

P.E.R.C. NO. 2008-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WHARTON BOROUGH BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2008-042

WHARTON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Wharton Borough Board of Education for a restraint of binding arbitration of a grievance filed by the Wharton Education Association. The grievance contests the withholding of a teaching staff member's salary increment. The Commission finds that the withholding was based predominately on the staff member's teaching performance as a school social worker 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, Oxfeld Cohen, P.C., attorneys
(Ariel S. Peikes, on the brief)

For the Respondent, Adams, Stern, Gutierrez &
Lattiboudere, LLC, attorneys (Erin E. McLaughlin, on
the brief)

DECISION

On December 11, 2007, the Wharton Borough Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Wharton Education Association. The grievance contests the withholding of a teaching staff member's salary increment. Because the withholding was based predominately on the staff member's teaching performance as a school social worker, we restrain arbitration.

The parties have filed briefs and exhibits. The Board has also filed the certification of Karen Elkins, its supervisor of

special education. The following facts have been taken from the exhibits and certification.

The Association represents a negotiations unit of teaching staff members including school social workers. The parties' collective negotiations agreement is effective from July 1, 2007 through June 30, 2008. The grievance procedure ends in binding arbitration.

Felice Walker is a social worker and child study team member. Elkins is Walker's supervisor. On June 28, 2007, the Board voted to withhold Walker's salary increment. On July 6, the superintendent notified Walker of the basis for the withholding. His letter stated, in part:

Over the course of the school year, numerous incidents arose that continued to raise concerns regarding your performance as social worker, case manager, and child study team member. In most cases, there was personal or written contact with you by the building principals and/or the supervisor of child study team services and special education. Generally, the concerns can be categorized in two areas: serious deficiencies in the quality of your written work; and, unprofessional conduct. This is thoroughly chronicled in the attached July 3, 2007 memorandum from your supervisor, Karen Elkins. You had been provided with written notice of the district's concerns as follows:

December 20, 2006 Letter from Karen
Elkins and Christopher Herdman
January 3, 2007 Observation Report
January 9 Memo re: general concerns
March 16, 2007 Memo Re: Interim Review
March 20, 2007 Memo Re: W S-W
June 18, 2007 Memo Re: End of Year Review 2007

June 18, 2007 Teacher Evaluation Form

You had been afforded the time and resources to improve. I am pleased to note that improvement in the quality of your written work has been evident and clearly articulated to you. However, serious concerns have remained in the professional quality of your performance, characterized by undermining administrators, circumventing the I&RS^{1/} process, treating colleagues and supervisors disrespectfully, breaching confidentiality, exceeding your roles as case manager and social worker, failing to effectively communicate with administrators, and unreasonably conceding to parental requests.

As a result of your failure to satisfactorily perform your professional duties the Board of Education at its meeting on June 28, 2007, upon my recommendation, has acted to withhold your salary increment for the 2007-2008 school year.

On July 20, 2006, the Association filed a grievance asserting that the increment was withheld without just cause. The grievance was not resolved. On October 11, the Association demanded arbitration. 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

^{1/} I&RS refers to Intervention and Referral Services.

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]

The Board argues that despite the administration's having worked with Walker during the 2006-2007 school year, her performance did not improve to the standard required. It argues that this matter is not arbitrable because the withholding resulted from Walker's performance deficiencies.

The Association argues that because Walker's increment was withheld predominately for alleged mishandling of confidential information, inappropriate dealings with parents, and circumvention of the administration, the withholding is disciplinary and arbitration is appropriate.

In increment withholding cases, we focus on the specific reasons cited in the statement of reasons provided by a school board for a withholding. N.J.A.C. 19:13-2.2(a)(3). Here, the superintendent's letter states that Walker's increment was withheld because she:

- 1) undermined administrators;
- 2) circumvented the I&RS process;
- 3) treated colleagues and supervisors disrespectfully;
- 4) breached confidentiality;
- 5) exceeded her roles as case manager and social worker;
- 6) failed to effectively communicate with administrators; and
- 7) unreasonably conceded to parental requests.

The documents referenced in the superintendent's letter set forth examples of the alleged misconduct.

