

P.E.R.C. NO. 2009-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WOODBRIAGE TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2009-020

WOODBRIAGE TOWNSHIP
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants to request of the Woodbridge Township Board of Education for a restraint of binding arbitration of a grievance filed by the Woodbridge Township Education Association. The grievance contests the withholding of a teaching staff member's increments. The Board listed ten reasons for the withholding. Because the withholding is based predominately on an evaluation of teaching performance, the Commission restrains binding arbitration.

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, Wilentz, Goldman & Spitzer, P.A.
attorneys (Viola S. Lordi, of counsel and on the brief
and Mary E. Smith, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Nancy I. Oxfeld, on the brief)

DECISION

On October 17, 2008, the Woodbridge Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of arbitration of a grievance filed by the Woodbridge Township Education Association. The grievance contests the withholding of a teacher's salary increments. The parties have filed briefs, certifications and exhibits. Because the withholding is based predominately on an evaluation of teaching performance, we restrain arbitration.

The parties have filed briefs and exhibits. The Board has filed a certification from its superintendent.^{1/} These facts appear.

The Association represents a broad-based unit including certificated teaching staff. The parties' collective negotiations agreement is effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration.

The grievant is a high school mathematics teacher. On April 7, 2008, the Board's then-superintendent of schools notified the grievant that he intended to recommend that the Board withhold her employment and adjustment increments for the 2008-2009 school year. His letter lists ten reasons. On April 25, the superintendent wrote to the grievant advising that the Board, at its meeting the previous evening, voted to withhold her increments. The same ten reasons were listed in that letter.

On April 28, 2008, the Association filed a grievance asserting that the withholding was without just cause. The superintendent and the Board denied the grievance. On June 19, the Association demanded arbitration. This petition ensued.

^{1/} The Board argues that the Association's factual assertions in response to the allegations in the withholding are not supported by a certification. However, in an increment withholding scope case, the Board's reasons for the withholding govern the outcome, not the teaching staff member's response to those reasons.

The April 7 and April 25, 2008 letters to the grievant list these ten reasons:

1. Grievant failed to create or maintain a collegial working relationship with her students, the math department and other staff members;
2. Grievant has difficulty engaging her students in a lesson;
3. Grievant failed to return quizzes and tests to her students in a timely manner;
4. Grievant failed to advise her students of their progress in a timely manner;
5. Grievant failed to maintain her grade book in accordance with school and district policies, including using inappropriate zero marks, blank grades, and lack of rubric;
6. Grievant failed to maintain sufficient parental contact;
7. Grievant failed to alert the school administration about a student who walked out of her class without permission;
8. Grievant was tardy on several occasions;
9. Grievant violated an administrative directive by eating food during hall duty; and
10. Grievant's cell phone rang during HSPA testing, which caused Grievant to leave the testing room in direct contravention of a directive prohibiting use of cell phones during HSPA testing.

The appendix filed by the Board contains numerous "Observation Forms" relating to these events. The incidents

occurred during the 2006-2007 and 2007-2008 school years.^{2/} The Appendix also has replies from the teacher, two letters from parents, an annual performance review for the 2006-2007 school year, but no similar document for 2007-2008. To determine if the listed reasons predominately relate to teaching performance, we will review the reasons, the documents and apply precedent.

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.

^{2/} At our request, the Board amended its brief to link the pertinent documents in the appendix to each of the ten reasons given for withholding the increment.

In Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991), 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]

Where more than one reason is listed as the basis for withholding an increment, we must determine whether the withholding is predominately related to the evaluation of teaching performance. See Orange Tp. Bd. of Ed., P.E.R.C. No. 2005-65, 31 NJPER 118 (¶50 2005); Camden Cty. Vo-Tech Bd. of Ed., P.E.R.C. No. 2007-47, 33 NJPER 24 (¶9 2007). And, where a Board cites multiple reasons, but shows that it acted primarily for certain of the listed reasons, we will weigh those concerns more heavily in our analysis. See Bergenfield Bd. of Ed., P.E.R.C. No. 2006-80, 32 NJPER 126 (¶58 2006). Here, no one reason has

been given more weight than the others. We now examine the ten reasons for the withholding.

