

P.E.R.C. NO. 99-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RANDOLPH TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-98-88

RANDOLPH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Randolph Township Board of Education for a restraint of binding arbitration of grievances filed by the Randolph Education Association. One grievance contests the withholding of a tenured secretary's increment for the 1996-1997 school year and the second contests the withholding of another tenured secretary's increment for the 1997-1998 school year. The Commission holds that, under the 1990 amendments, all non-teaching staff member withholdings are disciplinary and must be submitted to binding arbitration.

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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Respondent.

Appearances:

For the Petitioner, Vogel, Chait, Schwartz & Collins,
P.C., attorneys (Aron M. Schwartz, of counsel)

For the Respondent, Bucceri & Pincus, attorneys (Linda
Ganz Ott, of counsel)

DECISION

On May 18, 1998, the Randolph Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of two grievances filed by the Randolph Education Association. One grievance contests the withholding of a tenured secretary's increment for the 1996-1997 school year and the second contests the withholding of another tenured secretary's increment for the 1997-1998 school year.

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

The Association represents certain certificated staff, as well as secretarial, food service, custodial, maintenance and other employees.

The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1995 through June 30, 1998. While the grievance procedure provides for binding arbitration of some disputes, Article III.B.4.c. states that binding arbitration "shall not be applicable to any interpretation, application or alleged violation" of several "express contract provisions." Among those provisions is Article XV, Salaries. Subsection B of that article states:

Advancement on the salary schedules covered by this Agreement shall not be automatic but shall be granted for years of satisfactory service upon recommendation of the superintendent after evaluation by at least one person qualified to supervise. The Board retains the right to deny an increment on a salary schedule for inefficiency or other good cause.

For 1996-1997, the agreement includes a nine-step salary schedule for secretarial and office personnel and for 1997-1998 and 1998-1999, a twelve-step schedule. Each secretarial salary schedule includes classifications for general, administrative, managerial and supervisory secretaries.^{1/}

Kathryn Hintz is a secretary in the high school attendance office and Donna Speer is a secretary in the high school nurse's office. They are not "teaching staff members" -- a term describing school district employees who are required to hold a certificate from the State Board of Examiners. N.J.S.A.

^{1/} The agreement also includes salary schedules for teachers, food service, custodial, and maintenance personnel.

34:13A-22; N.J.S.A. 18A:1-1; see also Randolph Tp. Bd. of Ed. v. Randolph Ed. Ass'n, 306 N.J. Super. 207, 212 (App. Div. 1997), certif. denied, 153 N.J. 214 (1998).

During her employment, Hintz has had attendance problems due to a medical problem that required several hospitalizations. Her evaluations for the 1991-1992 through 1994-1995 school years recommended that she be granted the "normal salary increment" for the ensuing year, but each evaluation noted the number and disruptive impact of her absences. Hintz's 1995-1996 annual evaluation again gave her positive professional characteristic and competency ratings but noted that her attendance had not significantly improved. Under the "recommendations" section of her annual evaluation form, the supervisor put a check next to the statement "I recommend that the normal salary increment for this member be withheld."^{2/}

On April 16, 1996, the Board voted to withhold Hintz's employment and adjustment increments for the 1996-1997 school year. On April 19, 1996, the Board secretary informed Hintz that the Board had acted to freeze her salary for the 1996-1997 school year because of the impact of her absences on office operations, students, parents and staff. On August 13, 1996, the Association demanded arbitration.

^{2/} The form had one other alternative for tenured staff: "I recommend that this staff member be given the normal salary increment."

Speer's annual evaluation for the 1996-1997 school year stated that she had not met the job requirements of maintaining cumulative tardy and late-to-school records and issuing accurate student passes. In addition, it quoted her previous year's evaluation, where the supervisor had expressed his "understanding" that Speer would demonstrate a higher degree of accuracy in her work and improve her attendance. In the "recommendations" section of Speer's annual evaluation form, her supervisor checked off the statement recommending that the staff member's "normal salary increment" be withheld.