Of the seven reasons cited by the superintendent, most relate to Walker'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. 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). The Board's concerns about Walker's alleged undermining of administrators, circumventing the I&RS process, exceeding her role as case manager, and failure to communicate with administrators involve assessments of her teaching performance as a social worker. Walker's alleged disrespectful treatment of colleagues and supervisors, breach of confidentiality, and conceding to parental requests are mixed reasons involving both teaching performance and other reasons.

With regard to Walker's alleged undermining of administrators and circumventing the I&RS process, Elkins asserts that in September 2006, Walker directed the principal to tell a physical education teacher to use a preparation period to provide adaptive physical education for a student, and to pay the teacher an additional sum for the work. When an alternate program was developed, Elkins alleges that Walker contacted the parents and physician to oppose it. Elkins contends that in October, Walker convened an unauthorized meeting of teachers and para-

professionals concerning a student who Walker believed should be referred for a special education evaluation. Elkins asserts that the student had been performing adequately in a general education program and had not yet been recommended for the I&RS process.

Regarding Walker's allegedly exceeding her role as case manager and social worker, Elkins asserts that Walker had difficulty cooperating with her co-case manager on a student's case and failed to include the co-case manager in planning, documentation, and pertinent decisions relating to the student. Elkins also alleges that Walker failed to communicate with administrators in March 2007, when she did not inform them that an out-of-district child would be returning to the district. This resulted in the school's not having an appropriate program available for the student upon his return.

The above four reasons involve teaching performance because they involve judgments as to the type and timeliness of instruction provided to students and could affect the continuity and effectiveness of instruction for students. Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005).

With regard to Walker's alleged disrespectful treatment of colleagues and supervisors, all the examples have at least some relationship to teaching performance. Elkins alleges that at a January 3, 2007 meeting to discuss a student's eligibility for a special education evaluation at which the child study team and

the student's parent were present, Walker interrupted her team members and took over the conversation multiple times. Elkins states that it is incumbent on each team member to work diligently to create a mutually respectful and unified appearance in meetings with parents. This incident involved teaching performance as Walker's alleged behavior interfered with the flow of communication between the child study team and the parent. The remaining incidents involved Walker's allegedly expressing disdain for Elkins and the principal's opinion about a student's placement and telling parents in the presence of their child's case manager that they could request another case manager if they were dissatisfied with the current case manager.

The remaining reasons cited for the withholding - - Walker's allegedly breaching confidentiality and acceding to parental requests, also have some relationship to teaching performance. Walker allegedly shared a parental communication that raised concerns about a certain teacher with the teacher in question and also allegedly acceded to parent demands by agreeing that both she and her teammates would submit reports early in contrast with more generous administrative code deadlines. Both of these allegations involve incidents that could have had an impact on the students Walker provides services for.

The Association's reliance on Freehold Reg. H.S. Bd. of Ed., P.E.R.C. No. 2007-65, 33 NJPER 149 (¶53 2007), is misplaced.

In that case, we restrained arbitration of a guidance counselor's increment withholding noting that the reasons for the withholding could not be reduced to a simple question of whether an incident of misconduct occurred. We contrasted Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶ 23025 1991), where the board alleged and the teacher denied that he engaged in corporal punishment. This case, like Freehold, involves a number of allegations of performance deficiencies that must be reviewed by the Commissioner of Education.

Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001), is distinguishable because that case involved a withholding based on a board's allegations that a teacher failed to properly supervise students. Clifton Bd. of Ed., P.E.R.C. 92-112, 18 NJPER 269 (¶23115 1992), is also distinguishable because that case involved a withholding based on allegations of misconduct, such as falsifying a sign-out sheet, repeatedly missing back to school night, and insubordination.

Finally, the Association argues that the Board failed to recognize the improvement in the technical aspects and timeliness of Walker's work. This argument goes to the merits of the withholding and is outside of our limited jurisdiction to determine the appropriate forum for resolving a withholding dispute. N.J.S.A. 34:13A-27a.

ORDER

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

BY ORDER OF THE COMMISSION

Chairman Henderson and Commissioners Branigan, Fuller, Joanis and Watkins voted in favor of this decision. Commissioner Buchanan voted against this decision.

ISSUED: June 26, 2008

Trenton, New Jersey