

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MORRIS SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-23

THE EDUCATION ASSOCIATION
OF MORRIS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Education Association of Morris. That grievance contested the withholding of a teacher's salary increments. Pursuant to N.J.S.A. 34:13A-26, the Commission concluded that the increments had been withheld based on an allegation of misconduct involving a relationship with a former student outside class and that the allegation predominantly involved a disciplinary reason rather than an evaluation of teaching performance.

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Appearances:

For the Petitioner, Wiley, Malehorn and Sirota, attorneys
(Daniel E. Goldman, of counsel)

For the Respondent, Klausner, Hunter, Cige & Seid, attorneys
(Brian M. Cige, of counsel; Brian M. Cige and Susan
Ryscavage, on the brief)

DECISION AND ORDER

On September 9, 1992, the Morris School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Education Association of Morris. That grievance contests the withholding of a teacher's salary increments.

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

The Association represents the Board's certified personnel and certain other employees. The parties entered into a collective negotiations agreement effective from July 1, 1989 through June 30, 1992. Article 13 is entitled Disciplinary Action. It provides that

"the Board shall have the right to take disciplinary action for good and just cause" and that disciplinary action includes "withholding of increments when taken for disciplinary reasons rather than educational proficiency reasons." Such a withholding may be submitted to binding arbitration under N.J.S.A. 34:13A-29.

David Siefert has been employed by the Board for over 15 years. He teaches math and science to sixth graders at the Frelinghuysen Middle School.

On May 29, 1990, Siefert received his annual teacher evaluation for the 1989-1990 school year. He was rated "Acceptable" in every category. Under Professional Characteristics, the evaluation stated:

Mr. Siefert is a dedicated teacher who accepts the responsibility for and the consequence of his actions. He is demanding and his personal and professional standards are high. While many of his students can meet these standards, Mr. Siefert needs to be more sensitive to those who are unable to do so because of developmental and behavioral distractors. It would be highly beneficial for him to communicate with both students and parents in more positive ways so that it is perceived that he is caring and not punitive. It is also recommended that Mr. Siefert attend professional lectures, workshops and conferences for continued professional growth. Mr. Siefert's attendance is satisfactory. He is a cooperative staff member who is always ready to help.

Siefert filed a response noting his supervisor's agreement that his quiz/test policy demonstrates a sensitivity to the needs of students with developmental difficulties. His response also recognized that he had problems dealing with "me generation" attitudes such as "I'll

do it only if I feel like it." He stated his goal, so far unrealized, to be "the most patient teacher" possible.

In May 1991, Siefert received his evaluation for 1990-1991. He was rated "Acceptable" in every category.

In October 1991, Siefert and his principal, Daniel Skelton, developed a professional improvement plan for the 1991-1992 school year. The plan listed two goals for Siefert: 1) internalizing and reflecting on his reaction to student behavior and planning appropriate responses, and 2) continuing efforts to improve communication between home and school. The plan also listed activities/strategies, evaluation criteria, and time lines. Siefert added handwritten comments stating that most of his responses had been appropriate; the vast majority of his responses were no less professional than those of the vast majority of teachers; and there had been no recent complaints.

On October 10, 1991, Siefert received an observation/conference report concerning a science class. He was rated "Acceptable" in all three categories: Professional Characteristics, Class Management, and Teaching Procedures. The report praised his contagious enthusiasm.

On November 1, 1991, the principal met with a parent of a ninth grade student at Morristown High School who had been in Siefert's sixth grade class. The parent showed the principal a 1990 Christmas card from Siefert to her daughter. On the cover of the card was printed: "Know what good girls and boys get for

Christmas?" Printed inside the card was this: "Figured you wouldn't! MERRY CHRISTMAS." Handwritten inside the card was this:

Hi! Bet you're surprised to be getting this! I miss having you in class. (I miss picking on you)! How's life? Thanks for your SMILE every day -- although in fact, you look GUILTY. I always wonder what you've been up to and/or what you're thinking! Right now I'm sitting in a staff development class in the library on "Writing Across the Curriculum," and it's BOOOOOORING!!!! Aren't you flattered -- I'd rather write to you than listen to some boring wind-bag teach about "writing across the curriculum"! It's 2:15 PM (12/10/90) - 1 hour and 15 minutes more of this garbage to go!

