

P.E.R.C. NO. 2008-71

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MAHWAH TOWNSHIP BOARD  
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2008-059

MAHWAH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Mahwah Township Board of Education for a restraint of binding arbitration of a grievance filed by the Mahwah Education Association. The grievance contests the withholding of a teaching staff member's increment. The Board's stated reasons for the withholding was the failure to submit required course recommendations by the deadline, incorrectly grading student examinations and curving grades in violation of school policy, and engaging in an unprofessional manner with a student in her class by confronting the student about an email. The Commission concludes that this withholding is predominately based on an evaluation of teaching performance and restrains 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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Appearances:

For the Petitioner, Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys (Marc H. Zitomer, of counsel and on the brief; Joseph L. Roselle, on the brief)

For the Respondent, Springstead & Maurice, attorneys (Alfred F. Maurice, on the brief)

DECISION

On February 19, 2008, the Mahwah Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Mahwah Education Association. The grievance contests the withholding of a teaching staff member's increment. We restrain arbitration because the withholding is based predominately on an evaluation of teaching performance.

The parties have filed briefs, exhibits and certifications. The Board has not submitted the statement of reasons for the withholding that is required to be given to the teacher within ten days of the withholding pursuant to N.J.S.A. 18A:29-14 and is

required to be filed with its scope petition pursuant to N.J.A.C. 19:13-2.2(a)(3). The Board has submitted a certification from the superintendent who recommended the withholding to the Board and has submitted related memoranda and the teacher's Annual Performance Report. See Washington Tp., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005) (where a board has not submitted a copy of the official statement of reasons, the board must submit certifications from the principal actors in the dispute explaining the facts surrounding the withholding, the basis for the recommendation to the board, and the basis of the board's action); Woodbury Bd. of Ed., P.E.R.C. No. 2006-81, 32 NJPER 128 (¶59 2006) (board did not provide statement of reasons, but did produce annual performance report referencing alleged deficiencies and certification of principal as to basis for withholding recommendation). It has also submitted a certification from the World Language Department supervisor. The Association has submitted the certification of the teacher, Emily Diaz.

The Association represents certificated teaching staff members. The parties' collective negotiations agreement is effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration and can be used to review disciplinary determinations.

Emily Diaz is a tenured high school Spanish teacher. On June 27, 2007, the Board accepted the recommendation of the superintendent and voted to withhold Diaz's salary increment for the 2007-2008 school year. The Association filed a grievance that the Board denied. On September 24, the Association demanded arbitration. This petition ensued.

The superintendent states that Diaz's increment was withheld for these three reasons:

1. She incorrectly graded student examinations and curved grades in violation of school policy;
2. She did not submit required student course recommendation forms by the stated deadline; and
3. She engaged in an unprofessional manner with a student in her class by confronting the student about an email the student sent anonymously to Diaz's supervisor expressing concern about the midterm examination and instructing the student to write a letter to the administration supporting Diaz.

Diaz's Annual Performance Report includes comments about the three reasons and recommends that her increment be withheld. It labels the alleged failure to submit course recommendations as insubordination and criticizes Diaz for her tone and demeanor in dealing with her supervisor during a meeting about the incident. The record also includes other documents that discuss the three reasons for the withholding.

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]

On their face, each of the three reasons involves an evaluation of teaching performance. Grading inadequacies are related to teaching performance. See Willingboro Bd. of Ed., P.E.R.C. No. 2006-88, 32 NJPER 166 (¶75 2006). So are issues surrounding an alleged failure to timely complete student course recommendations. Cf. Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005); Trenton Bd. of Ed., P.E.R.C. No. 2002-67, 28 NJPER 239 (¶33089 2002); Salem City Bd. of Ed., P.E.R.C. No. 2001-3, 26 NJPER 357 (¶31142 2000). Finally, a dispute over what constitutes an appropriate school-related interaction with a teacher's student predominately concerns teaching performance. See Camden Cty. Vo-Tech Bd. of Ed., P.E.R.C. No. 2007-47, 33 NJPER 24, 25 (¶9 2007).

The Association argues that the evaluators' use of the words "insubordination" and "unprofessional conduct" in Diaz's Annual Performance Report and in a Notification of Concern proves that the withholding was not based on an evaluation of teaching

performance. We disagree. Even though the Board viewed the teacher's alleged failure to improve her teaching performance as insubordination, that allegation is still intertwined with the predominant teaching performance concerns. Dumont Bd. of Ed., P.E.R.C. No. 2007-17, 32 NJPER 232 (¶134 2006); Hazlet Bd. of Ed., P.E.R.C. No. 95-59, 21 NJPER 118, 120 (¶26072 1995) (allegation of insubordination tied to teacher's alleged refusal to change his teaching techniques was a teaching performance reason for increment withholding).

To the extent the Association may be arguing that other reasons such as absenteeism or Diaz's tone toward her supervisor formed the basis for the withholding, we decline to look behind the Board's stated reasons to see if some other reason was at work. In selecting a forum under N.J.S.A. 34:13A-27, we accept the board's reasons for a withholding and do not consider contentions that those reasons are pretextual or unsupported. Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003); Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996). We assume the Board will be bound by its asserted reasons before the Commissioner of Education and that the Commissioner has the power to entertain allegations that the asserted reasons are pretextual. See, e.g., Fanella v. Washington Tp. Bd. of Ed., 1977 S.L.D. 383 (Comm'n of Ed. 4/11/77) (withholding set aside where recommendation to withhold

for failure to complete task was made before deadline for task completion).

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: June 26, 2008

Trenton, New Jersey