

P.E.R.C. NO. 99-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DEMAREST BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-99-4

DEMAREST EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Demarest Board of Education for a restraint of binding arbitration of a grievance filed by the Demarest Education Association. The grievance asserts that the Board withheld a teacher's salary increment as a disciplinary action and seeks restoration of the increment. The Commission finds that under all the circumstances, this withholding was not based predominately on the evaluation of teaching performance and may be reviewed through binding arbitration. The Association acknowledges that the teacher's interaction with a student during a band rehearsal involves an evaluation of teaching performance. The Commission finds that an allegedly inappropriate interaction with a parent and an alleged misinforming of students about why their class had been moved does not involve an evaluation of teaching performance.

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, Stanton, Hughes, Diana, Salsberg,
Cerra & Mariani, P.C., attorneys
(Matthew J. Giacobbe, on the brief)

For the Respondent, Springstead & Maurice, attorneys
(Alfred F. Maurice, on the brief)

DECISION

On July 23, 1998, the Demarest Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Demarest Education Association. The grievance asserts that the Board withheld a teacher's salary increment as a disciplinary action and seeks restoration of the increment.

The parties have filed exhibits and briefs and the Board has filed a certification. These facts appear.

The Association represents teaching staff members. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1996 through June 30, 1999. The grievance procedure ends in binding arbitration.

John Zemba has been employed by the Board as a music teacher for eleven years. According to the Board, during rehearsal on the day of the 1996 holiday concert, and in the presence of other students, Zemba took a musical part away from a student who apparently could not perform the part. The student apparently had two other parts in the concert which he did perform. According to the Association, the student approached Zemba and advised that he was not prepared for his part and asked to be excused.

Before the concert that evening, the student's parent approached Zemba and a confrontation occurred.^{1/}

Accordingly to the Board, on January 29, 1997, his students asked Zemba why the instrumental music class was not being conducted in the library as usual. Zemba allegedly replied that he did not know. On January 30, at a meeting in the superintendent's office, Zemba allegedly indicated that he told his students that he was unaware of why the class was not being conducted in the library, but indicated that he had received a January 28 memorandum which explained the reason for the change in location. According to the Association, other staff members told

^{1/} The Board has submitted a letter from the parent to the middle school principal demanding that Zemba be fired. In the letter, the parent complained about Zemba's removal of her child's musical part and relates details of her confrontation with Zemba. The parent stated that Zemba "raged and screamed at me" and "physically jabbed me in the shoulder." The letter also cited prior problems between this parent and Zemba.

Zemba that the library was not being used for another purpose. He allegedly responded that if the library was not being used, he did not know why there had been a change.

On February 28, 1997, Zemba received his interim evaluation for the period of September 1, 1996 through February 28, 1997. The interim report includes an evaluation in the following areas: Effective Instruction, Teaching Strategies, Class Management, Pupil Evaluation/Communication and Community Relations, Preparation and Planning, and Professional Competency. The summary section states:

Mr. Zemba has successfully met the job targets outlined in his Professional Improvement Plan. Through the use of the school key board, select students are being introduced to the technology of sequencing and recording music.

Mr. Zemba has demonstrated unsatisfactory performance in the following evaluative criteria areas: II. Teaching Strategies - Indicator #1 and Indicator #8; III. Class Management - Indicator #2; IV. Pupil Evaluation - Indicators #4 and #5 and VI. Professional Competency - Indicator #6.

It is expected that Mr. Zemba will demonstrate a conscious and concerted effort to improve these unsatisfactory evaluative criteria areas.

