

P.E.R.C. NO. 2015-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASCACK VALLEY REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-067

PASCACK VALLEY REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and restrains in part, the request of Pascack Valley Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Pascack Valley Regional Education Association. The grievance contests the withholding of a school social worker's employment, adjustment, longevity, and education-based salary increments. Finding that the reasons for the withholding predominately relate to evaluation of performance, the Commission restrains arbitration of the grievant's employment, adjustment, and longevity increments. The Commission finds that the withholding of the grievant's education-based guide movement is arbitrable because it is not an authorized increment withholding under N.J.S.A. 18A:29-14.

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)

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

DECISION

On February 27, 2014, the Pascack Valley Regional Board of Education filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Pascack Valley Regional Education Association. The grievance contests the withholding of a school social worker's employment, adjustment and longevity increment along with the grievant's education based guide movement. Because the increment withholding is based predominately on an evaluation of her performance as a social worker, we restrain arbitration. However, we do not restrain arbitration regarding the withholding of the education based guide movement.

The Board filed briefs, exhibits, and the certifications of Eva Merk, the District Supervisor for Special Services, and P. Erik Gundersen, the Superintendent of Schools. The Association filed a brief. The Association has not filed any certifications. While the Association did request an evidentiary hearing "for the purpose of resolving the factual disputes raised in the parties' briefs and submissions," it did not recite facts "supported by certification(s) based upon personal knowledge" or detail "the substantial and material disputed factual issues that the requesting party contends necessitate an evidentiary hearing." N.J.A.C. 19:13-3.6 and N.J.A.C. 19:13-3.7. We therefore deny the request for a hearing. These facts appear.

The Association represents a negotiations unit of professional personnel employed by the Board, including teachers, social workers, guidance counselors, psychologists, librarians, nurses, and speech and reading specialists. The Board and Association are parties to a collective negotiations agreement (CNA) effective from July 1, 2011 through June 30, 2014. The grievance procedure ends in binding arbitration.

The grievant has been employed by the Board as a school social worker since September 2000. As a school social worker and member of the District's Child Study Team, the grievant's responsibilities include: establishing a liaison service between parents, students, and the school; maintaining accurate, current

records as required; participating in evaluation of students for placement in special programs and referrals pursuant to law; identifying and referring cases that may need more intensive consideration; and identifying case needs and meeting with students and parents on a regular basis for short term counseling and crisis intervention when appropriate.

The grievant's June 20, 2013 "Annual Report on Staff Evaluation" for the 2012-13 school year included the following in its "summary of concerns":

(1) in many cases, [grievant] has not met the expectations to effectively serve as a liaison between parents and students and the school at large. It is especially characteristic with involved and demanding cases that she demonstrates a lack of investment and stick-to-itiveness. As a result, this supervisor must constantly monitor her casework to ensure that she is responding appropriately, brainstorming options and taking next steps to help. Of additional and considerable concern is [grievant]'s frequent failure to properly monitor many of her cases; i.e., to follow-up on student status and assess effectiveness of programming and interventions and respond to ongoing needs. Her effectiveness with meeting students' needs and collaborating with others in order to do so is inconsistent. (2) Although [grievant] demonstrates basic knowledge of special education laws and procedures, she does not always follow established timelines and other mandates and thus requires regular supervisory monitoring. Also, when completing Annual Reviews, [grievant]'s IEPs are often not thorough and are missing critical information, etc. (3) In the evaluation process, [grievant]'s Social History Assessments have not included the "appraisal" that is required by code to be in the report; [grievant] must include this statement as well as more consistently and clearly address the other required statement (see above) of "relevant behavior...to the student's academic functioning." Also, [grievant] has not conducted a structured observation for students for