On May 13, 1997, the Board voted to withhold Speer's employment and adjustment increments for the 1997-1998 school year. On May 14, the Board secretary so informed Speer, noting that the reasons for the withholding were her failure to regularly maintain cumulative tardy and late-to-school records and "inconsistency in accuracy" of clerical work.

Speer requested that the Board reconsider its action but, on July 14, 1997, the Board reaffirmed its decision to withhold her increment for the 1997-1998 school year. On July 29, the Association filed a grievance with the superintendent contesting the increment denial. On August 4, the assistant superintendent denied the grievance, stating that the superintendent could not overturn the Board's decision. On September 17, the Association demanded arbitration.

On January 15, 1997, in response to the Association's August 1996 demand to arbitrate Hintz's increment withholding, the Board filed a verified Complaint and Order to Show Cause in the Chancery Division of Superior Court seeking to enjoin the arbitration. The Board contended that arbitration would violate the parties' agreement precluding binding arbitration of increment denials. On February 19, the Association filed an Answer asserting that the Commission had primary jurisdiction to hear the dispute. At a hearing on the Order to Show Cause, the Court ruled that it lacked jurisdiction and an order dismissing the Complaint was entered on March 18, 1997. The Board appealed.

On December 22, the Appellate Division affirmed the trial court's order dismissing the Complaint. Randolph, 306 N.J. Super. at 214. The Appellate Division rejected the Board's argument that, because the parties had negotiated the issue of arbitrability of salary increments, the subject was one of contractual arbitrability for the courts. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 155 (1978). The Court noted that because N.J.S.A. 34:13A-29 compels binding arbitration of increment withholdings that are predominately disciplinary, the negotiated agreement could not deprive employees of their rights under that statute. After noting our jurisdiction to resolve scope of negotiations questions, as well as our authority to determine whether a teaching staff member withholding is predominately disciplinary, the Court ruled that we had

jurisdiction to determine whether the Hintz withholding was legally arbitrable. Randolph, 306 N.J. Super. at 211, 214.

On December 15, 1997, one week before the December 22 Appellate Division ruling in Randolph, the Board filed a Complaint seeking to enjoin arbitration of Speer's increment withholding. That matter was held in abeyance pending the Supreme Court's action on the Board's petition for certification in Randolph. Following the Supreme Court's denial of certification, the Board withdrew the Complaint in the Speer matter and, pursuant to Randolph, filed this petition.

The Board seeks a restraint of binding arbitration of the grievances contesting both the Speer and Hintz withholdings. It maintains that they were based predominately on evaluations of performance and, therefore, need not be submitted to binding arbitration under the 1990 scope of negotiations amendments to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-22 to -29. The Association counters that the act of withholding an increment is disciplinary and that the reason for a withholding is relevant only for teaching staff members, who have an alternate statutory appeal procedure for withholdings based predominately on the evaluation of teaching performance. In its reply brief, the Board asserts that the increment provisions in the parties' contract are a mandatorily negotiable form of merit pay, that the parties were free to agree that merit pay decisions would not be submitted to binding arbitration, and that the only constraint on

the parties' negotiated merit pay system is the requirement in N.J.S.A. 34:13A-29 that binding arbitration be available where a decision denying merit pay is disciplinary. It argues that nothing in the 1982 "discipline" amendments to N.J.S.A. 34:13A-5.3 refers to increment withholdings or provides that all withholdings for non-teaching staff members are disciplinary.

The scope of negotiations question posed by the parties is this: does N.J.S.A. 34:13A-29 preempt the contract provision excluding increment withholdings from binding arbitration by granting non-teaching staff members a statutory right to contest all withholdings through binding arbitration? Cf. Hanover Tp. Bd. of Ed., P.E.R.C. No. 99-7, 24 NJPER 413 (¶29191 1998).

Resolution of this question requires a discussion of increment salary structures and increment withholdings, as well as a review of how the 1982 discipline amendment and the 1990 scope of negotiations amendments affected the legal arbitrability of grievances contesting such withholdings.