Zemba responded to each area of the interim evaluation in which his performance was rated unsatisfactory. His response to the summary stated:

This is the first evaluation of my performance during my 11 years of service that indicates anything other than praise for my professional competency. Since the writing of this interim evaluation, I have had 1 classroom lesson observed and evaluated. This observation,

performed by my principal, Dr. McDonald, cites me as using "positive, supportive remarks as a means of commanding student performance" and "continually providing positive and constructive feedback to each student in the class...." This evaluation is inconsistent with the evaluations I have received over the past 11 years. Although I disagree with the comments on the interim evaluation which describe my actions with students as being "inappropriate and insensitive" and criticizes my behavior with students as "showing no regard or respect for their feelings of self-worth" I call your attention to what is according to my latest observation/evaluation a demonstration of my conscious and concerted effort to improve what was alleged to have been unsatisfactory evaluative criteria areas. I am gratified to report that my building administrator has noted this improvement and expect that these positive comments and this positive evaluation of the performance of my professional responsibilities will be reflected on my summative evaluation for the 1996-1997 school year.

On June 20, 1997, Zemba received his Summative Teacher Evaluation for the period September 1, 1996 through June 30, 1997. He was rated unsatisfactory in the same categories as in his interim evaluation and for the same reasons. The portions of the evaluation finding unsatisfactory performance state:

Teaching Strategies

Taking the band parts away from students during the band rehearsal is inappropriate, insensitive, and unprofessional behavior of a classroom teacher. Mr. Zemba is expected to establish an educational atmosphere which allows children to participate without undue pressure as he attempts to motivate them through use of encouragement, positive reinforcement, and reward. The behavior that is demonstrated to students shows no regard or respect for their feelings of self-worth. If a student's performance does not meet the standard that is

expected, Mr. Zemba should inform them privately. The timeliness and manner in which he communicates these messages to students is inappropriate.

Class Management

It is expected that Mr. Zemba demonstrate the responsibility to keep parents informed of their child's progress. In an incident that occurred earlier this year, if Mr. Zemba had explained to a parent prior to the holiday concert that her son's performance did not meet his expectations, then the reassignment of that particular part might have been handled in a more compassionate manner.

Pupil Evaluation/Communication and Community Relations

The manner in which Mr. Zemba responded to a parent during an incident earlier this year was inappropriate, insensitive, unacceptable, and unprofessional. His behavior exacerbated the situation and did not do anything to diffuse the parent's concerns. As a teacher working in the Demarest School system, he is expected to conduct himself professionally at all times. Most importantly, part of his responsibility is that he is expected to conduct parent conferences in a skillful and empathetic manner. He is expected to demonstrate a level of emotional management that is appropriate to the standard of all teachers within the profession.

Professional Competency

At a meeting conducted in the superintendent's office on January 30, 1997, Mr. Zemba indicated that he told his students on January 29 that he was unaware of why Instrumental Music instruction was not conducted in the library where such instruction usually takes place. At this meeting, Mr. Zemba indicated that he had received a memo (dated January 28, 1997) which explains the reason for changing the location for Instrumental Music instruction. By indicating he was "unaware" of why Instrumental Music instruction was moved to other locations,

Mr. Zemba provided false information to his students.

* * *

By misinforming his students on January 29, Mr. Zemba failed to model the behavior expected of a professional teacher in the Demarest School system.

On August 19, 1997, the Board approved the superintendent's recommendation to withhold Zemba's employment and/or adjustment increment for the 1997-98 school year. On August 27, 1997, the Business Administrator/Board Secretary advised Zemba by letter of the Board's decision. That letter stated the reasons for the withholding as follows:

"Your failure to motivate one of your students through encouragement, positive reinforcement and reward and your failure to encourage an atmosphere which allowed him to participate without undue pressure; your failure to promote a spirit of mutual respect in pupil-teacher relationship based upon a humanistic classroom environment; your failure to keep the student's parent informed about her child's academic and social progress through the established reporting system and other available and appropriate means; your failure to communicate with the student's parent in a skillful and empathetic manner, with planning, recording and follow-up; and your failure to conduct yourself ethically and professionally."

The above resulted from the way in which you removed one of your students from participation in the holiday concert in December 1996 and the way in which you responded to the student's mother.