Well, I hope you have a super Christmas. What's the book of McDonald's gift certificates for? Just 'cause I love ya. Enjoy!

The parent complained that the card was suggestive and placed her daughter under undue pressure. The principal informed the superintendent immediately.

On November 5, 1991, the superintendent and the principal met with Siefert and an Association representative. They questioned Siefert and told him that they would refer the matter to the Division of Youth and Family Services ("DYFS") and the Morris Township police department for investigation. They also told him the Board would discuss the complaint at its next meeting.

The next day the superintendent wrote a memorandum concerning the meeting. The memorandum stated that Siefert had expressed indignation and could not understand why there was any concern. According to Siefert, the student had been troubled when she first came to his class and had left the program motivated and

achieving. He simply wanted her to know he was thinking about her and missed her.

On November 15, 1991, a police detective filed an incident report. The names of informants were redacted. He quoted one informant as being under the impression, based on her son's comments, that Siefert tried to embarrass the females in his class by telling off-color jokes. He concluded that there was no indication of any criminal wrongdoing. The record does not indicate the results of the DYFS investigation.

On March 4, 1992, Siefert received an observation/conference report concerning a second science class. He was again rated "Acceptable" in all three categories: Professional Characteristics, Class Management, and Teaching Procedures. The report praised Siefert's excellent classroom management. Under Recommendations, the administrator noted that Siefert should have spoken privately to a student who was late to class. The report stated that when the student came in a few minutes late, Siefert said "What is this, the beginning of the year? Are we starting over? Get to class on time. Tomorrow I'll keep you after school." Siefert responded that he had been misquoted; instead he said "tomorrow if you come late without a pass, I'll keep you after school." Siefert also wrote that he had been motivated by a desire to reduce the potential for litigation arising from routinely allowing students to come late to classes without passes.

On April 28, 1992, the principal sent Siefert a memorandum describing the complaints of two parents. Both complaints stemmed from Siefert's reaction to his students' behavior when taught by a substitute teacher on March 25, 1992. According to the memorandum, Siefert required each student to write down what had happened in the substitute's class. One student's mother complained that her daughter was upset at having to tell on a classmate; the other student's father complained that Siefert had assigned his daughter a detention for "talking" based on what other students had reported. The memorandum also stated that Siefert had admitted handling the situation improperly; Siefert had not contacted the parents of the second student although he told the principal he would; Siefert had carried out the detention over the parents' wishes, and that student had come to fear Siefert. The memorandum concluded:

During the 1991-92 school year your Professional Improvement Plan centered on developing consistency in reaction to student behavior and in improving communication between home and school. I view these most recent complaints as examples of the difficulties you have in improving in this area. Your overreaction to what could be characterized as normal behavior children displayed with an inexperienced substitute clearly indicates a lack of judgment on your part and is of concern to me. In a Feb. 3, 1991 conference with you, I informed you of my intent to begin a written documentation process related to parent complaints about your demeanor. This reprimand is consistent with that intent.

On April 30, 1992, the principal sent Siefert a memorandum summarizing a conference. It stated:

I met with you and your representative Frank Luzzi to discuss the April 28, 1992 written reprimand you had received. I informed you that the memo was consistent with my intent to begin a written documentation process regarding parent complaints about your professional demeanor. You took exception with some of the content. I informed you of your right to attach a rebuttal.

I emphasized the need for you to refocus and improve in the areas cited in the reprimand and detailed in your 1991-92 Professional Improvement Plan.

At an unspecified time after this conference, the principal prepared Siefert's evaluation for 1991-1992. He rated Siefert "Unacceptable" under both Professional Characteristics and Class Management and "Acceptable" under Teaching Procedures. He recommended that Siefert's employment and adjustment increments for the next school year be withheld. The only incident cited as a basis for this recommendation was the Christmas card sent to a former student.

Under Professional Characteristics, the principal stated that the "Unacceptable" rating was the result of the Christmas card incident. That incident demonstrated a "complete lack of professional judgment" and raised questions about his "professional characteristics" since it had been written during an in-service program. The principal also noted the complaints about his handling of the substitute teacher incident as an example of Siefert's failure to improve communication between school and home. Under Class Management, the principal cited the substitute teacher incident and the late student incident.