Increment Salary Structures and Increment Withholdings

In New Jersey public employment, the terms "increment" and "increment withholding" have traditionally been used in connection with salary schedules fixing minimum and maximum salaries based on years of experience and, for teaching staff members, the level of educational attainment. See N.J.S.A. 52:14-15.28 (requiring Civil Service Commission, predecessor to Department of Personnel, to establish automatic increases in

salary, based upon length of service, within established salary ranges); N.J.S.A. 18A:29-6 to -8 (repealed by L. 1985, c. 321) (establishing minimum salary schedules for teaching staff members based on experience and education and requiring annual employment increments). Under a typical increment structure -- whether negotiated or established by statute or regulation -- employees receive increments after the completion of an additional year or years of satisfactory service, in accordance with the salary schedule. See, e.g., Probst v. Haddonfield Bd. of Ed., 127 N.J. 518, 520 (1992); State of New Jersey (OER), P.E.R.C. No. 97-41, 22 NJPER 392 (¶27212 1996) (increments awarded to State employees who received ratings above "significantly below standard"); State of New Jersey (OER), P.E.R.C. No. 87-130, 13 NJPER 347 (¶18141 1987), aff'd NJPER Supp.2d 191 (¶169 App. Div. 1988) (under regulations then in existence, increments were denied only to State employees who were rated unsatisfactory);^{3/} East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd 11 NJPER 334 (¶16120 App. Div. 1985), certif. denied 101 N.J. 280 (1985) (under negotiated increment structure, non-teaching staff members were denied increments only for unsatisfactory performance); see also N.J.S.A. 18A:29-14 (board

^{3/} Current regulations provide that a State employee shall be denied an annual anniversary increment if he or she receives a performance assessment review rating of either marginally or significantly below standards. N.J.A.C. 4A:6-5.3. A classified employee may appeal a withholding to the Merit System Board. Ibid.

may withhold a teaching staff member's increment for inefficiency or other good cause, subject to the teaching staff member's right to appeal to the Commissioner of Education).^{4/}

Increment salary schedules are traditional in the education field and, for full-time teaching staff members, were once statutorily required. See N.J.S.A. 18A:29-6 to -8 (repealed). Salary schedules providing for increments for additional years of service were never statutorily required for non-teaching staff members, but boards have the authority to negotiate increment pay schedules for these employees. East Brunswick, 10 NJPER at 429, 430 n.1. Unlike teaching staff members, they do not have a statutory right to appeal a withholding to the Commissioner of Education. Ibid.

^{4/} In requiring the payment of "automatic" increments after contract expiration, unfair practice decisions have also described increment pay structures as those where employees below the maximum salary are entitled to an "automatic" increment based on the satisfactory completion of an additional year or years of service, subject to withholding in individual cases for unsatisfactory performance. See, e.g., Ramapo-Indian Hills Reg. School Dist. Bd. of Ed., I.R., 97-8, 22 NJPER 386 (¶27207 1996); Borough of Fanwood, I.R. No. 85-5, 10 NJPER 606 (¶15284 1984); Newark Public Library, I.R. No. 84-9, 10 NJPER 321 (¶15154 1984); Union Cty. Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1977); see also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 50 n.10 (1978) (describing, as consistent with federal labor law, the Commission's description of an increment as "automatic" if it is granted on the commencement of another year of service and recognizing that increments may be withheld for poor performance under an automatic increment structure); cf. Neptune Tp. Bd. of Ed. v. Neptune Ed. Ass'n, 144 N.J. 16 (1996) (N.J.S.A. 18A:29-4.1 prohibits payment of teaching staff member increments after the expiration of a three-year agreement).

In contrast to increment pay structures dependent only on satisfactory completion of another year of service, there are merit pay systems where receipt of a pay increase or bonus is keyed to above-average performance. See Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 87-49, 12 NJPER 838 (¶17321 1986) (after first year of employment, increases given only to employees with more than an 85% rating; increases varied for 85% through 95% ratings); Essex Cty., P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), aff'd NJPER Supp.2d 182 (¶158 App. Div. 1987) (pay structure had characteristics of merit program where increments were not automatic and ratings scale provided that satisfactory employees did not receive increments). Cf. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 333 (1989) (recognizing that merit pay systems are mandatorily negotiable).

