

P.E.R.C. NO. 2013-57

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SUMMIT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2012-032

SUMMIT EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Summit Board of Education for a restraint of binding arbitration of a grievance filed by the Summit Education Association. The grievance contests the withholding of a tenured secretary's salary increment. The Board withheld the increment due to the secretary's alleged improper personal use of her office computer. Because the reasons cited by the Board for the withholding are predominately disciplinary, the Commission holds that the grievance is arbitrable.

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, Lindabury, McCormick, Estabrook & Cooper, P.C., attorneys (Anthony P. Sciarrillo, of counsel)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Sanford R. Oxfeld, of counsel)

DECISION

On December 14, 2011, the Summit Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Summit Education Association, contesting the withholding of a tenured secretary's salary increment.

The parties have filed briefs and exhibits. The Board has filed the certification of its director of human resources. These facts appear.

The Association represents full and part-time teaching staff, maintenance and custodial staff, as well as secretarial and clerical employees. The parties' collective negotiations

agreement is effective from September 1, 2008 through August 31, 2011. The grievance procedure for clerical employees lists two categories of grievances: Class A grievances involving the application or a dispute over a specific term of the agreement; and Class B grievances meaning all other disputes grievable by law. The Association may submit Class A grievances to advisory arbitration.<sup>1/</sup>

Article V - Employee Rights provides:

[N]o tenured employee shall be discharged or any employee otherwise penalized (excluding non-renewal of a non-tenure employee) without just cause. Any such action by the Board shall be subject to the grievance procedure.

The secretary is assigned to the Special Services Department and works for the Child Study Team, Supervisor of Pre-K/6 and Speech Language Specialists.

In the Spring of 2011, the technology department audited the secretary's office computer, examining 11 days. The department concluded that the computer showed "dozens of hours of internet access for personal use."

On May 10, 2011, a meeting was held among the secretary, her immediate supervisor, an Association representative and the HR

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<sup>1/</sup> N.J.S.A. 34:13A-26, 27a and 29 provide that, where an increment is withheld from a school employee for predominantly disciplinary reasons, grievances challenging such withholdings will be resolved through binding arbitration with the burden of proof on the school district. See Scotch Plains-Fanwood Bd. of Ed. and Scotch Plains-Fanwood Ed. Ass'n, 139 N.J. 141 (1995).

director concerning the secretary's personal use of her office computer. On May 19, her supervisor summarized the meeting in a memorandum to the secretary that primarily addressed the improper personal use of her office computer. The memorandum recites:

During the conference the following directives were provided:

1. There is to be no internet access of a personal nature on any district computer;
2. This confidential personnel issue is not to be discussed with your colleagues in your office and any district office;
3. The Technology Department will run a report on your computer each Friday to ensure compliance with the above noted directive;
4. It was noted that an audit would be conducted of the Special Services Office to determine the need for three full-time secretaries due to the extensive amount of time that was spent on the internet juxtaposed to your comment relative to your concerns about being assigned routine tasks.

Based on the above a recommendation will be made to the Board of Education to withhold your increment.

On June 17, 2011, the Board Secretary advised the secretary that the Board had voted to withhold her increment.<sup>2/</sup>

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<sup>2/</sup> The letter recites that the Board's action was based upon the recommendation of the Superintendent. The parties did  
(continued...)

On May 24, 2011, the Association filed a grievance challenging the recommendation to withhold the secretary's increment for "inappropriate use of a district computer during the work day." It asserts that withholding of the increment violates Article V. The grievance states that:

1. Because this was the first time the secretary had been cautioned about the appropriate (computer) use policy, the appropriate penalty would have been the issuance of a letter of reprimand;
2. An increment withholding is too severe a punishment for a first time violation;
3. Increment withholdings have been used when job performance is inadequate and the secretary's job performance was not in question.

The Board denied the grievance at the subsequent steps of the grievance procedure and on July 18, 2011 (Docket No. AR-2012-29) the Association demanded binding arbitration asserting that the dispute was a disciplinary matter. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations.

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2/ (...continued)  
not submit any written recommendation made by the Superintendent. We will treat the May 19, 2011 memorandum issued by her supervisor as the statement of the reasons for the withholding. See N.J.A.C. 19:13-2.2(a)3.

Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider whether the Board had cause to withhold the secretary's increment.