In addition, you informed your students in January of 1997 that you were not aware of why Instrumental Music instruction was not being

conducted in the Library, when in fact you were aware. By misinforming your students you were not exhibiting appropriate professional behavior.

On September 12, 1997, the Association grieved the withholding. On October 1, 1997, the interim superintendent denied the grievance. On December 8, the Board denied the grievance. On December 11, the Association demanded arbitration and 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 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]

Preliminarily, we note that inclusion of the three reasons in the Summative Teacher Evaluation does not necessarily mean that they are an assessment of teaching performance under N.J.S.A. 34:13A-26. Red Bank Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-23, 24 NJPER ___ (1998). Recommendations for withholding increments are generally made as part of an annual evaluation process that assesses all aspects of a teacher's job performance.

The Association acknowledges that the interaction with the student during the band rehearsal involves an evaluation of teaching performance. It argues, however, that the other two reasons do not. We agree.

Zemba's allegedly inappropriate interaction with a parent occurred when the parent approached him about having a conference. Our role is not to determine what happened or whether the teacher's response to the parent was inappropriate. Our function is simply to determine whether this reason and the other reasons for the withholding were based on the evaluation of teaching performance. Once we have determined the predominant basis for the withholding, either an arbitrator or the Commissioner of Education will review the merits of the withholding. We conclude that the Board's dissatisfaction with Zemba's interaction with the parent does not involve an evaluation of his teaching performance. Zemba was neither teaching, nor interacting with students, nor meeting with the parent in a formal parent-teacher conference. Contrast Southern Gloucester Cty. Reg.

School Dist., P.E.R.C. No. 93-26, 18 NJPER 479 (¶23218 1992) (repeated difficulties in interaction with students and parents involved teaching performance).

We also find that Zemba's alleged misinforming of students about why their class had been moved does not involve an evaluation of teaching performance. This alleged failure to "model the behavior expected of a professional teacher" may warrant Board concern. But it does not involve an evaluation of teaching performance. We do not suggest that an evaluation of the content of a teacher's communications to his or her students cannot involve teaching performance. In most cases, it probably would because teachers are generally teaching. However, Zemba's response to the students' question was not curricular-based, did not involve teaching, and did not present allegedly inappropriate materials to his students. Contrast Greater Egg Harbor Reg. H.S. Bd. of Ed., P.E.R.C. No. 95-58, 21 NJPER 116 (¶26071 1995), recon. den. P.E.R.C. No. 95-84, 21 NJPER 175 (¶26110 1995) (teacher allegedly made repeated negative remarks about capabilities of blonde, female students); Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) (teacher allegedly told off-color jokes, made demeaning comments to and about students and was insensitive to the needs of lower ability students); Roxbury Bd. of Ed., P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994) (increment withheld because of allegedly improper remarks to female pupils and inappropriate physical contact with pupils); Florham Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 159 (¶24081

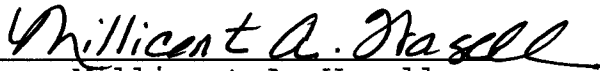
1993) (teacher had good evaluations but increment withheld because board maintained that, during class, he interrogated students about principal's behavior, questioned principal's competence, and advised students that principal sexually harassed staff member). It appears that the students would not have had a basis for believing that Zemba's response was misleading or inappropriate and that the heart of the issue involves an administrative decision about the allocation of resources. It is a dispute between the administration and Zemba and not Zemba and the students.

Under all these circumstances, we find that this withholding was not based predominately on the evaluation of teaching performance. Accordingly, we will not restrain the grievance contesting the withholding from proceeding to binding arbitration.

ORDER

The request of the Demarest Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan and Finn voted in favor of this decision. Commissioner Ricci voted against this decision. Commissioner Boose abstained from consideration. Commissioners Klagholz and Wenzler were not present.

DATED: October 26, 1998
Trenton, New Jersey
ISSUED: October 27, 1998