

P.E.R.C. NO. 94-83

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERNARDSVILLE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-94-48

BERNARDSVILLE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Bernardsville Education Association against the Bernardsville Board of Education. The grievance asserts that the Board withheld a teacher's salary increment without just cause. Under all the circumstances, the Commission concludes that this withholding predominately involves an evaluation of teaching performance. Any appeal must be filed with the Commissioner of Education.

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Appearances:

For the Petitioner, Schwartz, Simon, Edelstein, Celso & Kessler, attorneys (Nicholas Celso, III, of counsel)

For the Respondent, Balk, Oxfeld, Mandell & Cohen, attorneys (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On November 12, 1993, the Bernardsville Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Bernardsville Education Association. The grievance asserts that the Board withheld a teacher's salary increment without just cause.

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

The Association represents the Board's certified personnel, co-curricular personnel, and support staff. The parties entered into a collective negotiations agreement effective from July 1, 1991 until June 30, 1994. The grievance procedure ends in binding arbitration of contractual disputes and increment withholdings for disciplinary reasons. See N.J.S.A. 34:13A-26 and 29.

Donald Wilson is a tenured teacher. He teaches art classes at Bernards High School. Wilson's employment and adjustment increments for the 1992-1993 school year were withheld.

On September 2, 1992, a professional improvement plan was established for Wilson in an effort to "improve the quality and professionalism of our Art program." The plan identified these areas of weakness: Accountability, Time Management, Classroom Management, Organizational Skills, and Quality of Student Work. Under Accountability, these elements were listed as part of the improvement plan: sending attendance letters home within 48 hours and complying with staff attendance policies; submitting lesson plans weekly to the administrative team; establishing daily lesson objectives for each class and submitting them to the department supervisor; developing an assignment list and evaluation criteria for each class; having students clean up at the end of the class; securing the room, equipment, and supplies; informing the department supervisor if the facility would be used after 5:00 p.m.; developing a material storage inventory and project storage plan; and being repeatedly observed. Under Time Management, this element was listed: submitting all paperwork on time. Under Classroom Management, these elements were listed: letting students leave class only if an emergency arises; having disciplinary referral forms reviewed monthly; and supervising students properly at all times. Under Organizational Skills, these elements were listed: keeping the facilities and supplies neat; having weekly inspections; and developing a plan for distributing supplies. Under Quality of

Student Work, these elements were listed: viewing video on portfolio development; attending a staff development course on student assessment; and having students submit portfolios at the end of each marking period, with Wilson responding in writing to each portfolio and each student evaluating his or her own work.

In February 1993, the Board filed tenure charges alleging that Wilson had been inefficient.

On February 26, 1993, a revised professional improvement plan was established. The categories of weakness remained the same, although a few elements were changed or expanded upon. Under Accountability, Wilson was expected to develop an assignment list identifying student requirements and methods of assessment, including a scoring rubric and other assessment instruments. Under Time Management, Wilson was expected to attend a workshop, conference, or class selected by the principal. Under Quality of Student Work, Wilson was expected to develop a plan on how portfolios would be incorporated into the art program and to develop related handouts.

On June 7, 1993, Wilson met with his supervisors to review his progress. Each category and element was reviewed and these problems were identified as unresolved: not clearly identifying what the students will learn each period; not cleaning up the classroom at the end of class; not securing the room, equipment and supplies; not submitting materials concerning Time Management; not supervising students and allowing them to leave class absent emergencies; not keeping facilities and supplies neat; and not

achieving a higher quality of student portfolio presentations. It was also noted in the memorandum summarizing this meeting that students had not completed their self-assessments and may not have taken their presentations seriously or paid attention to other students' presentations.

In June 1993, Wilson received his annual evaluation. The evaluation praised his willingness to work long hours and teach many subjects, openness to suggestions for improvement, and enjoyment of student interaction. But the evaluation listed these performance areas as needing improvement: Accountability, Time Management, Classroom Management, Organizational Skills, Quality of Student Work, Security, Student Supervision, and Maintenance of Facility and Storage. The evaluation incorporated the memorandum summarizing the June 7 meeting.

Wilson's principal recommended that the tenure charges be suspended given Wilson's efforts to improve, but that his employment and adjustment increments be withheld for the 1993-1994 school year. She attached the documents previously described as well as a series of memoranda issued throughout the 1992-1993 school year criticizing Wilson's performance in such areas as lesson plans and objectives, student supervision and questioning techniques, clean-up procedures, learning activities, student assessments, art displays, student portfolios, and following directions. She later recommended that a new set of tenure charges be filed.

The Superintendent and the Board accepted her recommendation that Wilson's increments be withheld. Wilson was

informed that the Board was dissatisfied "with the rate and progress with which you have effectively addressed deficiencies in your performance as a faculty member."

The Association filed a grievance asserting that the withholding of Wilson's increments constituted a disciplinary action 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 (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 the 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 reviewable 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 must 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 involves an evaluation of Wilson's teaching performance. While a few of the administration's concerns might be characterized as disciplinary, its concerns overwhelmingly focus on teaching performance issues such as Wilson's lesson plans and questioning techniques, his supervision of his students and his

interactions with them in his classroom, his students' progress, and the quality of his students' portfolios. We must therefore restrain binding arbitration.

ORDER

The request of the Bernardsville 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. Commissioner Bertolino abstained from consideration. Commissioner Regan was not present.

DATED: February 16, 1994
Trenton, New Jersey
ISSUED: February 17, 1994