

P.E.R.C. NO. 2002-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

VERNON TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2002-5

VERNON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Vernon Township Board of Education for a restraint of binding arbitration of a grievance filed by the Vernon Township Education Association. The grievance contests the withholding of a teacher's salary increment. The Commission concludes that this withholding was prompted by a hallway incident where a teacher allegedly initiated physical contact with a student and was not predominately based on the 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, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Robert J. Merryman, on the brief)

For the Respondent, Bucceri & Pincus, attorneys (Sheldon H. Pincus, of counsel; Mary J. Hammer, on the brief)

DECISION

On September 4, 2001, the Vernon 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 Vernon Township Education Association. The grievance contests the withholding of a teacher's salary increment.

The parties have filed briefs, exhibits and certifications of the superintendent and grievant. These facts appear.

The Association represents all certified and non-certified personnel, excluding supervisors, administrators and

confidential positions. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

Bruce Crisman is a tenured English teacher. He received a Memo of Record from the Office of the Principal regarding an April 5, 2001 incident. The principal wrote:

At approximately 12:30 PM on Thursday, April 5th as I was entering the Guidance Department office area via the corridor, Mr. Crisman yelled out to me to come to him regarding a matter involving himself and a seventeen year old junior male student.... Present at the scene of the incident which took place at the trophy case area outside the main gym were: Mr. Crisman; ...[the student]; Mr. Dunnigan; ...[the assistant principal] and myself.

A great number of students were passing through the corridor area during this time as the incident occurred "in-between periods." Mr. Crisman was visibly upset with the student as demonstrated by the loudness of his voice tone that he expressed directed towards the student and the fact that he initiated physical contact with the student. Mr. Crisman explained that he felt that the boy should not have food in the corridor. Mr. Dunnigan took several steps back from the scene at the time of the incident while a heavy flow of traffic of students continued to pass by.

After verbally chastising the student and getting little to no response from the student, Mr. Crisman proceeded to make physical contact with the youngster as he pointed the fingers of his right hand into the boy's left upper chest/rib cage area and then abruptly grabbed the boy's left shoulder and arm area shrugging on them in the process. Immediately upon seeing this occur, I requested that Mr. Crisman please come with me in an attempt to diffuse the situation. I explained to him that Mr. Dunnigan would handle the matter from here.

Mr. Crisman then proceeded to meet with me per my request in Mrs. Gehl's office in Guidance with the door closed. (NOTE: This was the first room/space available closest to the scene of the incident that provided privacy.) During this conference I explained to Mr. Crisman that he was wrong to initiate physical contact with the student.

Mr. Crisman was visibly upset with me for addressing him as he indicated to me in the conference that he has been handling situations like this, which included touching students for 32 years. I explained to him that he was never to initiate physical contact with any student again unless it was in self-defense or to protect a student from another.

Mr. Crisman suggested that the implication was that I was "siding with the student." I explained to him that his suggestion was wrong. I further explained to him that there was nothing implied in what I was saying, but rather I was explicitly directing him not to initiate physical contact with a student ever again as already described.

Mr. Crisman exited Mrs. Gehl's office angrily.

Crisman's certification offers a different account of the incident. According to that certification, this is what occurred.

Crisman noticed a student attempting to hide a sandwich. He informed the student that food was not to be taken out of the cafeteria and he then walked the student to the end of the hallway to assistant principal Dunnigan. Dunnigan told the student to throw the sandwich out or return to the cafeteria to finish it. The student responded that his 7th period teacher knew he was getting the sandwich and that eating it in class was okay. Dunnigan again told the student to throw it out or return to the cafeteria. The student then took a big bite out of the sandwich and became angry.

Fearing the situation was about to escalate, Crisman leaned toward the student in a reassuring and confidential manner and said: "You're not in trouble, you're not going to be written up. Do as Mr. Dunnigan says, and next time, have a note from the teacher and all this could be avoided." Crisman then told the student to go ahead and finish the sandwich in the cafeteria. He might have put his hand on the student's upper arm in an attempt to calm him; the student calmed down and started walking toward the cafeteria.

The principal then walked up to Crisman and told him to follow him. Once they were in an empty office, the principal told him that he had acted highly unprofessionally and inappropriately. Crisman was angry and hurt because he thought he had diffused a potentially ugly situation and should have been praised. He and the principal exchanged heated words.

On April 30, 2001, the superintendent wrote to Crisman and advised him that the Board had approved withholding his increment for the 2001-2002 school year. The letter stated, in part:

The above action was taken based on the fact that you demonstrated very poor and unprofessional judgment while disciplining a student at Vernon Township High School on Thursday, April 5th. Specifically, you inappropriately initiated physical contact with a student during the course of disciplining him although the Assistant Principal had already responded and the Principal was approaching the scene of the incident.

