

P.E.R.C. NO. 2014-49

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2013-032

EAST ORANGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the East Orange Board of Education for a restraint of binding arbitration of a grievance filed by the East Orange Education Association. The grievance contests the withholding of a teacher's salary increment. The Commission holds that the withholding is predominately based on 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,  
LLC, attorneys (Joshua I. Savitz, of counsel)

For the Respondent, Oxfeld Cohen, P.C., attorneys  
(Timothy C. King, of counsel)

DECISION

On January 3, 2013, the East Orange Board of Education filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the East Orange Education Association. The grievance contests the withholding of a teacher's salary increment. Because the increment withholding is based predominately on an evaluation of teaching performance, we restrain arbitration.

The Board filed briefs, exhibits, and the certification of Candace D. Wildy, Director of Human Resource Services. The Association filed a brief. These facts appear.

The Association represents a broad-based professional unit including certified teaching personnel. The Board and

Association are parties to a collective negotiations agreement (CNA) effective from September 1, 2011 through August 31, 2014. The grievance procedure ends in binding arbitration.

The grievant is a music teacher who was assigned to teach music at the Healy Middle School in the 2010-11 school year. During that year, the grievant was first observed by the Assistant Principal on October 22, 2010. The Assistant principal issued a formal evaluation on December 7. Out of thirty-nine (39) observed areas, the grievant was rated "Unsatisfactory" in one (1), "Needs Improvement" in eleven (11) and "Satisfactory" in twenty-seven (27). He was rated "Unsatisfactory" in the following area:

**PLANNING AND PREPARATION:**

- PLANS AND ORGANIZES SUBJECT MATTER CAREFULLY AND SYSTEMATICALLY

He was rated "Needs Improvement" in the following areas:

**TEACHING STRATEGIES OR TECHNIQUES:**

- EMPLOYS A VARIETY OF METHODS/MATERIALS
- ADDRESSES INDIVIDUAL DIFFERENCES
- STIMULATES HIGHER LEVEL THINKING

**PLANNING AND PREPARATION:**

- IDENTIFIES INDIVIDUAL PUPIL'S NEEDS AND INTERESTS
- TEACHER LESSONS BASED ON APPROVED LESSON PLANS

**CLASSROOM MANAGEMENT:**

- MAKES EFFECTIVE USE OF CLASSROOM TIME
- KEEPS RECORDS WHICH ARE ACCURATE/ACCESSIBLE

**DEVELOPMENT OF STUDENT ATTITUDE:**

- ENCOURAGES PUPILS TO DEVELOP AND DEMONSTRATE APPROPRIATE BEHAVIOR IN SCHOOL SITUATIONS

**SCHOOL/COMMUNITY RELATIONS:**

- MAINTAINS EFFECTIVE COMMUNICATION WITH PARENTS

**PROFESSIONAL/PERSONAL QUALITIES:**

- ACTS ON SUGGESTIONS FOR IMPROVEMENT

**ATTENDANCE/PUNCTUALITY:**

- NO. OF TIME TARDY

On March 14, 2011, the Assistant Principal conducted another observation of the grievant. On March 30, 2011, the Assistant Principal issued another formal written evaluation. Out of thirty-eight (38) observed areas, the grievant was rated "Unsatisfactory" in twelve (12), "Needs Improvement" in thirteen (13) and "Satisfactory" in thirteen (13). He was rated "Unsatisfactory" in the following areas:

**TEACHING STRATEGIES OR TECHNIQUES:**

- EMPLOYS A VARIETY OF METHODS/MATERIALS
- ADDRESSES INDIVIDUAL DIFFERENCES
- STIMULATES HIGHER LEVEL THINKING

**PLANNING AND PREPARATION:**

- PLANS AND ORGANIZES SUBJECT MATTER CAREFULLY AND SYSTEMATICALLY
- ORGANIZES MATERIALS, EQUIPMENT, SUPPLIES, OR RESOURCES FOR INSTRUCTION
- TEACHER LESSONS BASED ON APPROVED LESSON PLANS

**CLASSROOM MANAGEMENT:**

- MAKES EFFECTIVE USE OF: A. CLASSROOM EQUIPMENT; B. MATERIALS; AND C. TIME
- KEEPS RECORDS WHICH ARE ACCURATE/ACCESSIBLE

**PROFESSIONAL/PERSONAL QUALITIES:**

- ACTS ON SUGGESTIONS FOR IMPROVEMENT
- SUBMITS REQUIRED RECORDS, REPORTS, OR DOCUMENTS IN A TIMELY MANNER

He was rated "Needs Improvement" in the following areas:

**TEACHING STRATEGIES OR TECHNIQUES:**

- PROVIDES CLEAR INSTRUCTIONAL EXPLANATION
- FOCUSES PUPIL'S ATTENTION ON TASK

**PLANNING AND PREPARATION:**

- UTILIZES CURRICULUM GUIDES
- PARTICIPATES IN PLANNING SESSIONS WITH COLLEAGUES
- IDENTIFIES INDIVIDUAL PUPIL'S NEEDS AND INTERESTS