1982 Discipline Amendment

In 1982, the Legislature enacted the so-called "discipline amendment" to N.J.S.A. 34:13A-5.3. See L. 1982, c. 103. That amendment was intended to overrule an Appellate Division decision holding that a public employer could not negotiate binding arbitration procedures for disputes concerning disciplinary determinations. Scotch Plains-Fanwood Bd. of Ed. v. Ed. Ass'n, 139 N.J. 141, 153 (1995), citing Assembly Member Patero, Statement to Assembly Bill 706 (Feb. 1, 1982). See also State v. State Troopers Fraternal Ass'n, 134 N.J. 393, 411-412 (1993). The Statement to Assembly Bill 706 explained that the

bill was intended to authorize negotiation of binding arbitration as an alternative to the existing procedures by which classified civil service and tenured and non-tenured education employees could appeal disciplinary actions such as the denial of increments. The sponsors thus viewed the "denial of increments" as disciplinary determinations. Given the education and civil service statutes and regulations then in effect, they presumably understood increments to be pay increases granted after satisfactory completion of an additional year or years of service. See N.J.S.A. 18A:29-6 to -8 (repealed); N.J.S.A. 18A:29-14; State of New Jersey (OER), P.E.R.C. No. 87-130 (describing pre-1985 Civil Service regulations on increments).

The Legislature passed Assembly Bill 706, but the Governor vetoed it and suggested that it be amended to, among other things, preclude binding arbitration of disputes concerning disciplinary actions when an alternate statutory appeal procedure existed. Scotch Plains, 139 N.J. at 154. The Legislature reenacted the bill to incorporate the recommendations in the Governor's veto message. Ibid.

In East Brunswick Bd. of Ed., we considered how the 1982 discipline amendment affected the arbitrability of increment withholding disputes involving both teaching staff members and non-teaching staff members. We reviewed the legislative history and emphasized that, from the beginning, the Legislature had considered increment withholdings to be a form of "discipline."

10 NJPER at 428. We noted that neither the Legislature nor the Governor made any statements to the contrary during the interchange that resulted in the amendments to N.J.S.A.

34:13A-5.3. Ibid. But we held that, because N.J.S.A. 18A:29-14 provided an alternate statutory appeal procedure by which teaching staff members could appeal such withholdings, it was "indisputable" that the 1982 amendment did not permit those employees to contest increment withholdings in binding arbitration. With respect to non-teaching staff members, we held that, unlike teaching staff members, they had no statutory entitlement to receive increments, no statutory protection against withholdings without good cause, and no alternate statutory appeal procedure for contesting increment withholdings. 10 NJPER at 429-430. We concluded that the ability of non-teaching staff members to receive increments was a mandatorily negotiable issue of compensation and that a school board's ability to discipline employees through withholding such negotiated increments was mandatorily negotiable and legally arbitrable under N.J.S.A. 34:13A-5.3. 10 NJPER at 429.

The Appellate Division affirmed our decision in East Brunswick. The Court reasoned that "[i]t is self evident that denial of increments constitutes discipline and the Sponsors' Statement attached to A-706 in the chain of legislation confirms that this is the intent of the legislature." 11 NJPER at 334. Accord State of New Jersey (OER), NJPER Supp.2d at 192 (legislative history indicated that increment withholdings of

classified civil service employees were disciplinary actions and, under the 1982 amendments, legally arbitrable issues). The Supreme Court denied certification to review the holding that increment withholdings involving non-teaching staff members were disciplinary disputes under the discipline amendment.

The shared legislative and judicial view of increment withholdings accords with workplace realities. Employees who are denied increments are generally singled out from among their peers. They suffer a stiff penalty costing them hundreds or thousands of dollars the first year and thousands of dollars over a career. They lose purchasing power since their salaries are frozen while the cost of living increases. They also lose credit for an additional year of experience.

