P.E.R.C. NO. 2014-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC CITY BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2013-050

ATLANTIC CITY EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Atlantic City Board of Education for a restraint of binding arbitration of a grievance filed by the Atlantic City Education Association. The grievance contests the withholding of a teacher's salary increment. Finding that the grievant's alleged falsification of home instruction forms is a disciplinary reason for the withholding not predominately related to an evaluation of teaching performance, the Commission holds that an arbitrator may review such allegations which do not require educational expertise to evaluate.

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, DeCotiis, Fitzpatrick & Cole, LLP, attorneys (Avis Bishop-Thompson, of counsel)

For the Respondent, Selikoff & Cohen, P.C., attorneys (Keith Waldman, of counsel)

DECISION

On February 6, 2013, the Atlantic City Board of Education filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the Atlantic City Education Association. The grievance contests the withholding of a teacher's salary increment and the placement of a reprimand letter in her personnel file. Because the increment withholding and the letter predominately are disciplinary, we deny the Board's request to restrain arbitration.

The Board filed briefs, exhibits, the certification of Superintendent Donna L. Haye, and the affidavit of E.G., mother of one of the grievant's students. The Association filed a brief. These facts appear.

The Association represents a broad-based unit including certified teaching personnel. The Board and Association are parties to a collective negotiations agreement (CNA) effective from July 1, 2010 through June 30, 2013. The grievance procedure ends in binding arbitration.

The grievant is a teacher who began providing home instruction services to a student, "K.O.", beginning in October 2010 and continuing for the remainder of the 2010-11 school year. The affidavit of K.O.'s mother states that the grievant failed to show up for most home instruction sessions. Prior to the start of the 2011-2012 school year, the mother told Board social worker Theda Allen that she was concerned about the grievant being assigned to teach her daughter for that school year. In September 2011, Allen filed a complaint with Harry Formica, Supervisor of Department of Special Services, regarding a complaint that the grievant had failed to provide home instruction services. The Board's investigation of the complaint determined that the grievant engaged in a pattern of falsifying the school district's home instruction forms and failing to show up to provide home instruction.

On September 24, 2012, the Board informed the grievant that it would consider taking employment action against her at its October 15 meeting. The grievant presented her side at the October 15 meeting and denied any wrongdoing. On November 20,

the Board voted to withhold the grievant's increment for the 2013-14 school year. By letter of November 30, 2012, Superintendent Haye issued a statement of reasons to the grievant for the increment withholding, stating, in pertinent part:

> This is to advise you that at the November 20, 2012 meeting of the Atlantic City Board of Education ("Board"), the Board voted to withhold your salary increments for the 2013-14 school year. This decision is based upon the results of the investigation conducted by the Administration which determined you engaged in a pattern of falsifying the school district's home instruction forms to declare that you provided home instruction for longer periods of time than was actually the case.
>
> ...
>
> During your presentation to the Board at the October 15, 2012 meeting, you denied any wrongdoing.
>
> The Board, however, was persuaded that good cause exists that you engaged in conduct unbecoming a public school teacher. By a public vote taken on November 20, 2012, the Board voted to withhold all adjusted increments and employment increments from your salary for the 2013-2014 school year. On the basis of such a withholding, your salary for the 2013-2014 school year contract will be $72,843. It shall not be mandatory upon the Board to pay any such increment in any future year as an adjusted increment. Furthermore, the Board directed that you are prohibited from providing home instruction services and you are ineligible from participating in any extra-curricular activities for one year. This letter shall also serve as a letter of reprimand and will be place in your personnel file.

On December 10, 2012, the Association filed a grievance on behalf of the grievant contesting her increment withholding and the letter of reprimand as violations of the CNA's just cause clause (Section 5.2). The grievance requested a remedy of return of the increment and adjustments for the 2013-14 school year, and removal of the reprimand latter from the grievant's personnel file. On December 20, the Board denied the grievance:

> We have reviewed the facts and circumstances as alleged in [Greivant's] grievance and the Board's practices and policies, we are denying [Grievant's] grievance to receive her increment and all adjustments for the 2013-2014 year based upon [Grievant's] lack of supervision and instruction in compliance with the home instruction program. Moreover, the withholding of the increment is based on [Grievent's] performance as a home instruction teacher and is not a subject for binding arbitration.

A Level 2 grievance hearing was held at the Board's January 14, 2013 meeting. Following the grievant's presentation, the Board voted to uphold the grievance. On January 18, 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 its decision to withhold the grievant's salary increment was not a disciplinary measure and is therefore not arbitrable. The Board argues that the increment withholding stems from the grievant's failure to provide adequate home instruction services for a special needs student due to: leaving work in the mailbox and not showing up; intimidating the student's parent and Board staff; and falsifying records regarding the home instruction services provided. It asserts that the decision to withhold the grievant's increment was based predominately on an evaluation of her poor home instruction performance, and was not intended to be a disciplinary measure. Citing Dennis Township Bd. of Ed., P.E.R.C. No. 98-50, 23 NJPER 605 (¶28297 1997), the Board notes that the Commission has found an increment withholding predominately evaluative where the two stated reasons were inability to control students and absence from the classroom. Furthermore, the Board argues that the reprimand letter placed in the grievant's file is not disciplinary, but is an informational evaluation of her home instructor performance and is thus not subject to arbitration.

The Association asserts that the increment withholding and November 30, 2012 reprimand letter were predominately disciplinary and not evaluative and are therefore arbitrable. It argues that the Commission must only consider the reasons for increment withholding stated in the Board's reprimand letter, and

that said letter imposed various punishments and accused the grievant of falsifying home instruction forms but contained no mention of criticism of her teaching performance. The Association notes that there were no evaluations written, no corrective action plans, and no conferences with the grievant discussing ways to improve her teaching performance. Citing Bergenfield Bd. of Ed. and Bergenfield Ed. Ass'n, P.E.R.C. No. 2006-69, 32 NJPER 82 (¶42 2006), aff'd 33 NJPER 186 (¶65 App. Div. 2007) and Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992), the Association asserts that the Commission has previously found that increment withholdings based on falsifying sign-out sheets, not reporting to class, absences, and leaving school before the end of the day were not predominately evaluative of teaching performance. It contends that the instant case also involves a withholding based on absenteeism or non-performance where there is no teaching performance to evaluate, and is thus predominately disciplinary and arbitrable.

In determining whether an increment was withheld for disciplinary reasons or teaching performance, we require the statement of reasons issued to the grievant be submitted with the petition. N.J.A.C. 19:13-2.2(a)(3). Here, the statement of reasons provides the Board withheld the increment based on the results of an investigation which concluded the grievant falsified school district home instruction forms to reflect that

she provided instruction longer than actually provided. While these are allegations of serious misconduct, if true, they do not require educational expertise to determine it is wrong. See Clifton Bd. of Ed. (withholding predominantly disciplinary where based on allegations that teacher left work early, falsified sign-out sheet, repeatedly missed back-to-school night, and was insubordinate). Thus, a grievance arbitrator may review the increment withholding.

We are also persuaded that the November 20, 2012 letter of reprimand was disciplinary as it is void of any evaluative comments, prescribes additional sanctions and states it is a "letter of reprimand." The arguments made by the Board to support its actions go to the issue of just cause to be determined by the arbitrator.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Voos and Wall voted in favor of this decision. None opposed. Commissioners Bonanni and Jones were not present.

ISSUED: November 21, 2013

Trenton, New Jersey