

P.E.R.C. NO. 2002-3

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONTCLAIR BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2001-47

MONTCLAIR EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Montclair Board of Education for a restraint of binding arbitration to the extent a grievance contests the substantive decision to withhold a teaching staff member's increment. The allegations that the teacher acted unprofessionally and inappropriately with her students in the classroom involve the evaluation of her teaching performance. The request is denied to the extent the grievance contests alleged procedural violations associated with notice requirements. The arbitration demand was filed by the Montclair Education Association.

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, Schenck, Price, Smith & King, LLP,  
attorneys (Arla D. Cahill and Richard H. Bauch, on the  
brief)

For the Respondent, Bucceri & Pincus, attorneys  
(Gregory T. Syrek, on the brief)

DECISION

On March 30, 2001, the Montclair Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Montclair Education Association. The grievance contests the withholding of a teaching staff member's increment.

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

The Association represents certain employees, including teachers. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1999 through June 30, 2002. The parties' grievance procedure ends in binding arbitration.

Lissa Landou is a tenured science teacher. She was hired in September 1994 as a provisional teacher and later received her instructional certification.

Landou has been evaluated each year. The annual performance report form has nine categories: Instructional Performance; Instructional Management; Professional Growth; Personal/Professional Characteristics; Parent-Community Relations; Attendance; Recommendations and Professional Development Plan. Each of the first five categories lists certain criteria on which teachers are rated. There are three ratings: Yes, No, and Occasionally.

For the 1998-99 school year, Landou received "Yes" ratings in all the criteria in the first five areas except Personal/Professional Characteristics. For the criterion "Works well with other staff members" she received an "Occasionally" rating. The Comments section of that category stated that "Dr. Landou needs to become aware of her professional and personal attitude towards her colleagues." She received commendations for three activities. Under the Recommendations section, it stated that she should become more involved in school and community events and become more flexible when working with students of different ability groupings. Under Professional Development Plan, it stated that Landou plans to take a course in Administration and Supervision and the NTE for certification in Chemistry and Physics.

On May 5, 1999, Elaine Davis, the principal, sent a memorandum to Landou about "Attitude Toward Students." It stated:

This memorandum is official notification of problematic areas in your performance. Your general attitude towards students has a tendency to be negative and one that conveys an overall dissatisfaction with the school. Your colleagues complain about your constant reference to problems in either your personal or professional life. Your supervisor, Dede Portas, has recommended strategies for you to use to motivate students and has warned you to refrain from your negative comments especially in front of students. Your comments at the Staff Meeting on May 3rd further indicated your lack of acceptance of appropriate protocol when dealing with students.

I was directly involved in the incident last year regarding the removal of the hat from a student's head. The N.J.E.A. did not support you for the reasons you gave, but because you exacerbated the situation.

The current classes offered by N.J.E.A. are intended to provide you with the tools for deescalating problems, not adding to them. You were inappropriate in "invading" the students body space and making physical contact. All of the meetings failed to make this critically important point to you. Instead, you imply that the resolution of the situation was evidence of a lack of support for teachers when they try to implement school-wide policies.

You will be placed on 45-day notice starting September 7, 1999 to ensure that next school year you have a corrective plan for improving upon these serious attitudinal problems. The way you, as a professional, feel about your job is essential for your effectiveness as a teacher.

On April 12, 2000, the principal sent a memorandum to Landou. The subject was "Notification of Unprofessional Behavior." It stated:

Please be advised that this letter will serve as notification of unprofessional behavior exhibited by you in your period 1 Honors Biology class. During our discussion with you, Dede Portas, the Science Department Chair, and Dennis Murray, the association representative, we reviewed the allegation made by a parent who later documented in writing the specific quotes associated with you. When I read these quotes to you, you did not refute the fact that you had made these statements regarding your family and relationship with your mother.

The parent's concern was with the inappropriateness of your comments to young, impressionable children aged 14 to 15 years. This incident is similar to a previous one in which you made similar comments regarding family experience. At that time, you were disciplined and warned to refrain from this type of behavior.

Therefore, I am recommending a disciplinary action of withholding of increment in salary. It is important that you understand the special status a classroom teacher possesses to maintain a high caliber of professionalism and to keep private one's personal issues that could interfere in a student's ability to learn.