The Legislature granted teaching staff members a right to appeal withholdings to the Commissioner of Education. The issue in this case is whether the 1990 amendments grant non-teaching staff members a comparable right to neutral review of increment withholdings.

1990 Amendments

The 1990 amendments, N.J.S.A. 34:13A-22 through -29, were intended to expand "the scope of negotiations for public school employees in matters relating to extracurricular activities and discipline, including increment withholding." Scotch Plains, 139 N.J. at 154, quoting Assembly Labor Committee, Statement to L. 1989, c. 269, reprinted at N.J.S.A. 34:13A-22 (emphasis added).

As the underscored language indicates, the Legislature believed, as it had at the time of the 1982 amendment, that increment withholdings are a form of discipline. But while the 1982 amendment permitted parties to negotiate provisions requiring binding arbitration over disciplinary disputes for which there was no alternate statutory appeal procedure, the 1990 amendments mandate binding arbitration as the final step with respect to disciplinary disputes. N.J.S.A. 34:13A-26; -29.

The 1990 amendments do not require binding arbitration over all withholdings for teaching staff members. See Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459, 465 (App. Div. 1997). The amendments require us to resolve disputes as to whether a teaching staff member withholding is predominately based on the evaluation of teaching performance and therefore subject to review by the Commissioner of Education. N.J.S.A. 34:13A-27a.

The Board recognizes that, in Lower Camden Cty. Reg. Dist., P.E.R.C. No. 93-98, 19 NJPER 248 (¶24122 1993), we held that this inquiry over the reason for a withholding applies only to teaching staff members and, therefore, declined to restrain arbitration of a grievance contesting the withholding of a non-professional employee's increment for allegedly unsatisfactory job performance. 19 NJPER at 250. The Board asks us to revisit Lower Camden and to hold that N.J.S.A. 34:13A-29 mandates binding arbitration only of those non-teaching staff member withholdings

that are not based on an evaluation of performance. We decline to do so. Based on the text of the amendments and the legislative, judicial and administrative framework within which they were adopted, we reiterate that the dichotomy between teaching performance reasons and disciplinary reasons pertains only to teaching staff members. We further conclude that because all non-teaching staff member increment withholdings are disciplinary, a withholding based on unsatisfactory job performance must be submitted to binding arbitration under N.J.S.A. 34:13A-29.^{5/}

N.J.S.A. 34:13A-29 requires binding arbitration of disputes concerning "imposition of reprimands and discipline as that term is defined in this act." N.J.S.A. 34:13A-22 offers this definition:

"Discipline" includes all forms of discipline, except tenure charges filed pursuant to the provisions of subsubarticle 2 of subarticle B of Article 2 of chapter 6 of Subtitle 3 of Title 18A of the New Jersey Statutes, N.J.S. 18A:6-10 et seq., or the withholding of increments pursuant to N.J.S. 18A:29-14.

This language indicates that the Legislature considered that all increment withholdings were "discipline" in the generic sense: otherwise it would not have found it necessary to except one type of increment withholding from the term "discipline." And since

^{5/} In Lower Camden, where the parties' negotiated agreement provided for binding arbitration of disciplinary disputes, we did not need to decide whether N.J.S.A. 34:13A-29 superseded a contract clause such as Article III.B.4.c.

N.J.S.A. 18A:29-14 pertains only to the withholding -- and appeal -- of teaching staff member withholdings based predominately on the evaluation of teaching performance, those withholdings are the only ones to which N.J.S.A. 34:13A-29 does not apply. See also Scotch Plains, 139 N.J. at 155 (N.J.S.A. 34:13A-22 reflects a legislative determination to distinguish the withholding of an increment for reasons of teaching performance).

