

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY VOCATIONAL  
SCHOOLS BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-99-84

ESSEX COUNTY VOCATIONAL  
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Essex County Vocational Schools Board of Education for a restraint of binding arbitration of a grievance filed by the Essex County Vocational Education Association. The grievance alleges that the Board withheld a teacher's increment without just cause. The Commission finds that the withholding was for reasons predominately relating to the teacher's classroom management and disciplinary techniques and must therefore be reviewed by the Commissioner of Education.

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, Schwartz, Simon, Edelstein, Celso & Kessler, attorneys (Jacob Green, on the brief)

For the Respondent, Bucceri & Pincus, attorneys (Gregory T. Syrek, of counsel; Mary J. Hammer, on the brief)

DECISION

On April 23, 1999, the Essex County Vocational Schools Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Essex County Vocational Education Association. The grievance alleged that the Board withheld a teacher's increment without just cause.<sup>1/</sup>

Both parties have filed briefs and exhibits. The Board has filed two certifications. These facts appear.

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<sup>1/</sup> The grievance also alleged that the Board violated the evaluation procedures in the parties' collective negotiations agreement. The Board notes that this procedural issue is not separately identified in the Association's demand for arbitration. As neither party has briefed that issue, we do not consider it further.

The Association represents the Board's teaching staff members. The parties' collective negotiations agreement is effective from July 1, 1995 through June 30, 1998. The grievance procedure ends in binding arbitration.

Frank Cirminiello has been employed by the Board since 1978. He is a tenured Building Maintenance/Special Education teacher.

On September 22, 1997, a student reported that he touched Cirminiello's arm while leaving the shop classroom. Cirminiello allegedly reacted by grabbing the student's throat leaving a red mark.

The principal, Steven Gary, discussed the incident with Cirminiello. Cirminiello stated that he grabbed the front of the student's shirt, not his throat. The principal advised Cirminiello that grabbing the front of a student's shirt is inappropriate. The incident was also investigated by the Division of Youth and Family Services (DYFS); it concluded that physical intervention was unjustified and placed the student at undue risk of harm.

On October 3, 1997, a student leaned back in his chair during Cirminiello's class. Cirminiello allegedly responded by requiring the student to stand behind his desk for 30-40 minutes and participate in the lesson while standing.

On October 6, 1997, the principal met with Cirminiello and the student's mother, who thought her son's punishment was

extreme. Cirminiello responded that he was concerned for student safety and that the student had to stand for only 15 minutes, not 30-40 minutes. After the student's mother left, Gary advised Cirminiello that he felt the punishment was excessive.

On December 9, 1997, Gary sent a memorandum to the superintendent, Robert Noonan, about the two incidents. Noonan and Gary discussed the incidents. Noonan worried that enrollment in Cirminiello's classes was low, a fact he attributed to Cirminiello's reputation for being a strict disciplinarian in class.

On January 12, 1998, Gary and Noonan met with Cirminiello and Association representatives. The two incidents were discussed. The superintendent advised Cirminiello that he felt the discipline of requiring a student to stand for 30-40 minutes was excessive. Prior incidents of improper discipline were also discussed.

Following the January 12 meeting, Noonan and Gary discussed these incidents and the superintendent's concern about low enrollment. They agreed to recommend that Cirminiello's salary increment for the next school year be withheld.

On January 28, 1998, Noonan sent a letter to Cirminiello. That letter stated:

As I indicated to you at the meeting held on January 12, 1998, your use of physical means to discipline students is totally unacceptable. Any further occurrence of such activities would result in your immediate suspension.

If you need further guidance on appropriate means of disciplining special education students, you should consult with Dr. Michael Zelkowitz, the Supervisor of Special Education and head of the Child Study Team. I have also directed your principal, Steven Gary and Dr. Zelkowitz to monitor your class on a regular basis to ensure that you are using appropriate disciplinary procedures and maintaining a classroom atmosphere that is conducive to the instruction of special education students.

The two instances cited in Mr. Gary's memo and the previous incident by the Division of Youth and Family Services in my judgment constitute sufficient grounds for withholding your increment for the next school year, and I will be recommending such to the Board at a future board meeting. Your pattern of inappropriate disciplinary procedures, in fact, is of such a grave nature that I am giving serious consideration to further action that could impact on your continued employment with the district.

