

P.E.R.C. NO. 2023-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEPTUNE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2023-031
SN-2023-032
SN-2023-033
(CONSOLIDATED)

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission partially grants, and partially denies, the Board's request for restraint of binding arbitration of the Association's grievances challenging the Board's decision not to restore previously withheld salary increments and contesting the Board's off-guide formula for calculating the post-increment withholding salaries of three teaching staff members. The Commission finds that N.J.S.A. 18A:29-14 preempts the Association's grievances to the extent they seek to compel the Board to restore the previously withheld increments. The Commission finds that to the extent the Association's grievances contest the calculation of the grievants' post-increment withholding salaries and proper salary guide placement under the terms of the parties' new CNA, it is a legally arbitrable salary issue that does not interfere with the Board's statutory prerogative to not restore the increments.

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, Weiner Law Group, LLP, attorneys Margaret A. Miller, of counsel and on the brief; Rachel E. Fairley, on the brief)

For the Respondent, Mets Schiro & McGovern, LLP, attorneys (Kevin P. McGovern, of counsel)

DECISION

On March 10, 2023, the Neptune Township Board of Education (Board) filed scope of negotiations petitions seeking a restraint of binding arbitration of grievances filed by the Neptune Township Education Association (Association) on behalf of three teaching staff members employed by the Board: P.L. (AR-2023-305); S.W. (AR-2023-306); and C.V. (AR-2023-308). The grievances seek restoration of previously withheld salary increments and contest the Board's off-guide formula for calculating the post-increment withholding salaries of three teaching staff members.

The Board filed briefs, exhibits, and the certification of its Superintendent, Dr. Tami Crader. The Association filed a

brief.^{1/} These facts appear.

The Association represents all certified educational personnel employed by the Board, as well as secretaries, school safety officers, paraprofessionals, psychologists, and other titles as specified in the parties' recognition clause. The Board and Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2015 through June 30, 2020. The grievance procedure ends in binding arbitration.

Board Exhibit I also includes the Association's grievances and the Board's responses indicating that the Board and Association ratified a new CNA in August 2022. These documents indicate that the new CNA includes new salary guides with what the Association refers to as an "off-guide formula" and the Board refers to as an "off-guide chart." Neither party submitted a copy of the newly ratified CNA.

Board Policy 3152, entitled "Withholding An Increment," provides the following concerning increment restoration:

An increment withheld may be restored only by action of the Board. Nothing in this policy shall limit the right of a successor Board to restore an employee from whom an increment or increments have been withheld to that place on the salary guide he/she would have achieved had the increment or increments not been withheld.

^{1/} The Association did not submit a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certification(s) based upon personal knowledge.

Crader certifies to the following facts. C.V. is employed by the Board as a tenured teaching staff member assigned to teach Kindergarten at Green Grove Elementary School. Following the 2018-2019 school year, the Board withheld C.V.'s increment for the 2019-2020 school year for unsatisfactory attendance. S.W. is employed by the Board as a tenured teaching staff member assigned to teach STEM to students from Pre-K through 5th grade. Following the 2015-2016 school year, the Board withheld S.W.'s increment for the 2016-2017 school year for unsatisfactory attendance. P.L. is employed by the Board as a tenured teaching staff member assigned to teach Physical Education and Health to high school students. Following the 2017-2018 school year, the Board withheld P.L.'s increment for the 2018-2019 school year for unsatisfactory attendance.

On November 7, 2022, the Association filed three separate grievances with Superintendent Crader on behalf of C.V., S.W., and P.L. seeking that they each have their previously withheld increments restored and challenging the Board's off-guide formula used to determine the grievants' salaries post-increment withholding under the parties' newly ratified CNA. P.L.'s grievance alleges, in pertinent part:

The NTBOE has maintained a formula for determining increment withholding salaries that is unreasonable in its application especially as it has been applied to [P.L.]. Additionally, the NTBOE and NTEA recently ratified a five year collective bargaining

agreement including new salary guides. The NTBOE and NTEA's effort to place all teachers on a guide has created a draconian unintended consequence. . . . In August 2022, the NTEA and NTBOE ratified a collective bargaining agreement that included a "Teachers Off-Guide" salary chart. This chart does not follow the longstanding practice as to increment withholding, but rather gives a flat raise of \$800.00. The guide is retroactive. . . . The "Teachers Off-Guide" salary guide is unfair and unreasonable and should be removed from the contract and the old formula reinstated as to teachers. (It was not created for any other group within the CBA.) There is only a provision for six individuals to be placed on the guide. There is no provision for additional teachers being added to the guide or removal [sic] from the guide.

