

P.E.R.C. NO. 2011-39

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD TAPPAN BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2010-062

OLD TAPPAN EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Old Tappan Board of Education for a restraint of binding arbitration of a grievance filed by the Old Tappan Education Association. The grievance contests the increment withholding of a teaching staff member. Because the reasons cited by the Board 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, Fogarty & Hara, attorneys (Rodney T. Hara, of counsel and on the brief; Janet L. Parmelee, on the brief)

For the Respondent, Springstead & Maurice, attorneys (Alfred Maurice, of counsel)

DECISION

On February 17, 2010, the Old Tappan Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Old Tappan Education Association. The grievance contests the withholding of the adjustment and employment increments of a special education teacher. As the stated reasons for the withholding predominately relate to an evaluation of teaching performance, we restrain arbitration.

The parties have filed briefs and exhibits. The Board has also filed the certification of its Superintendent of Schools. These facts appear.

The Association represents the Board's teaching staff members. The parties' collective negotiations agreement is effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration.

The teacher began employment in 2001 as a teacher aide in special education classes. She subsequently was hired as a long-term substitute special education teacher and became a full-time special education teacher in 2003. She is certified to teach students with disabilities in grades pre-school through 12 and has tenure. During the 2008-2009 school year, the teacher had these special education teaching assignments: third-grade "pull-out replacement instruction;"<sup>1/</sup> and second grade "in-class support instruction."<sup>2/</sup>

On November 24, 2008, the Superintendent conducted a formal observation of the teacher's third grade class. He issued a detailed report including recommendations, one of which was that the teacher send the Superintendent a detailed lesson plan by a

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1/ Pursuant to N.J.A.C. 6A:14-4.6(d), "pull-out replacement resource programs are programs of specialized instruction organized around a single subject and are provided to students with disabilities by an appropriately certified teacher of students with disabilities." The subject area of the teacher's "pull-out" assignment for 2008-2009 was mathematics.

2/ N.J.A.C. 6A:14-4.6(e) provides that "in-class support instruction" is a resource program that offers individual and small group instruction to students with disabilities in a general education class or in a pull-out classroom.

specific date. The report also directed that the teacher work with the building principal and a special education consultant on developing clear and concise lesson plans.

Following a post-observation conference, the Superintendent issued a memorandum to the teacher summarizing concerns he had after other visits to the teacher's classroom. The teacher did not submit the lesson plan on the due date.<sup>3/</sup> She met with the principal that day and discussed lesson plans and several other issues summarized in a memorandum prepared by the principal two days later. The teacher and the principal met again a week later and the principal issued a memorandum listing the issues that had been discussed. The teacher was formally observed two additional times prior to the issuance of a year-end evaluation in June 2009.

On July 7, 2009, the Superintendent wrote to the teacher that he would be recommending to the Board that it withhold the teacher's salary increments for the 2009-2010 school year "due to the unsatisfactory fulfillment of your professional responsibilities." The letter lists these reasons:

1. Lack of follow through with regard to meeting timelines, planning and implementing agreed upon lesson/unit components, and completing student evaluations;

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<sup>3/</sup> After receiving another reminder, the teacher submitted the lesson plan two weeks after the due date. The next month the teacher was sent messages that she had not submitted additional lesson plans.

2. Disconnect between goals/objectives and lesson activities and delivery;
3. Lack of consistent differentiation, especially in the delivery of reading and mathematics instruction and assignment/test modification necessary to successfully address individual student needs;
4. Lack of regular incorporation of guided, leveled reading instruction and/or the consistent implementation of a multi-sensory reading program;
5. Lesson sequencing, pacing and follow through have been unsatisfactory;
6. Not able to consistently provide accurate, detailed and specific information about students' academic progress;
7. Unsatisfactory preparation and presentation of lessons;
8. Untimely submission of lesson plans; and
9. Inadequate lesson plans.

On July 14, 2009, the teacher received a letter from the Board Secretary/Business Administrator advising that the Board had passed a resolution to withhold her salary increments. The letter recited the reasons articulated by the Superintendent.

On July 23, 2009, the teacher initiated a grievance asserting that the Board lacked just cause to withhold her salary increments. The grievance was denied at the succeeding stages of the grievance procedure and, on September 29, 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, 146 (¶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.

The Board argues that at least seven of the nine stated reasons relate to whether the teacher had met the professional expectations of her position as a special education teacher.

The Association responds that the Board's main concern appears to be timeliness and tardiness rather than overall teaching performance. It also maintains that the withholding was motivated by the teacher's failure to take certain courses that the Board had declined to pay for and because the teacher had filed a workers' compensation claim. The Association asserts that areas of positive performance cited in the Board's exhibits indicate that the teacher's performance was not deficient.

The Board replies that the Association has not shown that a workers' compensation claim was made, cannot prove that the Board acted for punitive reasons, and has not filed a certification in support of these assertions. See N.J.A.C. 19:13-3.5(f)(1).

The stated reasons focus on the teacher's alleged teaching performance deficiencies. The concerns about timeliness and

tardiness are relevant to teaching performance. See Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 98-153, 24 NJPER 339 (¶29160 1998) (arbitration restrained where withholding based on repeated late filing of reports; psychologist's skill in interacting with students and parents did not mean cited deficiencies were unrelated to evaluation of performance). Here, the majority of the Board's stated reasons go beyond whether duties were performed in a timely manner. For example, the Superintendent stated that her lesson plans were inadequate, a reason related to teaching performance. See Willingboro Bd. of Ed., P.E.R.C. No. 2006-88, 32 NJPER 166 (¶75 2006).<sup>4/</sup>

ORDER

The request of the Old Tappan Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Commissioners Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. Commissioner Colligan voted against this decision.

ISSUED: October 28, 2010

Trenton, New Jersey

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<sup>4/</sup> We do not determine if the Board reacted to the alleged filing of a workers' compensation claim as we do not look behind the Board's stated reasons. See Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996) (arbitration restrained despite allegation that increment was withheld in response to complaint of influential parent of teacher's student).