

P.E.R.C. NO. 94-80

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROXBURY TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-94-39

ROXBURY EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Roxbury Education Association against the Roxbury Township Board of Education. The grievance asserts that the Board withheld a teacher's increments without just cause. Under all the circumstances, the Commission concludes that this withholding predominately involved an evaluation of the teacher's teaching performance. The cited reasons for the withholding center on the Board's subjective educational judgment concerning an allegation of an inappropriate interaction with students during a physical education class and other allegations of nasty and inappropriate comments made to students.

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Appearances:

For the Petitioner, Rand, Algeier, Tosti & Woodruff, P.C.,
attorneys (Ellen S. Bass, of counsel)

For the Respondent, Bucceri & Pincus, attorneys
(Sheldon H. Pincus, of counsel; Gregory T. Syrek on the
brief)

DECISION AND ORDER

On October 15, 1993, the Roxbury 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 Roxbury Education Association. The grievance asserts that the Board withheld a teacher's increments without just cause.

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

The Association represents the Board's teachers and certain other employees. The parties entered into a collective negotiations agreement effective from July 1, 1992 to June 30, 1994. Article IV

provides that "[n]o employees shall be disciplined or reprimanded without just cause." The grievance procedure ends in binding arbitration.

Brad DiRupo is a tenured physical education teacher. On May 25, 1993, DiRupo's principal was informed that three fifth grade students had complained that DiRupo had touched girls "in areas that they feel are wrong" and looked up the dress of a student he had lifted up to retrieve a ball stuck in the bleachers. DiRupo was suspended with pay pending an investigation.

The principal contacted the Division of Youth and Family Services ("DYFS"). DYFS investigated, but apparently found no evidence of criminal misconduct. It concluded instead that DiRupo had exhibited poor judgment and should receive administrative counselling.

DiRupo's principal then conducted an investigation. A memorandum to the superintendent contained these findings. Interviews with students and parents disclosed allegations that DiRupo had often made nasty and improper remarks to students, such as calling them "jerk," "stupid," and "ugly"; joking with a blonde student that blondes were "stupid"; and commenting on "one young lady's legs" and another student's physical "development." The students also discussed the incident which triggered the investigation and another incident in which DiRupo allegedly touched a girl's shoulder in a way that "was not friendly."

Based on the information in his memorandum, the principal recommended that DiRupo's increments for the 1993-1994 school year be withheld. To support this recommendation, he cited three incidents from years past which had led to a decision not to continue to employ DiRupo as a coach, e.g., practicing on a snow day, losing equipment, displeasing the booster club, having messy locker rooms, mishandling an injury, and misinforming parents about a son's eligibility.

The superintendent endorsed the principal's recommendation and distributed the principal's memorandum to the Board. The Board voted to withhold DiRupo's increments for the 1993-1994 school year. The business administrator/board secretary notified DiRupo of this action and gave these reasons:

- (a) improper behavior in connection with female pupils;
- (b) use of improper descriptive terms for pupils;
- (c) use of improper comments to female pupils.

The Association grieved the withholding. It asserts that DiRupo has been disciplined without just cause. The Board denied the grievance and the Association demanded binding arbitration. This petition ensued.

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 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.

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 shall 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

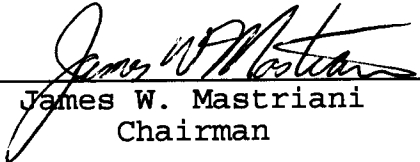
according to the Sponsor's Statement and the Assembly Labor Committee's Statement to the amendments, only the "withholding of a teaching staff member's increment based on the actual teaching performance would still be appealable to the Commissioner of Education." As in Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-8678 (10/23/87), 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]

Under all the circumstances, we conclude that this withholding predominately involved an evaluation of DiRupo's teaching performance. While the Board has not relied on observation reports or an annual performance report, the cited reasons for the withholding center on its subjective educational judgment concerning an allegation of an inappropriate interaction with students during a physical education class and other allegations of nasty and inappropriate comments made to students. We have restrained arbitration in several cases involving similar reasons. Wayne Tp. Bd. of Ed., P.E.R.C. No. 93-107, 19 NJPER 272 (¶24137 1993); Florham Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 159 (¶24081 1993); Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1992). Contrast Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991) (permitting arbitration of withholdings based solely on true or false allegations of illegal corporal punishment). We do so here as well.

ORDER

The request of the Roxbury Township Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

DATED: January 24, 1994
Trenton, New Jersey
ISSUED: January 25, 1994