1. Grievant failed to create or maintain a collegial working relationship with her students, the math department and other staff members. (Exhibits K, N).^{3/}

We conclude that this is a mixed reason that partially relates to teaching performance.

Exhibit K, dated October 25, 2006, criticizes the teacher because one of her students was sent to the vice principal's office because the student was late to lunch and did not have a pass. It notes that the teacher stated that she had written a pass on the back of the student's test because she had run out of hall pass forms. The report asserts that when the administrator phoned the teacher twice shortly after the incident, she was impatient and appeared annoyed by the calls. The document, written by the administrator who made the phone calls, asserts that the incident showed that the teacher was deficient in working with administrators and did not communicate effectively. It states that the teacher violated policy by writing a pass on a student's test and warns that her failure to correct these deficiencies could result in withholding her increment for the 2007-2008 school year.

^{3/} The Board links Exhibit Y, a memorandum from the principal to the superintendent recommending that the increment be withheld to each of the ten reasons. That document lists nine reasons (omitting reason four) for the withholding.

The student with the improper hall pass and the grievant's telephone conversations with the administrator about it do not relate to teaching performance. See Red Bank Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-23, 24 NJPER 474 (¶29221 1998) (not using proper passes, keeping pupils after class, and scheduling them for extra help during other classes involve obeying policies, not teaching performance); Elizabeth Bd. of Ed., P.E.R.C. No. 2003-86, 29 NJPER 247 (¶74 2003) (verbal exchanges between teacher and supervisor over change in class assignments during which teacher accused supervisor of lying were not related to teaching performance).

Exhibit N, prepared on April 18, 2007, is the grievant's Annual Performance Evaluation for the 2006-2007 school year. It includes two comments that arguably relate to interpersonal relations with students and staff. One asserts that the grievant "has struggled in maintaining congenial relationships with her students and their parents, which has resulted in classroom confrontations." The Professional Improvement Plan reads that the grievant will "Maintain or create collegial working relationships with the Math Department" to "increase her domain within the (HSPA and SAT) range(s)."

Reason one does not address the grievant's relationships with parents. Accordingly, the comment on the annual evaluation referring to that issue is not relevant to this reason. However,

the statement on Exhibit N that the teacher has struggled to maintain congenial relations with students and that those problems have led to classroom confrontations involves teaching performance. See Orange Tp. Bd. of Ed. Although no specifics are provided, we do not look behind the stated reasons. The teacher's denials can be considered when the increment withholding is reviewed. Trenton Bd. of Ed., P.E.R.C. No. 2002-67, 28 NJPER 239 (A33089 2002).

2. Grievant has difficulty engaging her students in a lesson. (Exhibits J, R, W)

Exhibits J and R are observations of the teacher's performance during class on September 25, 2006 and October 29, 2007, respectively. Both exhibits focus primarily on instructional techniques and activities and contain some performance-related criticisms and suggestions. They also address procedural matters such as ensuring quizzes are graded and returned to students the day after they are given and whether logs of "extra help sessions" and contacts with parents had been created and maintained. Exhibit W is a letter from a parent to the principal asserting that her daughter had found the teacher's approach very difficult to understand and follow and also relates that an older daughter had similar difficulties when she was in the teacher's class.

We conclude that this reason relates primarily to teaching performance. See Englewood Bd. of Ed., P.E.R.C. No.

2006-33, 31 NJPER 353 (¶140 2005) (arbitration restrained where teacher allegedly lacked lesson plans and a class register book, and had poor instructional practices).

3. Grievant failed to return quizzes and tests to her students in a timely manner. (Exhibits J, R, U).
4. Grievant failed to advise her students of their progress in a timely manner. (Exhibits J, R, T, U).
5. Grievant failed to maintain her grade book in accordance with school and district policies, including using inappropriate zero marks, blank grades, and lack of rubric. (Exhibits R, S, T, V).

All of these reasons relate to teaching performance.

