

**MARY ANN BASILE, EDWIN BERKOUT, JR.,
PAUL CASTIGLIA, DANIEL DANDY, PETER
DiBELLO, IRVING GREENBERG, ANTHONY
LAMPARELLO and BRUCE ZIEGLER,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF ELMWOOD PARK, BERGEN COUNTY,**
Respondent.

Decided May 21, 1980

Initial Decision

SYNOPSIS

Eight tenured teachers employed by the Elmwood Park Board of Education appealed from the Board's denial of their annual increments.

The administrative law judge found that although none of the teachers' principals had recommended that the increments be withheld, the local superintendent advised the Board that he intended to recommend withholding petitioners' increments. Acting on this recommendation, the Board voted to withhold the increments based on the fact that the teachers did not meet the performance standards of the superintendent.

The judge found that the superintendent had recommended withholding these increments because 5 or more of the 28 responses on each of the teachers' evaluation forms had been checked "needs improvement." The judge also found that neither the teachers nor their evaluating principals were aware of such a criterion.

While allowing that a board of education has the authority to withhold increments, the administrative law judge concluded that in this instance the denial of increments was arbitrary and should be set aside. The judge found that the lack of knowledge on the part of the teachers and the principals of the criterion used by the superintendent in arriving at his recommendations renders any increment denial arbitrary. The judge also found that the Board had never adopted the superintendent's criterion as part of the district's evaluation system.

Accordingly, the administrative law judge ordered that the teachers be

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granted their increments.

Saul R. Alexander, Esq., for Petitioner

Stanley Turitz, Esq., for Respondent (Bartlett & Turitz, Attorneys)

ERRICKSON, ALJ:

Petitioners, who are tenured teachers employed by the Elmwood Park Board of Education, appeal from an action of the Board in April 1978 notifying them that their increments as provided by the then applicable negotiated agreement would be withheld for the ensuing 1978-79 school year. Specifically, petitioners allege that the withholding of increments was invalid by reason of arbitrariness, capriciousness, unreasonableness and failure to supply the sufficiently detailed and factual reasons required by statute. The Board, conversely, denies all allegations of impropriety and asserts that its action was a legal exercise of its discretionary authority.

PROCEDURAL RECITATION

The matter was transferred on July 2, 1979, by the Commissioner of Education to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A. 52:14F-1 et seq.* Counsel for the parties entered a Stipulation of Facts thus obviating the necessity for a plenary hearing. Petitioner filed a brief on January 24, 1980. When respondent, by letter, dated May 1, 1980, waived filing of a brief, the record was complete.

RELEVANT FACTS

I **FIND** the following to be the facts relevant to a determination of the controverted matter:

1. On March 28, 1978, the Board in executive session heard evaluation reports from its principals, none of whom recommended withholding of increments from any teacher. When the Superintendent advised the Board that he intended to recommend withholding petitioners increments, a special meeting was scheduled and conducted in public session at the request of eight of the petitioners on April 11, 1978. Evaluations of two teachers who had not so requested were discussed in closed session.

2. At the public session of the Board on April 18, 1978, the following was passed by a majority vote of the full membership of the Board:

. . . WHEREAS: The Superintendent of Schools does recommend to the Board of Education that increments be withheld from the following named persons:

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Mary Ann Basile

Edwin Berkout

Paul Castiglia

Daniel Dandy

. . .

Peter DiBello

Irving Greenberg

Anthony Lamparello

. . .

Bruce Ziegler

for good cause; more particularly the Superintendent of Schools finds that the quality of performance of each listed teaching staff member, as evidenced by the said final written evaluations indicates needs of improvement in a significant number of areas, and therefore said performances do not meet the standards of the Superintendent of Schools, therefore be it that based upon the Superintendent's recommendation and findings, good cause does exist and therefore increments be withheld . . . for the 1978-79 school year and that there be no change in their salary from 1977-78. . . .

3. The Board's then existing policy on withholding of increments provided *inter alia*, as follows:

The annual salary increment of any professional personnel employed by the Board of Education may be withheld upon the recommendation of the Superintendent of Schools, where the quality of performance does not meet the standards established by the Board of Education and the administration and is not that severe to warrant removal on charges of incompetency.

It is understood that before such action takes place, the employee will be given a minimum of three observations with a written report for each of strengths and weaknessess observed. . . .

4. Each petitioner was provided with a letter, dated April 20, substantially similar to the following:

At the Board of Education meeting held on April 18, 1978, it was recommended to the Board of Education, and approved, that your increment for the 1978-79 school year be withheld.

This recommendation was made to the Board of Education based upon your evaluation submitted to my office by the principal.

You are informed, therefore, that there will be no changes in your salary from the 1977-78 school year.

5. The evaluation form used for each petitioner was that agreed to by the parties to the Board's negotiated agreement.

6. The criterion used by the Superintendent in making his

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recommendation for withholding of increment was that if in the total of 28 responses under competence in instruction and professional responsibilities five or more check marks appeared in the "Needs Improvement" column of the evaluation form, he would recommend no increment regardless of any favorable recommendation of a principal. The two other columns on the check list were headed "Outstanding" and "Satisfactory."

