The grievance contests the withholding of a teaching staff member's salary increment for the 1999-2000 school year. The Commission concludes that this withholding was predominantly based on concerns arising from the staff member's inability to perform due to his absence and may be resolved through binding arbitration. The Board may raise all of its concerns about the absenteeism to the arbitrator.

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, Rand, Algeier, Tosti & Woodruff,  
P.C., attorneys (Robert M. Tosti, of counsel; Ellen S.  
Bass, on the brief)

For the Respondent, Oxfeld Cohen, LLC, attorneys  
(Nancy I. Oxfeld, on the brief)

DECISION

On January 12, 2000, the Middlesex Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Middlesex Education 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. The Board has submitted a certification of its attorney. These facts appear.

The Association represents all non-supervisory certified personnel, secretaries, para-professionals and custodians. The Board and the Association are parties to a collective negotiations

agreement effective from July 1, 1998 through June 30, 2001. The grievance procedure ends in binding arbitration.

Joseph Lachac is a tenured high school guidance counselor. He also serves as the district's Substance Awareness Counselor.

Lachac received a Teacher Observation Report dated April 14, 1999. The comments under the performance criteria indicate that he treats all students with concern and respect; his door is always open; he strives to meet all of the needs of the students; he has a good sense of humor and puts students at ease; he must plan his schedule in an organized manner due to the fact that he wears many hats; he keeps track of all students' current and future course requirements; he ensures that they know the requirements for graduation, college applications and financial opportunities; he monitors his students; he counsels students experiencing personal or family problems; he works closely with others to handle emergencies; he ensures that students are working to their ability, and he keeps in contact with parents. Under comments and recommendations, the report states that Lachac has many responsibilities as the substance awareness counselor and that the district must find a way to reduce his workload so that he can give more attention to students concerning drugs and alcohol. It also notes the district's concern that he had exhausted all of his sick leave and that his office and desk must be organized to keep confidential materials out of sight of students. Lachac was not available to sign the observation.

On May 6, 1999, Lachac wrote to the principal explaining his illness and advising the principal that he was scheduled for surgery for a bladder stone on May 18. The letter describes Lachac's diabetes and blood sugar and blood pressure problems. It also explains that he was passing blood but hoped to be in for at least a few days before the surgery.

On May 10, 1999, the superintendent notified Lachac that the Board had voted at its April meeting to continue his employment with an increment for the 1999-2000 school year. The letter states that Lachac's efforts and dedication to the students were greatly appreciated and urges him to keep up the good work.

On May 17, 1999, the principal wrote to Lachac concerning his absence and its negative effect on the guidance office and substance awareness counselor position. He requested medical documentation of Lachac's physical condition and documentation indicating a date that he would return to work. He told Lachac that until such documentation was received, he must call the school each day that he is not at work. The principal asked for information concerning a daily log for the substance awareness counseling so that students could continue to be monitored. He also asked about the status of a report that he had requested before Lachac's absence.

On May 21, 1999, Lachac wrote to the principal setting forth his medical condition. He stated that the principal would be receiving a letter from his doctor's office shortly, that he

had surgery on May 18, and that he was seeing his doctor on May 26. After that appointment, he would have a better sense of when he could return to work. He indicated that the daily logs were on the computer and the report regarding Title IV was on his desk. He also indicated that he had prepared a draft on drug/alcohol incidents, but was unable to forward it before his illness.

Lachac's doctor sent undated letters to the principal on two occasions. The first indicated that Lachac had been under his care from April 15 through May 18 and could not have worked during this period. The second indicated that Lachac has been under his care and could return to work on June 18, 1999.

The Board has submitted Lachac's June 8, 1999 evaluation. It indicated that he took 36.5 sick days, three personal days, and five days to attend conferences or other related school business. Under Direct Services to Students, Parents and Staff it stated:

Mr. Lachac's very poor attendance record is a cause of great concern for parents and students who are his responsibility. Student course requests for next year and course changes, which were signed by parents on 3/15/99, were not properly handled. Students required to meet with Mr. Lachac under his S.A.C. responsibilities were not and currently are not being met. There appears to be a serious concern with confidential materials not being filed properly and left visible for anyone entering your office.

Under Collaboration & Record Keeping Functions, it states:

Mr. Lachac has not properly filed student standardized test results. These tests include S.A.T., P.S.A.T. and grade 11-H.S.P.T. testing

results. Grades for students who attend the Middlesex Academy were left unopened and as a result could not be properly recorded. Finally, Mr. Lachac did not identify a student in the 12th grade who should have taken the H.S.P.T. to graduate. Many of these record errors are directly related to an inconsistent attendance pattern.

Under Recommendations/Suggestions/Commendations, it stated that Lachac should re-visit his educational ethics and values in regard to his students. It further stated that he must improve his attendance; improve record keeping and filing responsibilities; complete tasks in a timely manner; and properly secure and file confidential and personal records related to substance awareness and guidance responsibilities. Despite the earlier Board vote to grant Lachac his salary increment, it was recommended that his increment not be granted.

On or about June 14, the Board voted to withhold Lachac's increment. On July 14, the superintendent advised Lachac of the reasons for his recommendation to withhold his increment. The letter stated:

My recommendation was based on very serious concerns regarding your performance. You are frequently unavailable for your students. As a result, by way of example and not by way of limitation, student course changes and course requests for next year were not properly processed, and students were unable to meet with you as part of your S.A.C. responsibilities. In addition, due to poor record keeping, a student visitation trip to St. John's University had to be canceled.