The grievances for C.V. and S.W. contain nearly identical allegations. On November 15, Crader separately denied the three grievances, rejecting the requests to have increments restored and stating that revisions to the off-guide salary chart that the parties ratified are "a negotiable item" that would need to be discussed with the Board as a sidebar agreement. On November 22, the Association submitted its grievances to the Board.

On November 28, 2022, C.V. e-mailed Crader to request that her increment be restored by placing her back on the salary guide to where she would have been had her increment not been withheld for the 2019-2020 school year. On December 7, S.W. wrote a letter to Crader and the Board requesting that her increment be restored by placing her back on the salary guide to where she would have been had her increment not been withheld for the 2016-

2017 school year. S.W. also alleged:

The bigger issue that has come from all of this, is that with the newest pay guide, my salary is completely incorrect. It is no longer my correct step and salary minus my increment. I am completely off of the guide, which does not reflect my actual step, and my salary is approximately \$9,000 under what it should be.

On December 10, P.L. wrote a letter to Crader and the Board requesting that her increment be restored by placing her back on the salary guide to where she would have been had her increment not been withheld for the 2018-2019 school year. On December 22, Crader separately informed C.V., S.W., and P.L. that only the Board may take action to restore increments and that it did not restore their increments at its December 21 meeting.

On January 5, 2023, the NJEA informed the Board that the Association would be moving the increment restoration grievances for C.V., S.W., and P.L. to arbitration. On January 10, the Association filed requests for binding arbitration for each of the three grievants. This petition ensued.

Initially, we note that this dispute does not challenge the Board's original increment withholdings for the three grievants. Therefore, the Commission's jurisdiction to determine whether the Board's reasons for the increment withholdings were predominately disciplinary or predominately related to an evaluation of teaching performance is not invoked. See N.J.S.A. 34:13A-27. The Commission's scope of negotiations analysis for determination

of the legal arbitrability of a matter sought to be submitted to binding arbitration applies. N.J.A.C. 19:13-2.2(a)(4)ii.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievances or any contractual defenses the Board may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a

subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405.]

The Board asserts that the grievance is not arbitrable because reinstatement of a previously withheld increment is not mandatory but is at the discretion of the Board. It argues that the issue is preempted by N.J.S.A. 18A:29-14. The Board contends that continued off-guide placement following an increment withholding is not a continuing punishment, but is the effect of an earlier disciplinary action. The Board asserts that because the Supreme Court in Probst v. Haddonfield Bd. of Ed., 127 N.J. 518 (1992) found that the plaintiff teacher could not challenge the failure to restore her increment based on the fact that it resulted in her salary not being an on-guide salary level, then the Association here may not challenge the Board's calculation of the grievants' post-increment withholding salary levels. The Board contends that it has calculated and implemented the grievants' salaries in accordance with the most recent salary guides ratified by the Board and the Association.

The Association asserts that its grievances related to the calculation of salary and placement on the appropriate step of the salary guide are mandatorily negotiable compensation issues. It argues that the Board has deviated from a long-standing practice concerning how to account for a previously withheld

increment. The Association contends that under the terms of the parties' new contract, the Board is no longer just subtracting the value of the previously withheld increment from the annual salary the teacher would have been paid but for the increment withholding. It asserts that this change has resulted in a further reduction in pay for the grievants beyond just the value of the withheld increment. The Association argues that neither N.J.S.A. 18A:29-14 nor Probst v. Haddonfield Bd. of Ed. prohibit arbitration of this aspect of the grievances. It contends that Superintendent Crader's responses to the grievances recognized that the calculation of pay/placement on the salary guide are negotiable items. Finally, the Association asserts that the Board has exercised its prerogative concerning the restoration of previously withheld increments by promulgating Policy 3152 and the grievances challenge the Board's application of that policy.

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.S.A. 18A:29-14 provides:

Any board of education may withhold, for inefficiency or other good cause, the

employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

[Emphasis added.]

The Supreme Court of New Jersey has held that, while a school board has discretion to restore increments, it cannot be compelled to do so because N.J.S.A. 18A:29-14 clearly “prohibits mandatory reimbursement of previously withheld increments” and “no statute mandates that local boards return teachers to an adopted salary schedule following a withholding.” Probst v. Haddonfield Bd. of Ed., 127 N.J. at 526, 528. Thus, teachers cannot recover increments in future years absent a local board’s favorable exercise of discretion. Cordasco v. City of E. Orange Bd. of Ed., 205 N.J. Super. 407 (App. Div. 1985). Although a teacher losing an employment increment will always lag one step behind other teachers with the same experience, that fact is simply the effect of an earlier employment decision. North Plainfield Ed. Ass’n v. North Plainfield Bd. of Ed., 96 N.J. 587 (1984).