7. No issue was raised at the Board meeting in regard to the Superintendent's criterion whereby five "Needs Improvement" ratings triggered a withholding of increment.

8. Petitioners had had no prior knowledge that such a criterion was to be applied for withholding increments.

9. In all instances except one, the principal and supervisor recommended granting of an increment to petitioners. No recommendation at all was made by petitioner Dandy's principal concerning granting or not granting of an increment.

ISSUE AND STATUTORY REFERENCE

The issue here presented is whether the criterion applied and the withholding of petitioners' increments, contrary to recommendations of their principals, constituted arbitrary, capricious, unreasonable action. *N.J.S.A.* 18A:29-14 provides *inter alia*, that:

Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. . . .

DISCUSSION

It is well settled that a board has authority to withhold increments. *See, N.J.S.A.* 18A:29-14; *Westwood Education Association v. Board of Education of the Westwood Regional School District*, (*N.J. App. Div.*, June 21, 1974. A-261-73) (unreported), certif. den. 66 *N.J.* 313 (1974). It is similarly recognized that the Commissioner of Education, in his quasi-judicial capacity as a determiner of disputes rising under education law, has authority to examine the acts of boards of education. While he does not seek to substitute his judgment for that of local boards, he will, in his capacity

as a determiner of controversies and disputes, examine their acts as to their propriety and compliance with applicable statutory and decisional law in order that there be no doubt in the public mind that their acts are legal and reasonable.

As was stated in *James McCabe v. Board of Education of the Township of Brick, Ocean County*, 1974 S.L.D. 299:

. . . The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under the school laws, inquire into the reasonableness of the adoption of policies, resolutions, or bylaws, or other acts of local boards of education in the exercise of their discretionary powers, but will not invalidate such acts unless unreasonableness clearly appears. . . . (at 307-308)

In the instant matter the Superintendent, after reviewing the written evaluations and oral reports of the principals recommending all but one petitioner for an increment, set his own unrevealed standard for recommendation of increment. That standard was that any teacher with five designations of "Needs Improvement" among the 28 possible responses would be recommended not to receive an increment for the ensuing year. The Board, without raising questions or otherwise discussing or modifying that criterion, acted on his recommendation by withholding petitioner's increments. It is this criterion and action thereon which petitioners charge was unreasonable, arbitrary and otherwise inappropriate.

I am unable to perceive in the record before me any indication that the standard applied by the Superintendent, and apparently accepted by the Board without discussion when acting affirmatively on his recommendation, had previously been revealed to teaching staff members or to the principals who evaluated them. One may not presume that every exigency, which it may be necessary to consider when fixing a teacher's salary for an ensuing year, could possibly be covered by a school board's previously enunciated principle or set of criterion. I **FIND**, however, that the Superintendent's failure to reveal such an unbending standard as applied to the 28-item check list for every teacher was arbitrary. The record fails to reveal that this standard was sanctioned or announced in advance by the Superintendent or the Board to either the evaluators or those being evaluated.

It was arbitrary in that the principals, none of whom recommended the withholding of an increment for any petitioner, were not furnished the criterion with which the ultimate decision would be made regarding their work product. Without such knowledge they could only have been unaware

of the effect of five check marks in the "Needs Improvement" column. It goes without saying that a principal might well have reconsidered marking that column in the instance of a valued teacher whose need for improvement was, in fact, slight as compared to another teacher who in the same item exhibited great need for improvement. The record fails to reveal that the Superintendent or the Board had available, asked for, or took into account such comparative judgment.

The action was also arbitrary as it affected the teaching staff members whose livelihood was, at least in part, dependent on increments in an inflationary economy. None of these persons was informed in advance of the criterion to be applied to the key instrument used in the evaluation process.

Further evidence of arbitrariness is the exclusiveness of the Superintendent's criterion in that no provision was made for consideration of a teacher's offsetting strengths and weaknesses, optional comments, outstanding ratings, attendance, professional course and workshop activity or special contributions to school and community, all of which were elsewhere provided for on the evaluation instrument. Nor was provision made for consideration of the relative importance which the evaluator may have considered to apply to each of the 28 items in the aforementioned check list.

DETERMINATION

Having found that the criterion utilized by the Superintendent and the Board was, within the factual context herein presented, arbitrary and unreasonable, I **CONCLUDE** that corrective action is required in the interests of fairness. Accordingly, it is **ORDERED** that the Board pay to each petitioner the difference between the salary received during the 1978-79 and the 1979-80 school years and the salaries which would have been received had the increment not been withheld for the 1978-79 school year. It is also **ORDERED** that the Board notify each petitioner of the salary to be received during the 1980-81 school year, if still employed, which amount shall incorporate the increment for the 1978-79 school year which by this action has been ordered reinstated.

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After reviewing this Initial Decision, the Commissioner of
Education on July 21, 1980 issued the following
Final Decision:

The Commissioner has reviewed the entire record of the matter
controverted herein including the initial decision rendered by the Office of
Administrative Law.

The Commissioner affirms the findings and determination as rendered in
the initial decision in this matter and adopts them as his own.