

P.E.R.C. NO. 2011-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON,

Petitioner,

-and-

Docket No. SN-2010-040

PATERSON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State-Operated School District of the City of Paterson for a restraint of binding arbitration of a grievance filed by the Paterson Education Association. The grievance contests the increment withholding of a teaching staff member. Because the reasons cited by the District for the withholding relate predominately to an evaluation of teaching performance, the Commission grants the request for a restraint.

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, Paterson Public Schools (Mark S.
Tabenkin, of counsel)

For the Respondent, Richard Loccke and Sasha Wolf, NJEA
UniServ Representatives

DECISION

On November 17, 2009, the State-Operated School District of the City of Paterson petitioned for a scope of negotiations determination. The District seeks a restraint of binding arbitration of a grievance filed by the Paterson Education Association. The grievance contests the withholding of the salary increments of a 5th grade teacher. We restrain arbitration as the District's reasons for the withholding relate predominately to an evaluation of teaching performance.

The parties have filed briefs and exhibits. The District has filed certifications of the State District Superintendent and

the teacher's building principal. The Association filed the certification of the teacher. These facts appear.

The Association represents District employees including those in instructional certificated positions. The parties entered into a collective negotiations agreement effective from July 1, 2008 through June 30, 2010. The grievance procedure ends in binding arbitration.

On November 13, 2008, the teacher sent an e-mail to the other teachers in his building containing a three-page, single-spaced critique of academic protocols that also addressed demeaning treatment of the teaching staff by the administration.

The teacher's letter elicited this reply, copied to the other teachers in the building, from the then Superintendent:

I'm not sure of your reasoning and/or who is advising you, but the mass distribution of information regarding the performance of yourself and others is ill-advised. If you have issues and concerns about your assignment or treatment by a supervisor, you have the right and responsibility to inform the respective assistant superintendent for school administration and/or association representative within established policies, procedures, and contract. You and the other individuals are entitled to an opportunity to discuss/dispute the incident in confidence. Public distribution is unethical and unprofessional, and, as such, may be subject to disciplinary action. I trust I will not need to address this issue with you again.

The teacher's certification also asserts that, approximately one month later, the building principal addressed the teacher,

along with the other teaching staff members, and threatened that if the school again failed to make progress under the "No Child Left Behind" program and the administration was blamed for the poor performance, the teachers would be made to suffer as well.^{1/}

Evaluation documents prepared by the teacher's principal in February and March 2009 and attached to his certification recite in detail several performance categories where the teacher was rated as Needs Improvement and Unsatisfactory in a number of areas that center on enthusiasm for teaching, maintaining a positive learning atmosphere, knowledge of the subject matter, using appropriate techniques, and motivating students.

On May 22, 2009, the District Superintendent notified the teacher that his increments for the 2009-2010 school year "will be withheld due to your inadequate/unsatisfactory job performance as reflected in written observations and evaluations."

On June 11, 2009, the Association filed a grievance asserting that the withholding violated various articles of the parties' agreement. On November 11, 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

^{1/} The teacher's certification also refers to and attaches an e-mail memorandum sent to teaching staff members with a record of students who were walking the halls without permission and the names of their classroom teachers.

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, 146 (¶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.

The Board argues that the documents establish that the increments were withheld for poor teaching performance.

The Association states that it "neither admits nor denies" any of the allegations in the principal's certification and "will leave the District to its proofs." It counters that the teacher's increments were withheld to discipline him for his November 13, 2008 critique and represents the execution of the principal's threat concerning performance under the "No Child Left Behind" program.

In determining the predominate basis for a withholding, we ordinarily look to the official statement of reasons given in the letter notifying a teaching staff member of a withholding. In this case, that letter asserts that the withholding was due to poor performance as reflected in the evaluative documents issued by the building principal in February and March 2009.

As for the Association's claims that the withholding was in retaliation for the teacher's November 2008 letter and also represented the implementation of the principal's warning to the teachers regarding the school's lack of academic progress, we repeat that in selecting a forum under N.J.S.A. 34:13A-27, we

accept the reasons articulated in the documents advising the teacher of the withholding and do not consider contentions that those reasons are pretextual or unsupported. Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003); Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996). In other cases between these same parties, we declined to look behind the District's stated reasons to see if a discriminatory or improper motive was at work. See Paterson State-Operated School Dist., P.E.R.C. No. 2010-93, 36 NJPER ____ (¶____ 2010); Paterson State-Operated School Dist., P.E.R.C. No. 95-39, 21 NJPER 36 (¶26023 1994). We assume the District will be bound by its asserted reasons before the Commissioner of Education and that the Commissioner will examine claims that the asserted reasons are pretextual. Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008); Fanella v. Washington Tp. Bd. of Ed., 1977 S.L.D. 383 (Comm'r of Ed.) (increment restored as recommendation to withhold it for failure to complete task was made before task completion deadline). Accordingly, we restrain binding arbitration over the decision to withhold this teacher's increments.

ORDER

The request of the Paterson State-Operated School District 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