

P.E.R.C. NO. 2014-42

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LINDEN BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2013-051

LINDEN EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Linden Board of Education for a restraint of binding arbitration of a grievance filed by the Linden Education Association. The grievance contests the withholding of a teacher's salary increment. Finding that the stated reason for the withholding predominately relates to teaching performance because it was based on an annual evaluation containing unsatisfactory ratings in instruction, preparation, and professional responsibility, the Commission restrains arbitration of the increment withholding.

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, Weiner Lesniak, LLP, attorneys  
(Mark A. Tabakin, of counsel; Sarah A. Gober, on the  
brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys  
(Randi Doner April, of counsel)

DECISION

On February 21, 2013, the Linden Board of Education filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the Linden 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 has filed briefs, exhibits, and the certification of Assistant Superintendent Danny Robertozzi. The Association filed a brief and exhibit. 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 July 1, 2011 through June 30, 2014. The grievance procedure ends in binding arbitration.

The grievant is a tenured teaching staff member assigned to the Board's elementary School #8 as a kindergarten teacher. Robertozzi certified that in December 2011, the grievant was advised that her increment was in jeopardy of being withheld due to poor teaching performance. On December 8, 2011, the grievant received an Educator Improvement Plan Chart listing areas to be improved, objectives and plans for improvement, evaluation and measurement criteria and timelines, and a section for maintaining notes on the grievant's progress in each area.

The grievant's April 27, 2012 Evaluation Report rated her performance in thirty subcategories. She was rated Unsatisfactory in six sub-categories, Basic in seven sub-categories, and Proficient in seventeen sub-categories. The Evaluation concluded with the recommendation of Administrator Jennifer Smith to not grant the grievant's increment.

On May 8, 2012, the grievant submitted a rebuttal response to the April 2012 Evaluation Report. At its June 20 meeting, the Board passed a resolution to withhold the grievant's increment for the 2012-13 school year. The resolution noted that "the

Superintendent of Schools has recommended" the withholding, and that "the Board has considered the comments, statements, and recommendation of the Superintendent of Schools." By letter of June 21, Superintendent Rocco G. Tomazic issued the grievant a statement of reasons for the increment withholding, stating:

As you know, the Linden Board of Education discussed your employment at its June 20, 2012 meeting. At that time, the Board voted to withhold your employment and adjustment increments for the 2012-2013 school year. The Board found this action justified by your annual performance evaluation.

On July 12, 2012, the Association filed a grievance contesting the increment withholding as being a disciplinary measure without just cause in response to a Division of Youth and Family Services (DYFS)<sup>1/</sup> investigation that involved the grievant earlier in the 2011-12 school year.<sup>2/</sup>

On December 18, 2012, the Board denied the grievance, stating:

The Board is in receipt of the above referenced grievance which was the subject of a grievance hearing on December 17, 2012. At that time, the Association (representing [Grievant]) contested the withholding of [Grievant's] increments for the 2012-2013 school-year. Please be advised that the

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1/ Now the New Jersey Department of Children and Families.

2/ The Association stated that "DYFS cleared [Grievant] of the allegation of neglect", and the Board's Exhibit I shows that the State's Report concluded: "Since the allegation of abuse is unfounded, the District is not required to take any disciplinary or other personnel actions against [Grievant]."

grievance is denied for the following reasons:

1. Foremost, the Association's claim that [Grievant's] increment was withheld as disciplinary action in response to the incident giving rise to a DYFS investigation involving allegations of student neglect is erroneous. [Grievant's] increment was withheld for evaluative reasons and, therefore, this matter is not subject to the grievance procedure.

Prior to the DYFS investigation, [Grievant] was advised by the Superintendent that her increment was in danger of being withheld as a result of her poor teaching performance. In furtherance of her discussion with the Superintendent, in December of 2011, [Grievant] was placed on a performance improvement plan, in which several deficiencies regarding [Grievant's] classroom presentation were identified and strategies on correcting the those [sic] weaknesses provided.

