

P.E.R.C. NO. 2011-57

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-2010-070

PATERSON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding, the Public Employment Relations Commission grants in part and denies in part requests filed by the Paterson State Operated School District for restraints of binding arbitration of two grievances filed by the Paterson Education Association. The grievances assert that the School District violated contractual procedures in its evaluation of a tenured high school teacher and issued the teacher an adverse evaluation and withheld his increment for disciplinary reasons. Based on Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), *aff'd* 130 N.J. 312 (1992), the Commission declines to restrain arbitration alleging violations of contractual evaluation procedures. However, as the district articulated reasons relating to teaching performance, the Commission restrains arbitration over challenges to the substance of the evaluation and the increment withholding.

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, Schenck Price Smith & King, LLP,
attorneys (Sidney A. Sayovitz, of counsel)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, attorneys (Richard A. Freidman and Marissa
A. McAleer, of counsel)

DECISION

On March 5, 2010, the State-Operated School District of the City of Paterson petitioned for a scope of negotiations determination. The District seeks restraints of binding arbitration of two grievances filed by the Paterson Education Association. The grievances contest a formal evaluation of a tenured high school teacher, and the withholding of his salary increments. The Association asserts that both the evaluation and increment withholding were disciplinary sanctions unrelated to teaching performance. We restrain arbitration except to the extent the grievances assert that the District violated contractual evaluation procedures.

The parties have filed briefs, exhibits and certifications. These facts appear.

The Association represents teaching staff. The teacher has been employed in the District since 1999. The parties entered into a collective negotiations agreement effective from July 1, 2008 through June 30, 2010. The grievance procedure ends in binding arbitration. The grievances cite multiple contract articles that are reproduced in Appendix A.^{1/}

The 2007-2008 School Year

In November 2007, the current principal was assigned to the teacher's school. Her certification (§6, 7 and 8) asserts:

During the 2007-2008 school year, I regularly walked through the hallways during the afternoon periods. On these walks, I frequently observed that [the teacher's] classroom appeared "chaotic," which signaled to me that he had poor management skills.

Additionally, I often overheard his conversations with students in the hallway and made note that his verbal interactions and communication style were in need of improvement.

In the Spring of 2008, I was approached by several students regarding concerns that they had about [the teacher's] interactions with them. These students specifically mentioned that [the teacher] had a tendency to lose his temper in the classroom very easily.

^{1/} The contract articles are cited in letters dated May 13 and June 22, 2009, sent to the District's Human Resources Director, at Step Two of the grievance procedure.

For the 2007-2008 school year the principal's written evaluation graded the teacher "Outstanding" in 14 of the 22 rating categories. The remainder were "Successful."^{2/} The evaluation has only positive comments and praises the teacher for preparing students for standardized testing. The concerns raised by the principal in her certification do not appear in the 2007-2008 evaluation.^{3/}

The 2008-2009 School Year

The principal's certification includes these allegations about the teacher after the 2008-2009 school year began:

1. The teacher came into the main office with a male student and directed the principal to "do something about him because he had had enough." Both parents and students were in the office at the time.

2. In the Fall of 2008, during conferences the principal had with parents of students who were in the teacher's class, some parents related that the teacher often screamed or yelled at their children including one who reported that her son was "frightened" by the teacher's demeanor and tone.

3. On January 30, 2009, a "visibly shaken" student came to the principal and told her that the teacher had blocked the classroom door to prevent him from leaving and at one

2/ The rating categories are " Outstanding," "Successful," "Needs Improvement" and "Unsatisfactory."

3/ Evaluations dating back to the 2003-2004 school year were submitted by the Association. None have negative ratings or comments about the teacher's performance.

point had pushed him back from the door.^{4/} A few days after the incident the principal met with a parent regarding her son's attendance. The parent said that the student was scared of the teacher and would leave school at the end of the day as a "nervous wreck" because of the teacher's screaming in class and alleged physical contact with students.

