

P.E.R.C. NO. 2014-33

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2013-031

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. Finding that the grievant's evaluations overwhelmingly concern criticisms in teaching techniques, knowledge, planning, presentation, and classroom management, rather than her disciplinary issues of absenteeism, tardiness and cell phone use, the Commission holds that the withholding was based predominately on an evaluation of teaching performance and therefore restrains binding 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.<sup>1/</sup> 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.

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<sup>1/</sup> The Board requested a stay of the underlying arbitration, however, a January 12, 2013 letter from the arbitrator stated that the arbitration would be held in abeyance pending the outcome of this matter.

The Board filed briefs, exhibits, and the certification of its 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.

Grievant began teaching for the 2010-11 school year at the Johnnie L. Cochran, Jr. Academy. On October 15, 2010, she was first formally observed and evaluated by the principal and was rated as follows:

-**Teaching Strategies and Techniques**: "needs improvement" or "unsatisfactory" in six of seven subcategories;

-**Knowledge of Content**: "needs improvement" in two of three subcategories;

-**Planning and Preparation**: "needs improvement" or "unsatisfactory" in six of seven subcategories;

-**Classroom Management**: "needs improvement" or "unsatisfactory" in four of six subcategories;

-**Development of Student Attitude**: "needs improvement" in five of five subcategories;

-**Professional/Personal Qualities**: "needs improvement" or "unsatisfactory" in two of six subcategories;

-**School/Community Relations**: "needs improvement" in 3 of 3 subcategories.

On November 9, 2010, the principal conducted another formal evaluation of the grievant, which showed little to no improvement from the first evaluation.

The grievant was reassigned to the Toussaint Louverture School. On January 7, 2011, the grievant's new principal conducted a formal observation/evaluation. The results of the evaluation showed little to no improvement from the November 2010 evaluation in the categories of "Teaching Strategies and Techniques", "Knowledge of Content", "Planning and Presentation" and "Classroom Management". The principal made the following comments:

No objective on the board when I walked into classroom. Students were sitting at their desk with no work assignment. [Grievant] played a tape of colors in French 5 times and the students did not respond to the tape. Another strategy should have been used to engage the students in the lesson.

When I walked into the classroom at 1:56 pm [Grievant] was sitting on the kidney table talking with the TA. Once [Grievant] started the lesson she lost valuable time during the lesson trying to have students to partner with one another.

However, there was improvement in the categories of "Development of Student Attitude", "Professional/Personal Qualities", and "School/Community Relations." This evaluation also included an "Attendance/Punctuality" category wherein the grievant was rated "satisfactory" in the number of times tardy

subcategory but "needs improvement" in the cumulative number of days absent subcategory.

On March 30, 2011, the principal conducted another observation/evaluation of grievant, with similar results from the January 2011 evaluation. The principal made the following comments:

[Grievant] was talking on the cell phone several times during school [sic] the school day. This practice goes against district and school policy.

Under the recommendations for the grievant's "Professional Improvement Plan", the principal made the following comments:

Develop and implement classroom activities that engage the students and deflect the possibility of their participating in acting out behaviors. Clearly define and articulate classroom standards of behavior to students. Manage your time to allow for closure activities and assign follow up work based on students needs after the lesson. Consult with specialists to gain insight for planning creative lesson activities. Check for comprehension during the lesson and adjust teaching when necessary. Provide individualized instruction and actively involve students in the learning process. Write clearly defined, comprehensive and neat lesson plans that contain skills, activities, materials, timelines and expected outcomes. Explain the purpose, scope and expected goals of the lesson to the students. [Grievant] has enrolled in a Master's program in Best Practices in Teaching in order to address areas of Needs Improvement and Unsatisfactory. [Grievant] will work to maintain satisfactory attendance for the 2011/2012 school year failure to obtain satisfactory attendance will result in adverse personnel action.

On April 1, 2011, at the grievant's request, the principal completed another evaluation, with results similar to the March 2011 evaluation. The principal made the following comments under "Commendations" "[grievant] has objective, activity and materials posted. Also used a "Do Now" activity at the beginning of the lesson." Under the "Professional Improvement Plan" section, the principal commented as follows:

Inefficient lesson organization leads to very little student involvement. The basis of your lesson centered on the video which was not in your possession at the time of your lesson. The class lack [sic] organization and direction because you loss [sic] valuable instructional time trying to adjust lesson without video. You also did not have enough worksheets or crayons for students to use. There was no consistency in disciplinary techniques. Class organization and direction was not always evident.

On April 6, 2011, the principal recommended to the Human Resource Services Director that the grievant's increment be withheld. The principal commented that "the number of indicators rated as "needs improvement" coupled with the amount of support given this teacher illustrate her inability to improve her level of performance." The Human Resource Services Director certified that the principal considered all four of the evaluations conducted during the 2010/2011 school year in making the recommendation.

On August 4, 2011, the Superintendent sent grievant a letter informing her that the Board would consider her increment withholding at its August 9 meeting. On August 9, the Board passed a resolution withholding the grievant's 2011-12 increment. On September 19, the Association filed a grievance on behalf of the grievant contesting her increment withholding as being disciplinary without just cause. On August 9, 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 argues that arbitration should be restrained because the grievant's increment withholding was based on her ineffective teaching performance. It asserts that the grievant's evaluations from the 2010-11 school year show that she repeatedly performed unsatisfactorily and/or in need of improvement in her teaching strategies/techniques, knowledge of content, class planning and preparation, and classroom management.

The Association responds that the withholding predominantly concerns the grievant's alleged deficiencies in absenteeism and cell phone use in violation of Board policy, not her classroom



performance. It asserts that the grievant's "Unsatisfactory" absenteeism and tardiness ratings are issues that the Commission has found do not involve an evaluation of teaching performance.

A review of the grievant's evaluations make clear that while there were concerns about absenteeism and cell phone use, the overwhelming amount of criticism from two different principals stemmed from the grievant's alleged lack of improvement in the categories of Teaching Strategies and Techniques, Knowledge of Content, Planning and Presentation and Classroom Management - - all topics relating to teaching performance. The comments included by the principals in the evaluations also support that the concerns centered around grievant's performance in the classroom and her ability to effectively teach. Therefore, we grant the Board's request for a restraint of binding arbitration.

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 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