This reading of N.J.S.A. 34:13A-22 and 29 dovetails with N.J.S.A. 34:13A-25, -26, and -27. N.J.S.A. 34:13A-26 establishes the general principle that "[d]isputes involving the withholding of an employee's increment for predominately disciplinary reasons" shall be subject to N.J.S.A. 34:13A-29. N.J.S.A. 34:13A-27a empowers the Commission to resolve disputes as to whether "the withholding of an increment of a teaching staff member" is predominately disciplinary. Thus, N.J.S.A. 34:13A-27a contemplates disputes only over whether teaching staff member withholdings are predominately related to the evaluation of teaching performance. Reading N.J.S.A. 34:13A-27a together with N.J.S.A. 34:13A-22, which excludes only teaching performance based withholdings from the definition of discipline, we conclude that the logical interpretation of these provisions is that withholdings of other school district employees are always disciplinary. This reading is reinforced by N.J.S.A. 34:13A-27d, which provides that if the Commission determines that the reason

for a teaching staff member withholding relates predominately to the evaluation of teaching performance, then the teaching staff member must invoke N.J.S.A. 18A:29-14. In other words, N.J.S.A. 34:13A-27a and d both indicate that the teaching performance-disciplinary dichotomy pertains only to teaching staff members. Lower Camden.

We appreciate the Board's argument that by referring to the withholding of an "employee's increment" for predominately disciplinary reasons, N.J.S.A. 34:13A-26 implies that some increment withholdings for non-teaching staff members are not disciplinary. If one reads N.J.S.A. 34:13A-26 in isolation, there is some plausibility to that argument. But given the statutory framework we have just discussed, we read N.J.S.A. 34:13A-26 as encompassing both non-teaching staff member withholdings, all of which are disciplinary, N.J.S.A. 34:13A-22, and those teaching staff member withholdings found not to to be predominately related to the evaluation of teaching performance. N.J.S.A. 34:13A-27.6/

Our reading of the 1990 amendments accords with N.J.S.A. 34:13A-28, stating that nothing in the 1990 amendments "shall be deemed to restrict any right established or provided by [section

6/ A finding that a teaching staff member withholding is predominately related to the evaluation of teaching performance does not mean that the act of withholding the increment is not disciplinary. It means only that it may not be submitted to binding arbitration under N.J.S.A. 34:13A-29. See, e.g., Willingboro Bd. of Ed., P.E.R.C. No. 96-28, 21 NJPER 388 (¶26239 1995).

5.3]," and that the amendments "shall be construed as providing additional rights in addition to and supplementing the rights provided by that section." We do not believe that the Legislature meant to adopt a narrower view of discipline in the 1990 amendments than it adopted in the 1982 amendment. Under the discipline amendment to section 5.3, as interpreted by the Appellate Division in East Brunswick and State of New Jersey (OER), non-professional employees had the right to seek an agreement to submit all increment withholdings to binding arbitration. A holding that some non-teaching staff member withholdings are not disciplinary would narrow the pre-1990 definition of discipline and, contrary to N.J.S.A. 34:13A-28, would restrict employee rights by removing some withholding disputes from the ambit of existing negotiated disciplinary review procedures.

We reject the Board's argument that East Brunswick is not pertinent to evaluating the rights conferred on non-teaching staff members by the 1990 discipline amendments. The Legislature was aware of our decision and the Appellate Division's affirmance when it adopted the 1990 amendments. See Sponsor's Statement to A.4706 (6/19/89); see also Chase Manhattan Bank v. Josephson, 135 N.J. 209, 227 (1994). In adopting amendments that specifically addressed increment withholdings in school districts, and which were intended to expand the rights of school district employees, we believe the Legislature would have expressly indicated any

intent to narrow the definition of discipline to exclude some increment withholdings of non-teaching staff members. Cf. Calabro v. Campbell Soup Co., 244 N.J. Super. 149, 164-165 (App. Div. 1990), aff'd 126 N.J. 278 (1991). Instead, it mandated binding arbitration of disciplinary disputes and excluded only withholdings based on the evaluation of teaching performance from the definition of discipline.^{7/}