Notwithstanding, the December 2011 performance plan, [Grievant's] annual evaluation continued to identify "unsatisfactory" ratings in multiple areas of Planning and Preparation, Instruction and Professional Responsibility. Specifically, [Grievant's] evaluation demonstrates that [Grievant] lacks an understanding of the needs of her students, fails to implement the proper sequencing of instruction and neglects to differentiate instructional strategies. In addition, [Grievant's] evaluation reflects a continued lack of professionalism when dealing with parents and colleagues. [Grievant] exhibits a limited ability to accept constructive criticism and has been the subject of numerous parental complaints regarding her lack of professional [sic]. As a result of the inadequacies identified in the evaluation, the withholding of [Grievant's] increment was recommended. Thus, as evidenced by her annual evaluation

and previous performance improvement plan, [Grievant's] increment was withheld for predominately performance reasons and was not disciplinary in nature.

2. To the extent that the incidents leading to the DYFS investigation were considered in the recommendation to withhold [Grievant's] increment, the circumstances surrounding the underlying issues that gave rise to the investigation further buttress the weaknesses and concerns otherwise outlined in [Grievant's] evaluation. Since the charges of neglect asserted against [Grievant] were determined to be "unfounded" pursuant to DYFS's standards, the Board has been assured by administration that all references to the DYFS report and investigation have been removed from [Grievant's] file. Nevertheless, the Board is not precluded from taking responsive action to these same incidents provided that the District conducts its own investigation, which was performed.

Moreover, to the extent that [Grievant's] increment withholding was premised upon the events of January 27, 2012, the investigation conducted by the District revealed that on the day, [Grievant] failed to take the necessary and appropriate action to ensure the health, welfare and safety of her students during dismissal. As a result of her failure to properly supervise her charges, a five year old student was left in the classroom unattended for several minutes. Equally troubling, however, is [Grievant's] inability and/or unwillingness to appreciate the seriousness of this incident. Rather, when confronted about the events, [Grievant] sought to abrogate her responsibility by placing blame for the incident on the classroom paraprofessional. In doing so, [Grievant] has demonstrated a complete neglect of the responsibilities attendant to her role as a certified teaching staff member, which only further reflects the deficiencies noted in her evaluation. Based on the foregoing, the grievance is denied.

On December 24, 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 must be restrained because the grievant's increment was withheld for the following predominately evaluative teaching performance reasons: lack of professionalism with parents and staff; lack of understanding of the needs of her students; failure to implement proper sequencing of instruction; and limited ability to accept constructive criticism. The Board asserts that the grievant's 2012 Evaluation Report demonstrates that the increment withholding was not disciplinary, but was due to unsatisfactory performance in many of the assessed categories. Citing Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003), the Board notes that the Commission accepts the statement of reasons for the withholding and does not consider contentions that those reasons are pretextual or unsupported. It argues that the DYFS investigation related to the unsupervised student was not the basis for the



increment withholding, but that even it had been, it would still constitute a non-arbitrable performance-based reason.

The Association responds that the increment withholding was in retaliation for the dismissal of the DYFS charge and is therefore disciplinary in nature and arbitrable. Citing Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001), it argues that the Commission has found that withholdings based on leaving a student unsupervised are based on discipline for violation of administrative procedures, not deficiencies in teaching performance. The Association further asserts that the grievant received a favorable classroom observation on April 24, 2012 that was not mentioned in her sub-par April 27, 2012 Evaluation Report. It contends that the Evaluation Report listed unsubstantiated observations of the grievant acting unprofessionally to students, teachers, and parents.

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). Here, the statement of reasons explicitly states the Board relied on the grievant's performance evaluation. Thus, any appeal of the withholding must be made to the Commissioner of Education. The Association argues that the Board's stated reasons were not the real reason. However, in selecting a forum under N.J.S.A.

34:13A-27, we accept the board's reasons for a withholding and do not consider contentions that those reasons are pretextual or unsupported. Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003); Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996). We assume the Board will be bound by its asserted reasons before the Commissioner of Education and that the Commissioner has the power to entertain allegations that the asserted reasons are pretextual. Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008); 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). Accordingly, we restrain binding arbitration.

ORDER

The request of the Linden Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: December 19, 2013

Trenton, New Jersey