Exhibits J and R, described above, include statements that the teacher failed to return graded tests and quizzes to students in a timely manner. Exhibit U, a letter from a parent, addresses the same issue. See Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005) (arbitration restrained where reasons included teacher's alleged failure to timely return graded weekly homework).

Exhibits S, dated November 16, 2007, and T, dated December 20, 2007, referenced in connection with reason five, review the teacher's grade book for conformance to district policies, completeness and currency. Exhibit V, a February 6, 2008 memorandum from the principal to the teacher, raises concerns with four issues related to the maintenance of her grade book.

It accuses the teacher of failing to correct those deficiencies, characterizes her conduct as "repeated insubordination" and warns that he will recommend that her increment be withheld. The teacher responds to these documents, including a vigorous rebuttal to Exhibit T, which also notes that the teacher had not provided feedback to her students every two weeks as the supervisor had previously directed. We find that, on balance, these reasons relate to teaching performance. See Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008) (though Board viewed teacher's failure to improve professionally as "insubordination," reason for withholding concerned teaching performance).

6. The teacher failed to maintain sufficient parental contact. (Exhibits N, R).

Part of the 2006-2007 annual evaluation (Exhibit N) notes that the teacher "struggled in maintaining congenial relations with her students and her parents which has resulted in confrontational situations in the classroom." An October 29, 2007 (Exhibit R) report notes that as of that date, the teacher "has no recorded home contacts." It also recites that the teacher was given three directives to keep logs of extra help and home contacts.

These documents linked to the teacher's contacts with parents are ambiguous. In the same sentence, the 2006-2007 annual performance review (Exhibit N) mentions her relationships

with students and parents and says that there have been classroom confrontations. No allegations are made in this document or any other exhibits that these confrontations involved parents, as opposed to students. Nor are any details provided. Exhibit R reports that the teacher had not "recorded home contacts." Given our gate-keeping function we do not look behind these reasons or consider the teaching staff member's denials or explanations. An allegation that a teacher has failed to maintain proper parent contacts is related to teaching performance. See Freehold Reg. H.S. Bd. of Ed., P.E.R.C. No. 2007-65, 33 NJPER 149 (¶53 2007) (withholding based on Board's judgment that guidance counselor had a continuing pattern of not responding promptly to the guidance-related concerns and questions of students and parents involved teaching performance; professional improvement plan specifically aimed at counselor's deficient contacts with parents).

7. Grievant failed to alert the school administration about a student who walked out of her class without permission. (Exhibit Q).
8. Grievant was tardy on several occasions. (Exhibits O, P).
9. Grievant violated an administrative directive by eating food during hall duty. (Exhibit L).
10. Grievant's cell phone rang during HSPA testing, which caused grievant to leave the testing room in direct contravention of a directive prohibiting use of cell phones during HSPA testing. (Exhibit X).

None of these reasons relate to teaching performance. These issues have been addressed in our cases and we have declined to restrain arbitration of increment withholdings based on analogous conduct. See Camden Cty. Vo-Tech Bd. of Ed. (teacher's students in hallway without proper ID or authorization; students observed eating in class); Atlantic City Bd. of Ed., P.E.R.C. No. 98-43, 23 NJPER 567 (¶28283 1997) (alleged chronic tardiness); Willingboro Bd. of Ed., P.E.R.C. No. 98-51, 23 NJPER 607 (¶28298 1997) (teachers, acting as administrators and proctors, allegedly did not follow directives while administering State-mandated test).^{4/}

Our review of the Board's reasons, the supporting documents, and our case law leads us to conclude that five of the stated reasons (2, 3, 4, 5 and 6) are predominately related to teaching performance. We find that four reasons (7, 8, 9, and 10) do not predominately relate to teaching performance. Reason one is a mixed reason. Thus the balance tips toward a finding that the performance-related reasons predominate and we therefore grant the Board's request for a restraint.

^{4/} It appears that a ban on cell phones in the testing room was directed at students. In any case, the teacher's alleged failure to silence or turn off her cell phone does not relate to teaching performance.

ORDER

The request of the Woodbridge Township Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Colligan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioner Branigan recused herself. Commissioner Watkins was not present.

ISSUED: March 26, 2009

Trenton, New Jersey