**CLASSROOM MANAGEMENT:**

- INVOLVES PUPILS EFFECTIVELY IN CLASSROOM ROUTINES
- MAINTAINS A WORK AREA WHICH IS SAFE AND CONDUCTIVE TO LEARNING

**DEVELOPMENT OF STUDENT ATTITUDE:**

- PROMOTES POSITIVE PUPIL SELF-IMAGE
- ENCOURAGES PUPILS IN SELF-EVALUATION
- ENCOURAGES PUPILS TO DEVELOP RESPECT FOR PERSONS AND PROPERTY
- ENCOURAGES PUPILS TO DEVELOP A WILLINGNESS TO SOLVE PROBLEMS
- ENCOURAGES PUPILS TO DEVELOP AND DEMONSTRATE APPROPRIATE BEHAVIOR IN SCHOOL SITUATIONS

**SCHOOL/COMMUNITY RELATIONS:**

- MAINTAINS EFFECTIVE COMMUNICATION WITH PARENTS

Also during the school year, the grievant received numerous memos pertaining to various alleged administrative deficiencies such as failure to turn in phone logs and lesson plans, failure to report to lunch duty on time, failure to attend a scheduled staff meeting without an approved excuse, and unsatisfactory parent contact logs. Some of these memos were incorporated by reference into the evaluations.

By letter of August 4, 2011, Superintendent Dr. Gloria Scott informed the grievant that the Board would consider withholding his increment for the 2011-12 school year. The letter stated, in pertinent part:

Specifically, the Board will consider the recommendation of the Superintendent to re-appoint you for the 2011-2012 year without increment and/or adjustment increase for Unsatisfactory Performance.

By letter of August 16, 2011, Ms. Wildy informed the grievant that the Board approved of the withholding of his increment. The letter stated:

In accordance with N.J.S.A. 18A:29-14, the East Orange Board of Education, at the Board meeting held on August 9, 2011, voted to approve the recommendation of your Principal/Director and the Superintendent of Schools that your employment and adjustment increments for the 2011-2012 school year will be withheld for the following reasons:

**Domain A: Teaching Strategies or Techniques**

- Failure to Satisfactorily Employ a Variety of Methods/Materials
- Failure to Satisfactorily Address Individual Differences
- Failure to Satisfactorily Stimulate Higher Level Thinking

**Domain C: Planning and Preparation**

- Failure to Satisfactorily Plan and Organize Subject Matter Carefully and Systematically
- Failure to Satisfactorily Organize Materials Equipment, Supplies or Resources for Instruction
- Failure to Satisfactorily Teach Lessons Based on Approved Lesson Plans

**Domain D: Classroom Management**

- Failure to Satisfactorily Make Effective Use of Classroom Equipment
- Failure to Satisfactorily Make Effective Use of Materials
- Failure to Satisfactorily Make Effective Use of Time
- Failure to Satisfactorily Keep Records Which are Accurate and Accessible

**Domain F: Professional/Personal Qualities**

- Failure to Satisfactorily Act on Suggestions for Improvement
- Failure to Satisfactorily Submit Required Records, Reports or Documents in a Timely Manner

Accordingly, your salary for the 2011-2012 school year will be frozen at the level of your 2010-2011 school year salary.

On September 19, 2011, the Association filed a grievance on behalf of the grievant contesting the increment withholding as being disciplinary without just cause. On August 8, 2012, the Association demanded 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, 146 (¶22057 1991), 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 arbitration should be restrained because the increment withholding was based on ineffective teaching performance. It argues that the grievant exhibited a pattern of poor teaching performance as noted by the observations, evaluations, and memoranda he received throughout the 2010-11 school year. The Board notes that the Commission has found that allegations of insufficient instructional planning concern teaching performance and are not arbitrable.



The Association responds that arbitration should not be restrained because the grievant's increment withholding was predominantly disciplinary in nature, and not predominantly related to the evaluation of teaching performance. It asserts that the record supports that the withholding was not made based on the grievant's teaching performance, but rather due to the numerous memos he received regarding his alleged administrative deficiencies. The Association argues that matters occurring outside of the classroom, such as a teacher's performance during lunchroom duty, have been held by the Commission to be arbitrable.

The Board replies that the grievant's alleged failures to submit lesson plans, grade reports, and parent call logs constitute deficiencies in his performance as a teacher, regardless of the existence of administrative policies directing performance of these tasks.

In determining whether an increment was withheld for disciplinary reasons or teaching performance, we require to be included in the record, and rely upon, the statement of reasons issued to the grievant. N.J.A.C. 19:13-2.2(a)(3). While grievant's alleged failure to satisfactorily submit required records is mentioned in the statement of reasons, the majority of the reasons substantially concern the grievant's teaching performance such as criticisms of his teaching strategies and techniques, planning and preparation and classroom management.

See Woodbury Bd. of Ed., P.E.R.C. No. 2006-81, 32 NJPER 128 (¶59 2006) (arbitration restrained where teacher allegedly failed to prepare and develop adequate assessment strategies, have learning activities involving teacher feedback or student/student interaction, and record student grades); Englewood Bd. of Ed., P.E.R.C. No. 2006-33, 31 NJPER 353 (¶140 2005) (arbitration restrained where teacher allegedly lacked lesson plans and a class register book, and had poor instructional practices). Therefore, this appeal must be filed with the Commissioner of Education. Any assertion by the Association that the asserted reasons are pretextual should be raised in that forum. 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 East Orange Board of Education for a restraint of binding arbitration is granted.

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 30, 2014

Trenton, New Jersey