On April 24, 2000, Landou received her 1999-2000 annual evaluation. She received all "Yes" ratings in the first five categories except for Personal/Professional Characteristics. Under that section, she received "Occasionally" ratings under "Concerned with the effect of his/her total person" and under "Works well with other staff members." The Comments section under this category stated:

Dr. Landou needs to become aware of her professional and personal attitude towards her colleagues and students. She must maintain a more professional relationship with her students. Outside personal matters are not to be brought into the classroom.

Under the Professional Development Plan, it stated:

Continue with graduate courses. Complete requirements for certification in Physical Science. To become more involved in the MHS community and become more aware of your personal involvement with other staff members of the MHS faculty.

On May 8, 2000, the Board voted to withhold Landou's increment for the 2000-2001 school year. The Board's resolution did not state a reason for the withholding.

On May 22, 2000, the Association requested a grievance hearing before the Board. On June 5, the Board conducted a Stage III grievance hearing. On June 14, the personnel administrator sent a memorandum to the Association and advised it that the Board had denied the Association's request to restore Landou's increment. The memorandum stated, in part:

The Board discussed fully the issues which were raised. They respectfully disagreed with the points raised by the association and voted not to grant the reinstatement of the increments for 2000-2001. While it regrets this action, the board feels that this is appropriate for not following the directives of the Principal and Assistant Principal to discontinue the inappropriate comments and for not maintaining an appropriate level of professionalism.

On June 26, 2000, 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 this dispute 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 asserts that this withholding relates to an evaluation of teaching performance. It contends that the appropriateness of curricular conversations between teachers and students in a classroom setting centers on the educational relationship between the teacher and student.

The Association first asserts that the Board did not meet its obligation under N.J.S.A. 18A:29-14 to provide Landou with written notice of its action "together with the reasons therefor" within 10 days of the withholding. It next asserts that this case requires an objective determination as to whether an incident of insubordination or other conduct occurred, requiring no educational expertise or subjective analysis, and not a subjective



determination of observations and evaluations requiring the expertise of the Commissioner of Education. It contends that the withholding was intended to punish Landou for disregarding a directive and discussing family issues in class and that an arbitrator can determine if, in fact, Landou engaged in the conduct alleged.

The Board first responds to the Association's procedural argument. It contends that we do not decide this issue in a scope of negotiations proceeding; its compliance with education statutes is within the purview of the Commissioner of Education only; and the Association has not filed a timely demand for arbitration. The Board next responds that the appropriateness of curricular conversations between teacher and student is predominately related to teaching performance.

We hold that the substantive decision to withhold Landou's increment must be reviewed by the Commissioner of Education. The allegation that Landou acted unprofessionally and inappropriately with her students in the classroom involves the evaluation of her teaching performance. Willingboro Bd. of Ed., P.E.R.C. No. 2000-68, 26 NJPER 117 (¶31050 2000); Ramsey Bd. of Ed., P.E.R.C. No. 2000-59, 26 NJPER 94, 96 (¶31038 2000); Washington Bor. Bd. of Ed., P.E.R.C. No. 98-49, 23 NJPER 603 (¶28296 1997).

The Association's reliance on Demarest Bd. of Ed., P.E.R.C. No. 99-36, 24 NJPER 514 (¶29239 1998), aff'd 26 NJPER 113 (¶31046 App. Div. 2000), is misplaced. In that case, a teacher allegedly misinformed students about why their class had been moved. We noted that the interaction did not involve teaching and did not involve the presentation of inappropriate materials to the students. Here, the teacher is alleged to have engaged in a pattern of inappropriate comments to students during class that could interfere with their ability to learn.

An arbitrator may, however, consider the Association's procedural claim that the Board did not provide timely notice of the withholding or a statement of reasons and the Board's procedural defense that the demand for arbitration was untimely. These issues do not significantly interfere with the Board's decision to withhold an increment and are mandatorily negotiable. Greater Egg Harbor Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987).

#### ORDER

The request of the Montclair Board of Education for a restraint of binding arbitration is granted to the extent the grievance contests the substantive decision to withhold an increment from Lissa Landou. The request is denied to the extent

the grievance contests alleged procedural violations associated with the notice requirements.

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: July 26, 2001  
Trenton, New Jersey  
ISSUED: July 27, 2001