

P.E.R.C. NO. 2013-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MILLBURN TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2012-031

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1031,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Millburn Township Board of Education for a restraint of advisory arbitration of a grievance filed by the CWA Local 1031. The grievance contests the withholding of a groundskeeper's wage increase. The Commission holds that, where the parties' agreement provides advisory arbitration as the final step of the grievance procedure, the withholding of an increment for any reason is arbitrable regardless of whether the increment was withheld for disciplinary or performance-based reasons.

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, Weissman & Mintz, attorneys (Annmarie Pinarski, of counsel)

DECISION

On January 5, 2012, the Millburn Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of advisory arbitration of a grievance filed by the Communications Workers of America, Local 1031. The grievance contests the withholding of a groundskeeper's wage increase.

The parties have filed briefs. The Board has not submitted the statement of reasons for the withholding that is required to be given to the employee 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 J. Steven Digeronimo,

Business Administrator/Board Secretary, the board minutes, and the grievant's performance evaluations. 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). These facts appear.

CWA represents a unit of non-professional employees including grounds and maintenance employees. The Board and CWA are parties to a collective negotiations agreement effective from July 1, 2008 through June 30, 2011. The grievance procedure ends in advisory arbitration. Article 8 is entitled wages and provides for the minimum wages to be paid to specific titles with the negotiated percentage increases per year for the titles. It further provides longevity stipends for employees at 10, 19, and 24 years of experience. The agreement does not contain a step-based salary guide.^{1/}

^{1/} The Board refers to the action taken as an increment withholding in its arguments that we summarize, however we
(continued...)

The grievant is employed by the Board as a groundskeeper working in the Buildings and Grounds Department. Grievant is supervised by Ted D'Alessio, Athletics Foreman, John Van Teeckelenburgh, Director of Buildings and Grounds, and DiGeronimo. Grievant was primarily assigned as the groundskeeper for the District's athletic fields.

According to DiGeronimo, grievant had significant job performance deficiencies in the 2009-2010 school year. On April 27, 2010, grievant received a written evaluation from D'Alessio reflecting deficiencies in quality of work, dependability, attitude towards work, job related skills, cares and maintains outside property, and productivity. The narrative section provided that grievant showed some general improvement in his daily job requirements - he still lacks the initiative and foresight to be a productive outdoor maintenance worker. D'Alessio recommended that grievant be re-employed without any salary increase.

On June 10, 2010, grievant received his annual summative evaluation from Teeckelenburgh which rated him as deficient in performance areas. In the comment section, Teecklenburg wrote, "[Grievant] has had ample opportunity over the last few years to

1/ (...continued)
understand that the parties' agreement only provides for a salary increase as there are no incremental steps or a salary guide.

coordinate his work assignments in a reasonable fashion. He has been instructed by his supervisors on the many facets of his job responsibilities and continues to perform below acceptable levels." Teeckelenburg also recommended THE grievant be re-employed without a salary increase.

Based upon the alleged performance deficiencies, according to DiGeronimo, on June 14, 2010, the board withheld the grievant's increment for the 2010-2011 school year. On July 15, CWA filed a grievance contesting the withholding. On July 30, Van Teeckelenburg denied the grievance. On August 10, CWA moved its grievance to level two. By letter dated, August 19, Interim Business Administrator, Robert L. Zeglarskui, denied the grievance. On August 23, CWA requested a hearing before the Board of Education pursuant to the parties' procedure. On October 25, the Board held a hearing on the grievance in closed session. By letter dated November 1, grievant was advised that the board was denying the grievance on procedural and substantive grounds. On November 2, CWA requested advisory arbitration of the grievance pursuant to Article 5, Section 3.D.1. of the parties' agreement. 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. 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 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).

The Board argues that the parties' grievance procedure and Management Rights Article do not provide for arbitration of the instant grievance and that the reasons for the increment withholding were performance related and not disciplinary which require review by the Commissioner of Education.

CWA responds that the grievance concerns the Board's failure to pay the grievant's contractually negotiated 2010 across-the-board salary increase; the grievance requests advisory arbitration that is not restrained unless preempted; and as a

non-teaching staff member who does not receive an increment, the grievant does not have a recourse before the Commissioner of Education.

The Board replies that the grievance must be restrained as it relates to the employee's performance and that withholdings of increments must be submitted to binding arbitration and not advisory arbitration.^{2/}

We can not make a determination as to the Board's argument that the parties' have not agreed to arbitrate increment withholdings. Our Supreme Court in Ridgefield Park specifically stated that whether the subject of the grievance is within the arbitration clause of the parties' agreement is for a court to determine. Non-disciplinary increment withholdings of non-teaching staff are not subject to binding arbitration, but parties may agree to arbitrate them pursuant to their grievance procedure. Randolph Tp. Bd. of Ed. and Randolph Education Ass'n, 328 N.J. Super. 540, 545 (2000), cert. den. 165 N.J. 132 (2000).

We do not need to perform our normal analysis as to whether the Board withheld the increment/raise for disciplinary or

^{2/} The Board relies on Lakeland Cusdodial Ass'n and Lakeland Reg. H.S. Dist. Bd. Of Ed., P.E.R.C. No. 99-92, 25 NJPER 179 (¶30082 1999) where we stated that all increment withholdings involving non-certificated school employees are subject to binding arbitration. The Appellate Division decision in Randolph Tp. Bd. of Ed. and Randolph Education Ass'n, 328 N.J. Super. 540 (2000), cert. den. 165 N.J. 132 (2000), overrules that holding in Lakeland.

performance related reasons. See Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144, 146 (¶22057 1991). The fact that CWA has asserted it is seeking advisory arbitration pursuant to the parties' negotiated grievance procedure is dispositive. Where the parties' agreement provides the final step of the grievance procedure is advisory arbitration, the withholding of an increment for any reason can be reviewed by an arbitrator. Our Supreme Court has found advisory arbitration to be beneficial even in instances where there is a final decision maker as a possible inducement to avoid further litigation. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 325-326 (1979). In an increment withholding dispute where the Commissioner of Education was the final decision maker, the Court approved of advisory arbitration stating:

Not only is advisory arbitration not detrimental to the public interest, its utilization may well bring about beneficial consequences. The arbitrator's findings and conclusions constitute an additional source of information for the Commissioner and will therefore assist him in carrying out his statutory responsibilities. Moreover, this additional source of information -- unlike the input from the Board and the Association -- will derive from a disinterested observer. The arbitrator's advisory recommendation may induce the parties to resolve their dispute without invoking the Commissioner's jurisdiction. Finally, we cannot overlook the potential favorable effects that such a procedure will have upon the morale of public employees, inasmuch as they will be permitted to present their cause -- even if only as an initial matter -- to an individual whom they

do not consider aligned in interest with the Board. [Ibid.]

Thus, even if we were to conclude that the increment was withheld for performance-based reasons, we will not restrain advisory arbitration.

ORDER

The request of the Millburn Township Board of Education for a restraint of advisory arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: January 31, 2013

Trenton, New Jersey