Based on the statutory language of N.J.S.A. 18A:29-14 and

the above-cited judicial precedent, the Commission has held that grievances seeking to compel a school board to restore a previously withheld increment are preempted and not subject to binding arbitration. See Mahwah Bd. of Ed., P.E.R.C. No. 2019-13, 45 NJPER 154 (¶40 2018); Cherry Hill Bd. of Ed., P.E.R.C. No. 97-139, 23 NJPER 346 (¶28160 1997). Accordingly, we find that the Association's grievances are not legally arbitrable to the extent that they challenge the Board's determination not to restore the grievants' previously withheld increments.

We reject the Association's attempt to recast this aspect of the grievances as a challenge to the Board's policy that merely reiterates the Board's prerogative to restore a previously withheld increment while also noting, consistent with N.J.S.A. 18A:29-14, that an "increment withheld may be restored only by action of the Board." Even if the Board's policy could be interpreted to provide the Association with a right to have increments restored, a grievance over application of such a policy would nevertheless be preempted as it would undermine the Board's underlying statutory right under N.J.S.A. 18A:29-14 to not be mandated to restore an increment.

We next consider whether arbitration over the Board's formula for calculating the grievants' appropriate salary levels following the increment withholdings would significantly interfere with the Board's prerogative to decide not to restore

the increments. Regarding the balancing of educational policy goals and teachers' terms and conditions of employment, the Supreme Court of New Jersey stated: "It is only when the result of bargaining may significantly or substantially encroach upon the management prerogative that the duty to bargain must give way to the more pervasive need of educational policy decisions." Bd. of Ed. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 593 (1980).

"The 'prime examples' of mandatorily negotiable terms and conditions of employment under New Jersey case law 'are rates of pay and working hours.'" Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 199 (2016) (quoting Local 195, IFPTE v. State, 88 N.J. 393, 403 (1982)); Atlantic Cty., 230 N.J. 237, 253 (2017) ("We find that salary step increments is a mandatorily negotiable term and condition of employment because it is part and parcel to an employee's compensation for any particular year.") Accordingly, we find that the Association's grievance is mandatorily negotiable and legally arbitrable to the extent that it concerns the calculation of the grievants' post-increment withholding salaries and proper salary guide placement under the terms of the parties' new CNA. See, e.g., Manalapan-Englishtown Regional Bd. of Ed., P.E.R.C. No. 2007-42, 33 NJPER 3 (¶3 2007), aff'd, 35 NJPER 230 (¶82 App. Div. 2009) (proper salary guide placement of teacher returning

from disability leave was arbitrable); Fair Haven Bd. of Ed., P.E.R.C. No. 2009-65, 35 NJPER 154 (¶56 2009) (proper calculation of salary guide placement was arbitrable).

As this aspect of the grievances concerns only the mandatorily negotiable issue of the appropriate compensation level post-increment withholding, it does not interfere with the Board's determination, pursuant to N.J.S.A. 18A:29-14, not to restore the grievants' previously withheld increments. See Linden Bd. of Ed., P.E.R.C. No. 2022-2, 48 NJPER 100 (¶24 2021), aff'd, 49 NJPER 203 (¶48 App. Div. 2022) (although involuntary transfers were non-negotiable, proper compensation for teachers following transfer was arbitrable).

We find that the Board's reliance on Probst to restrain all aspects of the Association's grievance is misplaced. In that case, the teacher asserted that an increment withholding should be automatically restored the following year upon satisfactory performance. As part of that challenge, the teacher contested the general concept that an increment withholding may result in a teacher having a salary that is not specifically in the salary guide because it is calculated by subtracting the amount of the withheld increment from the teacher's normal salary guide step. The Association here does not challenge the fact that an increment withholding is calculated in such a fashion. Indeed, the Association's grievances set forth how that was the practice

until application of the new agreement's "Teachers Off-Guide" salary chart which has allegedly resulted in the grievants' salaries no longer equaling their regular step minus the value of their previously withheld increment. We therefore find that the Supreme Court's determination in Probst concerning the Board's prerogative to decide not to restore increments, which recognized that the withholding may result in an off-guide salary, does not impact the arbitrability issue here concerning how that post-increment withholding salary was actually calculated in conjunction with the salary guides in the parties' new agreement.

ORDER

The request of the Neptune Township Board of Education for a restraint of binding arbitration is denied to the extent that the Association's grievance contests the calculation of the grievants' post-increment withholding salaries and proper salary guide placement under the terms of the parties' new CNA. The Board's request for a restraint of binding arbitration is granted to the extent that the Association's grievance contests the Board's decision not to restore the grievants' previously withheld increments.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: June 29, 2023

Trenton, New Jersey