I hope that our meeting and this letter convey to you how serious your inappropriate use of physical force is viewed and results in you refraining from any future use of inappropriate discipline in the future.

On June 8, 1998, Cirminiello received his annual summary evaluation. Under Job Performance in the area of Strength(s) it stated "Preparation for instruction." Under Weakness(es) it stated "Interaction with students." In an attachment entitled Indicators of Pupil Progress, the principal recommended three changes in teaching performance: "(1) Improve interaction with students; (2) Develop a more effective approach to discipline, and (3) Because of very low student enrollment, changes in Industrial Maintenance must be made in order to attract more students." The principal recommended no increment.

On June 25, 1998, the superintendent advised Cirminiello that the Board had voted to withhold his employment and adjustment increments for the 1998-99 school year. The letter listed these reasons for the withholding:

1. On at least two occasions in the 1997-98 school year you used physical force incorrectly to restrain or discipline a student. You were previously reprimanded for similar behavior in 1994.
2. As a result of these actions and excessively harsh disciplinary procedures, you have created a classroom atmosphere that is not conducive to the development and growth of students in your shop.

In order for you to gain guidance on appropriate means of disciplining special education students, you should consult with Dr. Michael Zelkowitz, the Supervisor of Special Education and head of the Child Study Team. I have also directed your principal, Steven Gary, and Dr. Zelkowitz to monitor your class on a regular basis to ensure that you are using appropriate disciplinary procedures and maintaining a classroom atmosphere that is conducive to the instruction of special education students.

As I indicated to you at the meeting held on January 12, 1998 and in the subsequent letter of January 28, 1998, your use of physical means to discipline students is totally unacceptable. Any further occurrence of the same or similar actions on your part will result in your immediate suspension together with legal action for your dismissal from employment with the district.

On July 29, 1998, the Association grieved the withholding. The superintendent denied the grievance and the Association demanded arbitration. This petition ensued.

The Board asserts that this withholding was based on teaching performance reasons such as Cirminiello's classroom management and disciplinary techniques. The Association responds that this withholding centers on disciplinary reasons such as alleged corporal punishment.

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 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]

We have restrained arbitration in cases involving teaching performance judgments about allegedly inappropriate interactions with students, language, discussions, and disciplinary techniques during classes. See, e.g., Newton Bd. of Ed., P.E.R.C. No. 96-3, 21



NJPER 271 (¶26175 1995); River Edge Bd. of Ed., P.E.R.C. No. 95-76, 21 NJPER 161 (¶26099 1995); Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994); Roxbury Tp. Bd. of Ed., P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994); 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 1991).

However, where a teaching staff member has been alleged to have used corporal punishment and the sole issue is the truth of the allegation, as opposed to the propriety of using a disciplinary technique, we have held that an arbitrator can find the facts. See Morris Hills Reg. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991) (no educational expertise is needed to decide that if a teacher hit a child, it would be improper conduct).


We conclude that this withholding was withheld for reasons predominately relating to Cirminiello's classroom management and disciplinary techniques and, therefore, does not fall within the ambit of Morris Hills Reg. Bd. of Ed. The incident where the student was required to stand for a period of time involves disciplinary and classroom management techniques. With respect to the other incident, there is a factual question as to whether Cirminiello grabbed the student by the throat or neck; but his principal believed that, even under Cirminiello's version of events, he had used an inappropriate disciplinary technique. Accordingly, review of the withholding requires not simply and solely a

determination as to what occurred in the encounter, but also whether Cirminiello used an inappropriate disciplinary technique even if the facts are as he alleges. Finally, the Board cited another reason for the withholding: the creation of a classroom atmosphere uncondusive to the instruction, growth, and development of special education students. That reason centers on teaching performance. We therefore find that the increment was withheld for reasons predominately related to an evaluation of his teaching performance and must be reviewed by the Commissioner of Education. Compare North Caldwell Bd. of Ed., P.E.R.C. No. 98-90, 24 NJPER 52 (129033 1997) (arbitration restrained where increment withheld after teacher made student, who had pasted sign on classmate's back, wear sign on child's own face).

ORDER

The request of the Essex County Vocational Schools Board of Education for a restraint of binding arbitration of this increment withholding dispute is granted.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn and Ricci voted in favor of this decision. Commissioner Muscato was not present.

DATED: September 30, 1999  
Trenton, New Jersey  
ISSUED: October 1, 1999