whom she is case manager, which according to code shall be completed by the case manager. (4) In consultation, [grievant] has demonstrated time and again that when other professionals have some responsibility for a student, she sees her role and responsibilities as reduced or eliminated. [grievant] has also demonstrated frequently, that she is idle with cases until problems erupt or are realized by someone else rather than maintaining ongoing involvement and proactive support. [grievant] needs to improve rapport with students and parents, especially with difficult cases, and convey a belief that students can succeed and that there are always steps that can be taken to support students. She must attend all Annual Review meetings with our sending districts to ensure smooth transitions to our high school. (5) When dealing with students, [grievant] is only variably aware of student's thoughts, feelings and behaviors and inconsistently provides space in relationships with students for them to communicate and feel heard. [grievant] inconsistently demonstrates that she understands a student's perspective through helpful and effective responses. At times [grievant] has demonstrated insensitivity and a lack of support to students and families. (6) In general and in all areas of responsibility, [grievant]'s performance requires constant monitoring and regular supervisory intervention. (7) [grievant] has not followed supervisor's directives on numerous occasions and has become argumentative and insubordinate in situations where she has been wrong and remiss in her duties.

By letter of July 18, 2013, Superintendent Gundersen notified the grievant that the Board would withhold her "employment and adjustment increments" for the 2013-2014 school year for the following reasons:

1. Ineffectively serve as liaison between parents and students and the school;
2. Frequent failure to properly monitor your cases;
3. Not always following established timelines and other mandates;
4. IEPs are often not thorough and missing critical and/or current information;
5. Social History incomplete;

6. Failure to always conduct required structured observations;
7. Unsatisfactory rapport with students;
8. Failure to attend all annual reviews with sending districts;
9. Insensitivity and lack of support to students and their family;
10. Require constant monitoring and regular supervisor's directives;
11. Not following supervisor's directives; and
12. Argumentative and insubordinate when dissatisfaction with performance is discussed.

At its August 14, 2013 meeting, the Board withheld the grievant's 2013-14 increments based on the above-stated reasons. The grievant was informed of the Board's action via an August 15 letter that repeated the reasons for the withholding.

On September 23, 2013, the Association filed a grievance against the Board alleging that the increment withholding violated the parties' collective negotiations agreement because it was done in retribution for the grievant's May 24 affirmative action complaint against Merk (Supervisor of Special Education) and the Association's related June 7 grievance. On October 1, Gundersen denied the grievance, stating the following:

The fact that [grievant] decided to file an affirmative action complaint against Ms. Merk or that the Association filed a grievance against Ms. Merk on behalf of its members does not negate the legitimate concerns that Ms. Merk has about [grievant]'s performance.

On October 4, the Association proceeded to the next step of the grievance procedure by requesting a hearing on the matter. A hearing was held before the Board on October 14, and by letter of

November 11 the Board notified that Association that it was affirming the denial of the grievance. On December 2, the Association demanded binding grievance arbitration of the increment withholding. 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 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 asserts that arbitration must be restrained because the decision to withhold the grievant's increment was based predominately on an evaluation of her performance as a school social worker as documented in her 2012-13 annual evaluation. Citing Little Silver Bd. of Ed., P.E.R.C. No. 2011-12, 36 NJPER 314 (¶121 2010); Wildwood Bd. of Ed., P.E.R.C. No. 2007-57, 33 NJPER 110 (¶38 2007); Wharton Bd. of Ed., P.E.R.C. No. 2008-69, 34 NJPER 259 (¶91 2008); and Paterson State-Operated School Dist., P.E.R.C. No. 2010-93, 36 NJPER 236 (¶85 2010), the Board argues that the Commission has previously restrained arbitration of social worker and guidance counselor increment withholdings for failures to follow directives related to improving performance, failure to accurately complete and submit IEPs in a timely manner, failure to complete reports properly,

and failure to effectively communicate with students, parents, colleagues, and supervisors. Additionally, the Board argues that the Association's grievance alleges that the Board's decision to withhold the grievant's employment and adjustment increments was in retaliation for the Association's filing of a class action grievance and the grievant's affirmative action complaint, and not based on an educational assessment of her performance; as a result, an arbitrator lacks the authority to determine whether the withholding was pretextual and the Commission must accept the Board's stated reasons for the withholding of the employment and adjustment increment.