On December 18, 2008, the vice-principal memorialized an incident where an uncooperative student in the teacher's class defiantly refused to do his work. Later in that period, the student asked to go to the rest room and the teacher refused the request. The student became angry and threatened to leave. The teacher then allegedly slammed the student's desk down in order to prevent him from moving. The student responded that his father would "kick the teacher's ass." The vice-principal reported that the student's father said that he was embarrassed by his son's threats.

The 2008-2009 Evaluation

On March 11, 2009, the principal observed one of the teacher's classes. She was present for 45 minutes of the 80 minute teaching block. Sometime between that date and March 18, some of the teacher's students complained to the principal that the teacher would not allow students to use the restroom during

^{4/} The principal's certification attaches a handwritten note asserting that the teacher admitted that he held the door to prevent the student from leaving. The principal states that on February 9, she gave a copy of the school's policy on corporal punishment to the teacher.

class. The principal asserts that one of the teacher's students has a health condition that requires frequent bathroom use.

On March 18, 2009, the teacher was summoned to meet with the principal in the main office. According to the teacher's certification, the principal was agitated and questioned the teacher about his restroom policy remarking "Haven't you set the tone since the beginning of the year?" The teacher responded that he follows the school's restroom protocol giving teachers the discretion to bar students from going to the restroom during the first and last ten minutes of a teaching period. The teacher asserts that the principal treated him disrespectfully, that he may have responded angrily, and that they argued about his restroom policy. The teacher says that he complied with the principal's directive to document his March 16 interactions with a female student over her request to go to the restroom and to contact her parents.

The teacher's 2008-2009 evaluation has no "Outstanding" ratings. It grades the teacher as "Successful" in 16 categories and "Needs Improvement" in six areas, including three that had been rated "Outstanding" in the 2007-2008 review. No criterion was graded as "Unsatisfactory." The evaluation notes that the teacher had completed his professional improvement plan. The evaluation recommends that the teacher's increment be withheld. The principal's written comments include:

The teacher, while knowledgeable, sees all students as similar and should make adjustments to meet differences in individual students needs and abilities;

The teacher lacks sensitivity to his students' problems and should devote time to understand individual student needs to achieve greater success in the classroom;

The teacher needs to set a tone of decency in his class and should avoid unnecessary physical contact with students.

Two other comments also discuss his interactions with students, whether he recognizes individual student needs, and the atmosphere and tone in the classroom.

On March 19, 2009, the teacher was directed to meet with the principal about his evaluation. The teacher asserts that he had not been given a copy of the evaluation at least a day before the meeting as required by the contract. The teacher relates that just before he was handed a copy of the evaluation the principal volunteered that "[T]he evaluation had nothing to do with our prior incident the day before and that it was written prior to the March 18th incident."

After reviewing the evaluation, the teacher told the principal that he was not inclined to sign it. She responded that he could consult with an attorney if he wanted. After consulting with an Association representative, the teacher signed the evaluation the next day and, a few days later, submitted a rebuttal asserting that the principal had acted unprofessionally

and adversely evaluated him based on their argument and not on his performance. His rebuttal noted the excellent evaluation he had received from the principal in 2007-2008 and responded to the comments on the evaluation.

The Grievances

On March 30, 2009, the teacher filed a grievance with the principal. It appends his rebuttal, notes that he not been given a copy of the evaluation report 24 hours before meeting with the principal, or afforded a pre-observation conference.

On May 13, 2009, the Association sent a letter to the Human Resources Director alleging that the Board violated the agreement when the principal created a performance evaluation that was retaliatory in nature after the grievant disagreed with student allegations made against him about restroom privileges.^{5/} The grievance seeks "removal and destruction of any and all copies of the evaluation, the withdrawal of the recommendation to withhold the grievant's [increment], a directive to refrain from the bullying tactics of the school administration towards [the teacher]" and other appropriate relief. On May 19, the District responded that evaluation challenges are ineligible for binding arbitration and must be made through an appeal to the Commissioner of Education.

^{5/} The Association's grievance challenging the evaluation and the procedures associated with it asserts violations of these Articles: 3:3-1; 3:4-2; 4:3; 14:2; 14:3-2; 28:2; 28:3.