Additionally, you have performed your job responsibilities in an inefficient manner. By

way of example, and not by way of limitation, you have been derelict in your responsibility to properly file confidential materials, including student standardized test results; you failed to properly process grades for students who attend the Middlesex Academy; you failed to identify a student in the 12th grade who should have taken the H.S.P.T.

Your actions have negatively impacted the delivery of guidance services to our students.

On August 17, 1999, the Association filed a grievance alleging that the increment withholding was discipline without just cause. It seeks reinstatement at full step and receipt of an increment as Lachac was notified by the Board on May 10.

The grievance was denied by the superintendent and the Board. On November 15, 1999, the Association demanded arbitration. This petition ensued.

The Board asserts that this withholding predominately concerns Lachac's professional performance. It contends that excessive absenteeism was not the first and foremost reason. It points to interactions with students and lack of completion of paperwork requirements of his job.

The Association asserts that the performance issues did not arise until after April 14 when Lachac was absent due to his illness. The Association points to the positive observation report of April 14 and asserts that the only concern mentioned in both the July 14 statement of reasons and the April 14 observation is the need to file confidential materials properly. The Association asserts that we should look at all the factual

circumstances, not just the reasons upon which the withholding is allegedly based. It contends that the facts show that Lachac's performance was satisfactory until he was unable to work because of his health and therefore this grievance is disciplinary and should be reviewed by an arbitrator.

The Board asserts that the evaluation is for the period of September 1998 through June 1999, not just for the period from April to June when Lachac was absent. It contends that the April 14 observation is only for the period observed while the evaluation is for the entire school year. It rejects the Association's reliance on Mansfield Tp. Bd. of Ed and Mansfield Tp. Ed. Ass'n, 23 NJPER 209 (¶28101 App. Div. 1997), rev'g P.E.R.C. No. 96-65, 22 NJPER 134 (¶27065 1996), because it asserts that in that case the teacher had satisfactory evaluations and here, neither the observation report nor the evaluation is entirely positive.

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 grievance, 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 this 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 can 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.

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 case appears to us to predominately involve the Board's concern about Lachac's attendance. An observation report issued in April by the assistant principal is positive. Lachac is reported to treat all students with concern and respect. His ability to plan his schedule given the many hats he wears is addressed, but the evaluator recommends that the district do everything possible to improve his situation. The report notes that Lachac makes sure he keeps track of all his students' current and future course requirements and their college-related responsibilities. Finally, the report notes that Lachac monitors his students as well as counsels students with personal problems. The summary repeats the need for the administration to reduce Lachac's workload so he can give more attention to students' concerns regarding drugs and alcohol. The only negative comments involved a concern that Lachac had exhausted his sick time and his need to keep confidential material out of students' view. Although captioned an observation report, because Lachac is a guidance counselor, it appears that the report does not focus on a single observation but reflects more broadly on Lachac's overall performance.

On April 15, 1999, the day after the observation, Lachac began an extended absence for medical reasons that continued until

at least June 18. On April 19, the Board voted to grant Lachac his increment for the next school year.

Notwithstanding the Board's earlier decision to grant the increment and the fact that Lachac had not yet returned to work, on June 8, the superintendent notified Lachac that the Board would be considering withholding his increment. On June 21, the Board acted to withhold his increment. On July 14, the superintendent explained to Lachac that his recommendation was based on very serious concerns regarding his performance, in particular, his frequent unavailability to students and a number of serious consequences that appear to us to flow from his absence.

In our first increment withholding case, we reasoned that excessive absenteeism did not involve an evaluation of teaching performance, but rather flowed from the teacher's alleged failure to perform because of her absences. Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991). We have followed that approach in subsequent cases. See Edison Tp. Bd. of Ed., P.E.R.C. No. 97-40, 22 NJPER 390 (¶27211 1996), aff'd 304 N.J. Super. 459 (App. Div. 1997); Hillside Bd. of Ed., P.E.R.C. No. 92-124, 18 NJPER 358 (¶23155 1992). Cf. Pollard v. Teaneck Tp. Bd. of Ed., 92 N.J.A.R.2d (EDU) 286, 287 (St. Bd), aff'd App. Div. Dkt. No. A-4109-91 (2/22/94) (State Board of Education noted that increment withholding may be "an appropriate disciplinary action" where a teacher fails to fulfill professional responsibilities associated with an absence; decision also

adverted to Scotch Plains' determination that such withholdings are disciplinary). Contrast Rockaway Tp. Bd. of Ed., P.E.R.C. No. 97-88, 23 NJPER 129 (¶28062 1997) (although extended absence was a reason for withholding, impact of illness on teaching performance and teaching performance in general appeared to be dominant concern).

Under all the circumstances of this case, we conclude that the decision to grant Lachac his increment based on a positive evaluation would not have been overturned except for his extended absence. Cf. Mansfield (teacher with positive evaluation had increment withheld because of incident outside regular evaluation process). And we conclude that the withholding was predominantly based on concerns arising from Lachac's inability to perform due to his absenteeism. Accordingly, we decline to restrain binding arbitration.

Our role is one of gatekeeper: deciding which forum will review an increment withholding. The Board may raise all of its concerns about Lachac's absenteeism to the arbitrator.

ORDER

The request of the Middlesex 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 voted in favor of this decision. None opposed.

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