The Association asserts that the increment withholding was not predominately related to an evaluation of her performance. It argues that the reasons for the grievant's increment withholding are similar to cases involving excessive absenteeism, non-classroom interactions with parents or students, or violations of administrative procedures where the Commission declined to restrain arbitration. The Association also asserts that the Board has withheld the grievant's longevity increment and education based guide movement, which are contractual benefits that are different from the employment and adjustment increments that the Board may withhold pursuant to N.J.S.A. 18A:29-14. It argues that disputes over the longevity and education increments must proceed to arbitration.

The Board replies that the issue of withholding the grievant's longevity and education based guide movement is irrelevant because the instant petition relates to the Board's decision to withhold the grievant's increments, not the manner in which the increments were withheld and calculated.

We first respond to the Board's argument that the Association's grievance improperly alleges that the increment withholding was due to retaliation by the Board for the Association filing a class action grievance and the grievant's affirmative action complaint and that the Association did not allege that the employment and adjustment increment withholding was disciplinary in nature. In North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707 (¶16245 1985), we noted that a dispute often becomes more sharply focused as a grievance proceeds and professional assistance is received at higher levels. Id. at 709. We may look beyond the initial grievance documents to determine the essence of an association's claim. Here, the Association has argued in its brief that the withholding of the grievant's employment and adjustment increments was for predominantly disciplinary reasons. Accordingly, we will address that claim.

In increment withholding cases, we focus on the specific reasons cited in the statement of reasons provided by a school board for a withholding. Wharton Bd. of Ed. As set forth above,

the Board provided a letter to the grievant on August 15, 2013 that listed 12 reasons for the withholding of the grievant's employment and adjustment increments. Of the 12 reasons cited by the superintendent, one through seven and nine to eleven relate to the grievant's teaching performance as a school social worker. Like a principal, a social worker does not teach in a classroom, but is a teaching staff member who must carry out professional duties involving students and staff and the educational program. Wharton Bor. Bd. Of Ed., P.E.R.C. No. 2008-69, 34 NJPER 259 (¶91 2008); Compare Middletown Tp. Bd. of Ed., P.E.R.C. No. 92-54, 18 NJPER 32 (¶23010 1991) (principal evaluated as educational leader and manager); Readington Bd. of Ed., P.E.R.C. No. 95-38, 21 NJPER 34 (¶26022 1994) (school psychologist). In general, the Board's concerns about the grievant's alleged ineffectiveness to serve as a liaison between parents, students and the school; failure to properly monitor cases; not following established time lines and other mandates to complete required tasks; issues with interacting with students; and requiring monitoring and not following supervisor's directives, etc., all involve assessments of her teaching performance as a social worker. The grievant's alleged failure to attend all annual reviews with sending districts and alleged argumentative and insubordinate behavior can potentially be viewed as mixed reasons involving both teaching performance and other reasons. However, we find that

the superintendent's statement of reasons for withholding the employment and adjustment increments are related predominately to the evaluation of teaching performance.

With respect to the Association's assertion that the withholding of the grievant's longevity increment and education based guide movement were improper since they are contractual benefits that are different from the employment and adjustment increments that the Board may withhold pursuant to N.J.S.A. 18A:29-14, we have held that longevity payments are construed by the Commissioner of Education to constitute employment increments. South Harrison Tp. Bd. Of Ed., P.E.R.C. No. 96-84, 22 NJPER 242 (¶27126 1996), citing Rosania v. Middlesex Bd. of Ed., C.D. 18+-88 (210-87) (1/22/88). As far as the withholding of the education based guide movement, we know of no precedent construing that type of withholding, of an economic benefit for academic achievement, as an authorized increment withholding under N.J.S.A. 18A:29-14. South Harrison Tp. Bd. Of Ed. The issue of the education based guide movement may proceed to arbitration.

ORDER

The request of the Pascack Valley Regional Board of Education for a restraint of binding arbitration is granted to the extent the grievance contests the withholding of the grievant's employment and adjustment increments, including the longevity increment. The request is denied to the extent the grievance contests the withholding of the grievant's education based guide movement.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Voos and Wall voted in favor of this decision. None opposed. Commissioners Bonanni and Jones were not present.

ISSUED: January 29, 2015

Trenton, New Jersey