Non-teaching staff may use binding arbitration to review the withholding of increments for disciplinary reasons and for performance based-reasons where the parties have so agreed. See N.J.S.A. 34:13A-26 et seq.; Randolph Tp. Bd. of Ed. v. Randolph Tp. Ed. Ass'n, 306 N.J. Super. 207 (App. Div. 1997); Atlantic City Bd. of Ed., P.E.R.C. No. 2003-72, 29 NJPER 180 (¶53 2003); Flemington-Raritan Bd. of Ed., P.E.R.C. NO. 2003-64, 29 NJPER 113 (¶34 2003).<sup>3/</sup>

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 job performance, we must make that determination. N.J.S.A. 34:13A-

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3/ Where, by contract or operation of law, the final step of the grievance procedure is advisory arbitration, the withholding of an increment for any reason can be reviewed by an arbitrator. See Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 325-326 (1979) Thus even if we conclude that the increment was withheld for performance-based reasons, we would not restrain advisory arbitration.

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, 146 (¶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.

The Board asserts that this increment withholding cannot be arbitrated because it is based on the secretary's performance. It relies on Randolph Tp. Bd. of Ed. It appends the secretary's evaluations for 2010-2011 and for 2009-2010, asserting that, in

addition to the improper use of the computer, the secretary's increment withholding was based on other performance issues.<sup>4/</sup>

The Association argues that the Board's reliance on Randolph Tp. Bd. of Ed. is misplaced because the secretary's increment was withheld for disciplinary reasons, the alleged inappropriate use of her school computer. It observes that no warnings were issued to the secretary that were connected to any perceived performance deficiencies.

Randolph Tp. Bd. of Ed., 306 N.J. Super. at 212-213, recognizes that if a non-teacher's increment is withheld for disciplinary reasons, binding arbitration is mandated.<sup>5/</sup>

[A] salary increment, even for a non-teaching employee, that is withheld for predominantly disciplinary reasons, must be submitted to binding arbitration and that this procedure may not be replaced by the contract through negotiations. See N.J.S.A. 34:13A-5.3.

We conclude that the Board withheld the secretary's increments for predominately disciplinary reasons. Her 2010-2011 annual evaluation, prepared after the reprimand for improper

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<sup>4/</sup> The issues identified were: (1) interactions with parents, students, teachers, directors and persons from other districts; (2) performance as a receptionist for her department; and the preparation of special projects for the Child Study team and its members.

<sup>5/</sup> While Randolph does not mandate binding arbitration of increment withholdings of non-teachers in non-disciplinary cases, it does not bar agreements allowing such employees to obtain review of performance based increment withholdings through binding arbitration. See Atlantic City Bd. of Ed.; Flemington-Raritan Bd. of Ed.



computer use, refers to other independent job performance issues in a narrative. However, only the third paragraph, discussing the computer use, is linked to the increment withholding.<sup>6/</sup> It begins by stating that her actions violated Board policy and continues:

An audit of her computer over a period of weeks revealed hours of internet use on a daily basis starting soon after arrival to work and continuing throughout the work day. This negatively impacts on our ability to provide services to CST, students and parents. This concern was also addressed at the [May 10 meeting]. At this meeting [the secretary] was informed that a recommendation would be made to withhold her increment.

As the Board's reasons are predominantly disciplinary, the Association may use binding arbitration to review the increment withholding. The Board may argue that there was just cause for the to withholding.

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<sup>6/</sup> The HR director's certification appends the secretary's 2009-2010 evaluation. The Board argues that deficiencies listed in that document carried over into 2010-2011 and were part of the reason it withheld the increment. However, the prior evaluation rates her performance as substandard in three of 17 rating categories and does not mention computer use or warn that continued deficiencies may result in an increment withholding. Compare No. Highlands Reg. Bd. of Ed., P.E.R.C. No. 2003-49, 29 NJPER 24 (¶7 2003) (teacher, was previously warned about decorum to use with students; was reprimanded the year before for comment to a student; warned in writing that if such actions reoccurred, more significant discipline including increment withholding or tenure charges may be pursued). In deciding why an increment was withheld, we rely on the statement of reasons issued at the time of the personnel action, rather than certifications prepared for litigation. See N.J.A.C. 19:13-2.2(a)3.

ORDER

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

BY ORDER OF THE COMMISSION

Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Chair Hatfield recused herself.

ISSUED: January 31, 2013

Trenton, New Jersey