

P.E.R.C. NO. 2011-12

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LITTLE SILVER BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2010-045

LITTLE SILVER EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Little Silver Board of Education for a restraint of binding arbitration of a grievance filed by the Little Silver Education Association. The grievance contests the increment withholding of a guidance counselor. Because the withholding is predominately based upon an evaluation of the counselor's performance, the Commission restrains 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, Lindabury, McCormick, Estabrook & Cooper, P.C., attorneys (Anthony P. Sciarrillo, of counsel and on the brief, Joshua S. Sklarin, on the brief)

For the Respondent, Zazzali, Fagella, Nowark, Kleinbaum & Friedman, attorneys (Genevieve M. Murphy-Bradacs, of counsel)

DECISION

On December 11, 2009, the Little Silver Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Little Silver Education Association. The grievance asserts that the Board did not have just cause to withhold a guidance counselor's adjustment and salary increment. Because the withholding is predominately based upon an evaluation of the counselor's performance, we restrain arbitration of the decision to withhold her increment.

The parties have filed briefs. The Board has filed exhibits and the certification of its superintendent, Dr. Carolyn Kossack. These facts appear.

The Association represents full-time certificated employees of the Board including guidance counselors. The parties' collective negotiations agreement is effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration.

On July 31, 2009, the Board voted to withhold a guidance counselor's increment. The superintendent certifies that the Board withheld the increment for these reasons:

During the 2009 testing season, the counselor was absent during part of the testing week as well as during part of the make-up testing week presenting challenges to the administration to cover all testing environments;

Pursuant to a 2008-2009 Professional Improvement Plan, the counselor was responsible for conducting regular group counseling sessions with students, but such sessions were not consistent and did not span grade levels;

The counselor was to assist incoming 5th grade students with their transition into the school by continuing their group "lunch sessions" and she did not begin these sessions until the second marking period and thus hindered the goal of assisting incoming students;

The counselor was advised in her 2007-2008 performance review to visit other school districts to explore model programs for

conducting group sessions and failed to do so;

In March 2009, a meeting was held with the counselor and she was advised to explore group options to deal with students with particular needs (i.e. cutting, grief, and eating disorders) and she did not follow through with the directive;

The counselor was advised in her 2007-2008 performance review that she was to develop a resource binder of information that would be used for Intervention and Referral Services (I&RS) meeting and that task was not completed prior to the increment withholding, but was eventually completed;

The counselor failed to address Standard 9.1 regarding career awareness and planning which had the potential of placing the district in jeopardy of failing that component of the New Jersey Quality Single Accountability Continuum.

On August 27, 2009, the Association filed a grievance asserting that the increment withholding was without just cause. The grievance was not resolved. On December 4, the Association demanded arbitration. This petition ensued.

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]

These tests also apply to teaching staff members who do not teach, but must carry out professional duties involving students, staff, or the educational program. Readington Bd. of Ed., P.E.R.C. No. 95-38, 21 NJPER 34 (¶26022 1994).

The Board argues that the reasons for the increment withholding set forth in the superintendent's certification are the counselor's failure to comply with her PIP, her annual performance review, and her failure to assume the responsibilities in her job description that predominately relate to performance. It further argues that any appeal of the withholding must be to the Commissioner of Education.

The Association responds that the counselor's performance reviews are positive and the only deficiencies noted are her alleged misuse of personal or sick days and that she failed to follow employer directives or do so in a timely fashion. It argues that a performance evaluation that is primarily a disciplinary reprimand may be contested in binding arbitration. It relies on Red Bank Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-23, 24 NJPER 474 (¶29221 1998). In Red Bank, the teacher had a positive performance evaluation and we concluded that some of the reasons for the withholding -- falling asleep at a department meeting, leaving a meeting early and not attending a non-mandatory IEP meeting -- did not relate to teaching performance; and other reasons -- not using proper pass forms,

keeping pupils after class, and scheduling students for extra help during other classes -- involved alleged disobeying of operational procedures, not teaching performance.

The Board replies that the counselor's use of sick time is not the only reason for the increment withholding; the absences affected the delivery of testing and are therefore performance related; and the increment was not withheld because she did not follow Board policies and procedures. It reasserts that the withholding was because she failed to sufficiently perform the duties of her position.

We conclude that most of the reasons cited by the superintendent predominately relate to an evaluation of the teaching performance of the guidance counselor. They include allegedly failing to conduct group sessions with students, failing to continue group lunch sessions, and not exploring group options to deal with students with particular needs. See Wildwood Bd. of Ed., P.E.R.C. 2007-57, 33 NJPER 110 (¶38 2007) (restraining arbitration over withholding based predominately on alleged deficient counseling services). Even assuming the alleged misuse of personal or sick days during testing does not involve teaching performance, we nevertheless find most of the Board's reasons to involve teaching performance. The failure to follow a directive on a teaching performance issue, such as the directive to explore group options, does not convert that

teaching performance issue into a non-teaching performance one in a subsequent increment withholding proceeding. The directives here involve core performance issues for a guidance counselor and not operational procedures. Contrast Red Bank (many of the reasons for the withholding related to adherence to operational procedures, not teaching performance and Commission did not decide whether alleged failure to adequately revise a school district's curriculum to conform to State standards would be predominately related to the evaluation of a classroom teacher's performance -- that reason has elements of teaching performance and non-compliance with a directive to perform administrative responsibilities). Any appeal of this withholding must be made to the Commissioner of Education.

ORDER

The request of the Little Silver Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: August 12, 2010

Trenton, New Jersey