On May 22, 2009, the 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 was disciplinary and violated various articles of the parties' agreement.^{6/} It seeks restoration of the withheld increments. The Association demanded arbitration of both grievances. This petition ensued.

Analysis

Evaluation Procedures

The District does not specifically address the negotiability or arbitrability of the evaluation procedures that the Association's grievances assert were violated.

The Association alleges violations of contractual evaluation procedures including Article 14:2-4 "Copies of Evaluations." The grievances specifically seek the removal and destruction of any and all copies of the evaluation.

In Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397, 398 (App. Div 1991), aff'd 130 N.J. 312 (1992), the Court upheld an arbitration award vacating an evaluation because

^{6/} This grievance asserts violations of these Articles: 3:3-1; 4:2; 4:3; 12:5; 28:2; 28:3.

the teacher had not been provided with a copy of the document prior to a conference to discuss it.^{7/}

Our cases have held that grievances alleging violations of contractual evaluation procedures are mandatorily negotiable and legally arbitrable. See Passaic Bd. of Ed., P.E.R.C. No. 2003-66, 29 NJPER 117 (¶36 2003), (proper evaluation procedures must be followed before any recommendation is made to withhold an increment). See also Woodbury Bd. of Ed., P.E.R.C. No. 2006-81, 32 NJPER 128 (¶59 2006); Washington Tp. Bd. of Ed., P.E.R.C. No. 2004-62, 30 NJPER 105 (¶42 2004); Willingboro Bd. of Ed., P.E.R.C. No. 2001-068, 27 NJPER 236 (¶32082 2001). Therefore we deny the Board's request to restrain arbitration to the extent the grievances assert breaches of evaluation procedures.

Challenges to the Evaluation and Increment Withholding

A school board has a managerial prerogative to observe and evaluate employees. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd.

^{7/} The Lacey agreement provided:

A teacher shall be given a copy of any class visit or evaluation report prepared by his evaluators before any conference to discuss it. If a teacher or the administration, having received a copy of a class visit or evaluation report, wishes one or two days delay before conferring on the subject matter of the report, such limited delay shall be a matter of right. No such report shall be submitted to the central office, placed in the teacher's file or otherwise acted upon without prior conference with the teacher.

of Ed., 91 N.J. 38 (1982). Disciplinary reprimands may be contested through binding arbitration. N.J.S.A. 34:13A-29; N.J.S.A. 34:13A-5.3. In Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824, 826-827 (¶17316 1986), aff'd NJPER Supp.2d 183 (¶161 App. Div. 1987), we set forth our approach for determining whether an evaluation or reprimand is at issue:

We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore nonnegotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary.

A similar analysis is used to determine if challenges to increment withholdings can be reviewed through binding

arbitration. 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.

Although the precipitous change in the teacher's end of year evaluation for 2008-2009, as compared with the prior evaluations from both his current principal and her predecessor is notable, the alleged inadequacies listed in the evaluation refer to student-teacher classroom interactions, an issue that normally relates to teaching performance. See, e.g., River-Edge Bd. of Ed., P.E.R.C. No. 95-76, 21 NJPER 161 (¶26099 1995) (allegedly sharp and negative interactions with students, inappropriate tone). As stated in Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996) we do not look behind a school district's contemporaneous statement of reasons for withholding an increment. Thus, we do not consider whether the District acted for reasons unrelated to those specified in the statement of reasons issued to the teacher at the time the increment was withheld.

We cannot conclude that the evaluation, recommending the withholding of the teacher's increments, is disciplinary. We

will restrain arbitration over this claim, while recognizing that the procedural challenges to the evaluation could, as in Lacey, affect the evaluation's viability.

As the District, at the time it withheld the teacher's increments, articulated reasons relating to teaching performance for its actions, we do not probe its stated motive given our limited "gate-keeping" function in increment withholding disputes. We assume that the District will be bound by those reasons if the Association challenges the content of the evaluation and the increment withholding before the Commissioner of Education. Saddle River Bd. of Ed., 22 NJPER at 106.