Finally, we conclude that the Randolph decision does not require a different reading of the 1990 amendments. As noted, the holding of that case is that the Commission, not the Chancery Division, has primary jurisdiction to determine the negotiability question here: whether the 1990 amendments mandate binding arbitration of these withholding disputes. In reaching that conclusion, the Court noted our scope of negotiations jurisdiction, N.J.S.A. 34:13A-5.4d, and commented that:

Whether the statutory language means that all salary increment withholdings of non-teaching staff are deemed disciplinary and thus subject to binding arbitration need not be decided at this time. [Randolph, 306 N.J. Super. at 213]

^{7/} The Board argues that East Brunswick merely permitted the parties to agree to binding arbitration of non-teaching staff member increment withholdings, while requiring binding arbitration here would limit the parties' ability to agree to a clause such as Article III.B.4.c. That is the necessary result of the 1990 amendments. They mandate binding arbitration of disciplinary disputes, as defined by N.J.S.A. 34:13A-22, while the 1982 amendment merely permitted parties to agree to submit a disciplinary dispute to binding arbitration where the employee had no alternate statutory appeal procedure.

Thus, the Court expressly reserved the question that we have answered here. We recognize that, in the course of rejecting the Board's argument that the Chancery Division had jurisdiction over this question, the Appellate Division also stated:

We reject the argument that the express authority granted PERC to decide whether increment withholdings for teaching staff members are disciplinary or performance-based under N.J.S.A. 34:13A-27(a), compels the conclusion that PERC does not have jurisdiction over the same issues in a case involving non-teaching staff members....

Despite the ambiguity of this statutory provision, we are persuaded that the Legislative scheme established by the amendments contemplated that the determination as to whether a salary increment withholding is disciplinary or performance-based as it related to non-teaching employees should lie with PERC. As noted, PERC regularly determines whether the withholding of a salary increment was disciplinary, pursuant to N.J.S.A. 34:13A-27. [Randolph, 306 N.J. Super. at 213-214]

We disagree with the Board that these comments invalidate our continuing view that all non-teaching staff withholdings are disciplinary. They must be read together with the Court's statement that it was not resolving that question. Moreover, in referring to our jurisdiction to determine whether a non-teaching staff member's increment withholding was disciplinary or performance-based, the Court was, it appears, simply rejecting the Board's position that N.J.S.A. 34:13A-27 precluded us from determining the arbitrability of the withholdings here. It was

not addressing the nature of our role under N.J.S.A. 34:13A-22 et seq. The Court's election not to hold that all non-teaching staff member withholdings are disciplinary -- a view that the Board contends was urged on the Court -- appears to us to reflect the Court's view that this determination should be made in the first instance by us.

In sum, we believe that the Legislature understood an "increment withholding" to be the denial of a pay increase that is granted after satisfactory completion of an additional year or years or service, subject to withholding for unsatisfactory service in individual cases.^{8/} We conclude that, under the 1990 amendments, all non-teaching staff member withholdings are disciplinary and must be submitted to binding arbitration.^{9/}

^{8/} We agree with the Board that "merit pay" systems, as we have described them, are distinct from increment pay structures. But such a system is not present here. The parties negotiated a traditional increment pay structure, where secretaries are paid in accordance with a multi-step guide and move through the guide by receiving increments based upon satisfactory completion of "years of service." This structure is indistinguishable from those in prior cases where we have found withholdings to be a form of discipline. The provision in the parties' agreement that advancement on the schedule is not "automatic," but subject to satisfactory performance and the supervisor's recommendation, does not point to a different result. As discussed earlier, increment pay structures in New Jersey public employment do not ordinarily grant employees an absolute entitlement to those increments. Cf. East Brunswick, 10 NJPER at 430 n.1; see also Galloway Tp. Bd. of Ed., 78 N.J. 25, 50.

^{9/} The standard of review to be applied in arbitration is mandatorily negotiable. Montclair Bd. of Ed., P.E.R.C. No. 92-62, 18 NJPER 45 (¶23018 1991).

ORDER

The request of the Randolph Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: November 23, 1998
Trenton, New Jersey
ISSUED: November 24, 1998