During the 2001/2002 school year, I must strongly inform you once again that it is categorically expected that you will display appropriate and professional behavior when dealing with students, including while disciplining them. The above includes complete avoidance of any and all physical contact with students. In addition to the above, you are hereby directed to participate in an anger management and/or student disciplining techniques counseling or program, mutually agreeable to you and to the high school principal. The above will be at the expense of the district. Please discuss the above with the high school. Failure to comply with the above may either bring about consideration for increment withholding in the future or may result in the filing of dismissal charges. I do not anticipate having to communicate with you again regarding your conduct in and out of the classroom while you are employed in our school district.

Also on April 30, 2001, Crisman received a nearly identical letter serving as an official reprimand.

On May 7, 2001, Crisman filed a level 2 grievance alleging that this withholding violated a contract clause requiring just cause for disciplinary action.

On June 14, 2001, Crisman received his annual evaluation for the 2000-2001 school year. He was rated effective in all areas including classroom management.

The parties agreed to skip a grievance hearing before the Board since Crisman had already been provided an opportunity to address the Board about the withholding. The Association demanded arbitration and this petition ensued.

The superintendent states that Crisman had been counseled on occasions during the past few years about inappropriate contact

with students and inappropriate discipline. On May 16, 1997, Crisman was allegedly involved in an incident in class in which he grabbed a student by the arm and pulled her to a counter. Crisman was advised that staff members should never put their hands on any students except in an emergency. A notation was made in Crisman's annual performance evaluation for the 1996-1997 school year.

The Board has cited another incident. In April 2000, a student filed an affirmative action complaint against Crisman. The complaint alleged that Crisman told the student to shut up and touched her hand to get her attention. Crisman's increment was withheld for the 2000-2001 school year. That withholding was not challenged.

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]

The Board asserts that this withholding was based on an evaluation of Crisman's teaching performance. The Board argues that the determination of appropriate behavior by a teacher involves factors specific to the educational process more appropriately resolved by the Commissioner of Education.

The Association asserts that this withholding is arbitrable because it was based on one alleged incident involving

a student and that review requires no subjective educational judgment. It argues that no special expertise is needed to decide whether a teacher failed to follow applicable procedures.

The Board responds that its decision was not based on whether Crisman did or did not have improper physical contact with a student, but on Crisman's continuing pattern of conduct demonstrating poor and unprofessional judgment in disciplining students.

The Superintendent's April 30 letter makes clear that the April 5, 2001 incident prompted the withholding. Under the circumstances of this case, we find that a withholding based predominately on that incident is not one based predominately on the evaluation of teaching performance.

In Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991), we declined to restrain arbitration of a withholding based on a corporal punishment allegation disputed by the teacher; no educational expertise was needed to decide whether the alleged conduct occurred or was inappropriate. As Crisman's certification described the incident and denied that he improperly touched the student, the accuracy of the administrator's charge is the primary issue and can be resolved by the arbitrator. In addition, we take into consideration the fact that this incident did not occur in Crisman's classroom and the student was not assigned to him. See North Arlington Bd. of Ed., P.E.R.C. No. 97-28, 22 NJPER 366


(¶27192 1996) (withholding could be arbitrated where teacher allegedly demonstrated extremely poor judgment and unbecoming conduct involving child who was not his student). Contrast Hazlet Bd. of Ed., P.E.R.C. No. 95-59, 21 NJPER 118 (¶26072 1995) (failure to use educationally sound techniques in classroom discipline). Further, Crisman's annual evaluation shows that he was rated effective in all areas, including classroom management. Compare Mansfield Tp. Ed. Ass'n, P.E.R.C. No. 96-65, 22 NJPER 134 (¶27065 1996), rev'd and rem'd 23 NJPER 209 (¶28101 App. Div. 1997).

The Board can ask the arbitrator to consider Crisman's record and its argument that, even under Crisman's version of the facts, his hallway conduct ignored warnings he had received regarding physical contact with students. The arbitrator may not secondguess the Board's policy that teachers should not initiate physical contact with students unless it is in self-defense or to protect one student from another. Cf. Red Bank Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-23, 24 NJPER 474 (¶29221 1998); Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-72, 18 NJPER 64 (¶23028 1991).

ORDER

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

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Ricci voted in favor of this decision. Commissioner Sandman abstained from consideration. None opposed.

DATED: December 20, 2001
Trenton, New Jersey
ISSUED: December 21, 2001