On May 11, 1992, the Board voted to withhold Siefert's employment and adjustment increments for the 1992-1993 school year. It relied upon the reasons set forth in the recommendation to the Board and Siefert's evaluation.

On June 3, 1992, the Association grieved the withholding of Siefert's increments. The grievance stated that "the withholding is viewed as disciplinary and in violation of contract and statute. N.J.S.A. 34:13A-26."

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 the grievance or any defenses the Board may have. Nor do we consider whether the Board had good or just cause to withhold Siefert's increments.

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. [Id. at 146]

We now address the withholding of Siefert's increments. The only reason cited in Siefert's evaluation as a basis for the withholding is the Christmas card incident. That incident centers on Siefert's alleged misconduct concerning a relationship with a former student outside of class, not an evaluation of his teaching performance in class. The mere fact that this accusation of misconduct is included in an annual evaluation does not transform it into an evaluation of teaching performance. Bloomfield Bd. of Ed., P.E.R.C. No. 92-68, 18 NJPER 56 (¶23024 1991) (reprimand for failure to report suspected case of child abuse not turned into an evaluation simply because it was contained in an observation report form); Washington Tp. Bd. of Ed., P.E.R.C. No. 90-109, 16 NJPER 326 (¶21134 1990) (reprimand for leaving objectionable letter in students' view not turned into an evaluation simply because it was contained in an evaluation report).^{1/} Similarly, that Siefert wrote the card during a staff session and criticized the speaker

^{1/} Middletown Tp. Bd. of Ed., P.E.R.C. No. 92-54, 18 NJPER 32 (¶23010 1991) defined "teaching performance" for a principal as "the quality of the principal's performance as an educational leader and manager." Id. at 34. But "teaching performance" for teachers primarily means teaching and classroom management and does not encompass allegedly improper contacts with former students outside of school. While such alleged conduct may provide a legitimate basis for disciplining a teacher and for suspecting that the teacher's judgment may be questionable inside the classroom as well as outside, it does not constitute "teaching performance" for purposes of determining the appropriate forum for reviewing whether an increment withholding was justified.

does not turn this allegation into an evaluation of teaching performance -- it simply adds another accusation of misconduct and insubordination.

The evaluation refers to other alleged incidents, but does not cite them as a basis for the withholding. Two parents complained about Siefert's interactions with students about the problems a substitute teacher had with his class. The administration's views about these interactions with current students in a classroom setting involved an evaluation of teaching performance, but these complaints were handled by reprimanding Siefert. There is no indication that the administration would have withheld his increments based on this incident. The evaluation also refers to the March 4, 1992 observation report which describes Siefert's alleged response to a student's lateness. However, this report rated Siefert's class management as "Acceptable" and praised his classroom management as "excellent." There is no countervailing indication that Siefert's comments were a basis for the withholding.

Finally, the Board's brief (p.11) mentions "reports of Mr. Siefert's obscene or inappropriate joke telling in class." However, Siefert's observation and evaluation documents do not refer to these "reports" and it does not appear that the administration ever informed Siefert of these allegations or gave him a chance to respond. Thus, there is no indication that these "reports" were a basis for the withholding.

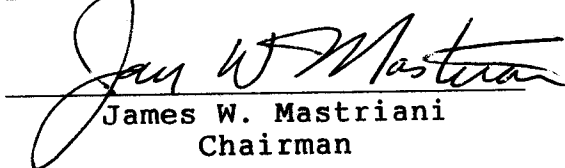
In sum, the allegation of misconduct in this case is serious. But it is not our task to determine the merits of this

allegation or the appropriateness of the penalty. Instead, our task is limited to determining the appropriate forum for addressing these questions. In discharging that task, we apply the standard the Legislature gave us and in applying that standard, we conclude that this allegation of misconduct involving a relationship with a former student outside class does not predominately involve an evaluation of teaching performance. We therefore decline to restrain binding arbitration over whether, after the employer evaluated this teacher's behavior, its decision to withhold his increment was for cause.

ORDER

The request of the Morris School District Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: December 17, 1992
Trenton, New Jersey
ISSUED: December 18, 1992