ORDER

The request of the Paterson State-Operated School District for a restraint of binding arbitration is denied to the extent the Association's grievances allege and seek relief for violations of contractual evaluation procedures. The requests to restrain arbitration over the remaining claims in the grievances that challenge the content of the evaluation and the withholding of the teacher's increment are granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Colligan, Eaton, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Krengel was not present.

ISSUED: February 3, 2011

Trenton, New Jersey

APPENDIX

3:3-1 Grievance Procedure/Time Limits

Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

3:4-2 Reprisals

No reprisals of any kind shall be taken by the District or any member of the administration against any party in interest, any representative, any member of the Association or any other participant in the grievance procedure by reason of such participation.

4:2 Statutory Savings Clause

Nothing contained herein shall be construed to deny or restrict to any employee such rights as s/he may have under New Jersey School Laws or other applicable laws and regulations. The rights granted to employees hereunder shall be deemed to be in addition to those provided elsewhere, except however, use of the grievance procedure shall be the sole and exclusive remedy, if chosen.

4:3 Just Cause Provision

No employee shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause. Any such action asserted by the District or any agent or representative thereof, shall be subject to the grievance procedure herein set forth in all other cases, except as more specifically limited by another provision of this Agreement.

12:5-4 Granting of Increments

12:5-4.1 The granting of scheduled increments to professional personnel shall not be automatic, but shall be dependent upon the favorable recommendation of the State District Superintendent.

12:5-4.2 Earned increments in conformity with the Salary Schedule A will be granted annually to employees paid on a ten-month year on September 1st.

12:5-4.3 Earned increments in conformity with Schedule A will be granted on the first of July for all twelve-month employees.

12:5-4.4 The decision to withhold an increment for educational reasons shall not be subject to binding arbitration. However, claims of procedural violations in the evaluative process may be submitted to the grievance procedure.

12:5-4.5 Increments will not be withheld for an employee based upon absenteeism if his/her absences are the result of an injury which was determined to be eligible for workers compensation benefits and which was sustained from an assault upon the employee while the employee was performing his/her duties.

14:2 Employee Evaluation - General Criteria

14:2-1 Open Evaluation

All monitoring or observations of the work performance of an employee shall be conducted openly and with full knowledge of the employee.

14:2-2 Observation Sessions

Each observation session should be long enough to enable the employee to demonstrate the full activity being observed, and no portion of the activity not actually observed should be commented upon. (For example, an

observer of a teacher should observe an entire class period or lesson, and should not comment about the teacher's effectiveness at opening the session and establishing student expectations unless s/he was there to observe from the beginning.)

14:2-2.2 An observation may be conducted for a shorter time if it is explicitly intended to focus on only a portion of the entire activity underway. (For example, if an earlier observation found a teacher ineffective at closing a lesson, after a conference discussing the prior observation, the evaluator would be free to observe only the closing section of a subsequent lesson.)

14:2-3 Evaluation by Certificated Personnel

14:2-3.1 Employees shall not be evaluated by their peers; no evaluation of staff shall be conducted by personnel defined in ARTICLE 1 of this Agreement.

14:2-3.2 An employee may request other relevant observers, such as department chairpersons or curriculum administrator.

14:2-4 Copies of Evaluation

An employee shall be given a copy, for his/her permanent retention, of any class visit, observation and/or evaluation report prepared by his/her evaluators at least one (1) day before any conference to discuss it. No such report shall be submitted to the central office, placed in the employee's file or otherwise acted upon without prior conference with the employee. No employee shall be required to sign a blank or incomplete evaluation form.

28:2 District Policy

This Agreement constitutes District policy for the term of said Agreement, and the District shall carry out the commitments contained

herein and give them full force and effect as District policy.

28:3 Savings Clause

Except as this Agreement shall otherwise provide, all terms and conditions of employment applicable on the effective date of this Agreement to employees covered by this Agreement as established by the rules, regulations and/or policies of the District in force on said date shall continue to be so applicable during the term of this Agreement. Unless otherwise provided in this Agreement, nothing contained herein shall be interpreted and/or applied so as to nor otherwise detract from any employee benefit existing prior to its effective date.