

P.E.R.C. NO. 2010-93

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON,

Petitioner,

-and-

Docket No. SN-2010-033

PATERSON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Commission grants the request for a restraint of binding arbitration submitted by the State-Operated School District of the City of Paterson where the Commission found that the increment withholding of a learning disabilities teaching consultant was based predominantly on teaching performance. The withholding was based on allegations that the LDTC failed to complete Individualized Educations Programs in a timely manner, incomplete IEPs, IEPs bearing the name of the wrong student, incomplete Child Study Team logs, and incomplete Child Study Team flow charts. The LDTC was rated Needs Improvement in Establishes and Maintains Harmonious Rapport with: A. Pupils, B. Staff, C. Parents, and Community. The LDTC was rated unsatisfactory in nine categories: Is Competent and Knowledgeable in Discipline, Exercises Good Judgement and Mature Attitude, Performs Professional Duties Skillfully and Willingly, Exhibits Evidence of Growth and Development, Accepts Constructive Criticism and/or Suggestions and Appropriately Affects Desirable Changes, Maintains Adequate Health Habits and Appearance, Is Dependable and Conscientious in the Execution of Responsibilities, Assumes Responsibilities for Care and Use of Professional Materials and Supplies, and Gives Evidence of Professional Materials and Supplies. In the general comments to the evaluation, the supervisor also cited alleged "Unprofessional behavior and conduct unbecoming towards immediate supervisor (called me an idiot three times)."

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, Paterson Public Schools (Mark S.
Tabenkin, of counsel)

For the Respondent, Sasha Wolf, NJEA UniServ
Representative

DECISION

On October 28, 2009, the State-Operated School District of the City of Paterson petitioned for a scope of negotiations determination. The District seeks a restraint of binding arbitration of a grievance filed by the Paterson Education Association. The grievance contests the withholding of the adjustment and employment increments of a learning disabilities teacher consultant (LDTC).

The parties have filed briefs. The District has also filed exhibits and certifications. These facts appear.

On numerous occasions, the LDTC's supervisor sent her memoranda concerning her alleged failure to complete

Individualized Education Programs (IEPs) in a timely manner, incomplete IEPs, inaccurate IEPs, IEPs bearing the name of the wrong student, incomplete Child Study Team logs, and incomplete Child Study Team flow charts. The same issues were noted in the LDTC's annual evaluation. In that evaluation, the LDTC was rated Needs Improvement in Establishes and Maintains Harmonious Rapport with: A. Pupils, B. Staff, C. Parents, and Community. The LDTC was rated unsatisfactory in nine categories: Is Competent and Knowledgeable in Discipline, Exercises Good Judgement and Mature Attitude, Performs Professional Duties Skillfully and Willingly, Exhibits Evidence of Growth and Development, Accepts Constructive Criticism and/or Suggestions and Appropriately Affects Desirable Changes, Maintains Adequate Health Habits and Appearance, Is Dependable and Conscientious in the Execution of Responsibilities, Assumes Responsibilities for Care and Use of Professional Materials and Supplies, and Gives Evidence of Professional Materials and Supplies. In the general comments to the evaluation, the supervisor also cited alleged "Unprofessional behavior and conduct unbecoming towards immediate supervisor (called me an idiot three times)."

On March 22, 2005, the supervisor recommended to the Director of Human Resources/Personnel that the LDTC's increments be withheld. By letter dated May 13, 2005, the Interim State

District Superintendent notified the LDTC that her increments were being withheld for "Poor Performance."

On June 16, 2005, the Association filed a grievance contesting the withholding. On October 5, 2009, the Association advised the District that it was submitting the grievance to binding 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 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 District argues that the reasons for the withholding related predominately to an evaluation of the LDTC's teaching performance. The Association responds that the alleged calling of the supervisor an idiot triggered the withholding and that the evaluation rated the LDTC unsatisfactory in the category "maintains adequate health habits and appearance," a non-teaching performance reason. The District replies that the vast majority of the reasons for the withholding relate to teaching performance

and that this Commission will not look behind a board's stated reasons to see if a discriminatory or improper motive was at work.

We agree with the Board that the overwhelming focus of the withholding is on alleged teaching performance deficiencies as a child study team member. Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 98-153, 24 NJPER 339 (¶29160 1998); Readington Tp. Bd. of Ed., P.E.R.C. No. 95-38, 21 NJPER 34 (¶26022 1994); Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 96-52, 22 NJPER 65 (¶27029 1996).

As for the Association's claim that the "idiot" comment was the catalyst for the evaluation and withholding, we repeat that in selecting a forum under N.J.S.A. 34:13A-27, we accept a 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. Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008); 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 Paterson State-Operated School District for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: June 24, 2010

Trenton, New Jersey