

P.E.R.C. NO. 2007-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILDWOOD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2007-019

WILDWOOD EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Wildwood Board of Education for a restraint of binding arbitration of grievances filed by the Wildwood Education Association. The grievances contest the withholdings of salary increments from two teaching staff members: a guidance counselor for allegedly providing deficient counseling services to special needs students and an elementary school teacher for allegedly failing to properly test and retest students. The Commission concludes that the withholdings were predominately based on an evaluation of teaching performance and any appeal must be filed with the Commissioner of Education.

_____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.

P.E.R.C. NO. 2007-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILDWOOD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2007-019

WILDWOOD EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Taylor, Whalen & Hybbeneth,
consultants (William F. Hybbeneth, Jr., on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Keith Waldman, on the brief)

DECISION

On November 3, 2006, the Wildwood Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of two grievances filed by the Wildwood Education Association. The grievances contest the withholdings of salary increments from two teaching staff members. Because the withholdings were predominately based on the evaluation of teaching performance, we restrain arbitration under N.J.S.A. 34:13A-27d.

The parties have filed briefs and exhibits. The Board has filed its superintendent's certification.

The Association represents teaching staff members. The parties' collective negotiations agreement is effective from July

1, 2005 to June 30, 2008. The grievance procedure ends in 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 (¶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.
[17 NJPER at 146]

These tests also apply to teaching staff members who do not teach, but must carry out professional duties involving students, staff, or the educational program. Readington Bd. of Ed., P.E.R.C. No. 95-38, 21 NJPER 34 (¶26022 1994). We apply them to these two increment withholdings.

Patrick Brooks

Patrick Brooks is a guidance counselor. On May 8, 2006, the superintendent informed Brooks that he would be recommending that Brooks's increments for the 2006-2007 school year be withheld for the following reasons:

He had been advised on numerous occasions during the 2005-2006 school year that his IEP ("Individualized Education Program") logs for special needs students were deficient in that they were incomplete, inconsistent and inaccurate.

He had failed to improve his performance even after being given specific instruction and assistance by his immediate supervisor and the Supervisor of Child Study Teams.

His failure to provide mandated services to special needs students was inexcusable in that the students he shortchanged were the District students most in need of counseling services.

Providing counseling services was the primary responsibility of the job of a Guidance Counselor and the failure to do so was an egregious lack of professionalism.

His failure to provide mandated services to special needs students place the District in direct jeopardy of censure should federal authorities monitor special education services.

On May 10, 2006, the superintendent presented these reasons to the Board. On May 11, the superintendent notified Brooks that the Board had voted to withhold his salary increment for the 2006-2007 school year.

On May 12, 2006, the Association filed a grievance alleging that the increment was withheld without just cause. The grievance was denied at all levels. On May 31, the Association demanded arbitration. This petition ensued.

The Board argues that Brooks has not met the responsibilities in his job description and mandated by State regulations. The Association responds that no educational expertise is needed to determine whether Brooks failed to do his job.

The reasons listed for this withholding involve the counseling services Brooks was required to provide special needs students and thus predominately relate to the evaluation of his "teaching" responsibilities as a guidance counselor. The performance deficiencies alleged in the evaluative documents are analogous to those in cases where we restrained arbitration of increments withheld from child study team members. See Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 98-153, 24 NJPER 339 (¶29160 1998); Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 96-52, 22 NJPER 65 (¶27029 1996); Readington Tp. Bd. of Ed. Any appeal of this withholding must be to the Commissioner of Education.

Jane Koebert

Jane Koebert is an elementary school teacher with an English as a Second Language (ESL) certification. On May 8, 2006, the superintendent informed Koebert that he would be recommending that her increment for the 2006-2007 school year be withheld for these reasons:

She failed to accurately test and place E.S.L. ("English as a Second Language") students, an integral and significant part of her teaching responsibilities.

She failed to accurately and adequately test a Kindergarten student, putting that child's academic program and progress at risk.

She failed to retest E.S.L. students as directed and her subsequent creation of false test results for those students potentially jeopardized the academic progress of those students.

She failed to appropriately interact with other teaching staff members with respect to E.S.L. services for students, thereby putting educational progress and the academic program for those students in jeopardy of being inadequate.

Her actions could have jeopardized the District's funding stream for E.S.L. Services.

On May 10, he presented these reasons to the Board. On May 11, he notified Koebert that the Board had voted to withhold her salary increment for the 2006-2007 school year.

On May 15, 2006, the Association filed a grievance alleging that the increment was withheld without just cause.^{1/} On June 7, the Association demanded arbitration and on June 24, the parties consolidated the Brooks and Koebert grievances to be heard by the same arbitrator. This petition ensued.

The Board argues that Koebert failed to meet the basic responsibilities of her position as an elementary teacher and ESL instructor and that non-traditional activities of teaching staff members have been held to involve teaching performance. The

7/ On the day the grievance was filed, the principal sent Koebert a notice of insubordination concerning her failure to file ESL paperwork for three students. This notice was not part of the stated reasons for the withholding so we do not consider it.

Association responds that no educational expertise is needed to determine whether she failed to do her job.

As a teacher with an ESL certification, Koebert's teaching responsibilities include testing and classifying students. A withholding based on her alleged failure to perform those duties properly must be reviewed by the Commissioner of Education. Although an aspect of this withholding could be characterized as insubordination, or failure to follow administrative procedures, the dominant concern appears to have been the teacher's alleged failure to perform her educational duties properly.

We reject the Association's suggestion that both teaching staff members' alleged deficiencies should not be classified as teaching performance because an arbitrator can objectively determine whether they failed to fulfil their job responsibilities. The test in an increment withholding case is whether the basis for the withholding was an evaluation of teaching performance, not simply whether that evaluation was objective or subjective. These appeals will require reviewing the Board's judgments that these teaching staff members did not properly perform their educational duties. Those educational judgments cannot be reviewed in binding arbitration. See Willingboro Bd. of Ed., P.E.R.C. No. 2006-88, 32 NJPER 166 (¶75 2006); Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005).

ORDER

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

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: April 26, 2007

Trenton, New Jersey