

P.E.R.C. NO. 2015-7

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BAYONNE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-031

BAYONNE TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Bayonne Board of Education for a restraint of binding arbitration of a grievance filed by the Bayonne Teachers Association. The grievance contests the withholding of a teacher's salary increment. Finding that the teacher's failure to provide calculators during a standardized test does not primarily relate to teaching performance, and that the teacher already had positive performance evaluations and was recommended for an increment prior to the testing mistake, the Commission holds that the withholding was not predominately based on an evaluation of teaching performance.

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, Apruzzese, McDermott, Mastro & Murphy, attorneys (Robert J. Merryman, of counsel)

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

DECISION

On November 6, 2013, the Bayonne Board of Education filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Bayonne Teachers Association. The grievance contests the withholding of a teacher's salary increment for failing to allow calculator usage during standardized testing. Because the increment withholding is not based predominately on an evaluation of teaching performance, we decline to restrain arbitration.

The Board filed briefs, exhibits, and the certification of Superintendent Patricia L. McGeehan. The Association filed a brief, exhibits, and the certification of the grievant teacher. These facts appear.

The Association represents a unit of teachers and other school professionals employed by the Board. The Board and Association are parties to a collective negotiations agreement (CNA) effective from September 1, 2007 through August 31, 2010. The grievance procedure ends in binding arbitration.

The grievant is a resource and inclusion teacher at Washington Community School. Prior to this position, she was a resource and inclusion teacher in the district's Robinson School.

In the grievant's first year at Washington Community School (2011-12 school year), she received ratings of "Meets Expectations" or "Exceeds Expectations" in all observation reports and in her annual evaluation.

In 2013, the Board conducted three observations of the grievant. The grievant was rated effective in all categories. The grievant's annual evaluation, covering the period from April 1, 2012 through March 31, 2013, also rated her effective and noted that her Professional Development Plan (PDP) had been addressed as evidenced by "The indicators of success from the 2012-13 PDP." Grievant's March 15, 2013 evaluation noted that "a review of the data reveals that pupils have made the progress anticipated" and therefore no changes in her job performance or program were recommended. The evaluator stated that the grievant's contract and salary increase would be recommended.

Dr. McGeehan certifies to the following facts. Grievant is a tenured Teacher of the Handicapped and was assigned as an In-Class Support Teacher at the Washington Elementary School during the 2012-13 school year. Her responsibilities include ensuring that modifications for tests, quizzes, and lesson plans are prepared and implemented for students in accordance with their Individualized Educational Plans (IEP's). In April 2013, standardized testing was administered for Bayonne elementary students and the grievant was assigned as testing monitor for seven classified students who each had IEP's requiring accommodations for standardized testing that included the use of calculators for the math portion of the test. During the standardized testing, grievant failed to provide calculators that the students needed for the test, so they completed the math portion without the necessary modifications. Once the Board discovered this error, it was required to notify the State Department of Education (DOE) which investigated how the error occurred. The grievant failed and/or refused to provide pertinent information to the State during its investigation into the calculator error. All seven students were required to retake the math section of the test with calculators. The DOE also required the Board to prepare a corrective action plan regarding the calculator error, and it cost the Board over \$600 for the re-administration of the tests with calculators.

Grievant certifies to the following facts. Prior to the testing day, Mr. Kopacz, Principal of Washington Community School, failed to provide any training regarding the tests and stated to her: "I'm not going to read the manual to you. If you do this wrong, you won't have food to put in your refrigerator." Kopacz then left handouts regarding the usage of calculators for the tests on the stage of the testing room and directed the test monitors to take one. Grievant certifies that contradictory e-mails were sent out prior regarding calculator usage, and manuals only became available on the morning of the tests. Grievant asserts that the Board failed to properly train her in the usage of calculators. Regarding the investigation into calculator usage during the test, grievant certifies:

At all times after the testing, I cooperated in the investigation of the issues. However, Mr. Kopacz attempted to violate my Weingarten Rights during the investigation. He kept telling me that I needed to write a statement immediately and would not allow me to speak to my Union representative. I told him that I would not write anything down without my representative present. This is what I believe to be the District's argument in stating that I did not cooperate. However, I attempted to cooperate at all times while protecting my rights as an Association member.

The grievant alleges her increment was withheld after the school district was allegedly fined for the failure to provide calculators. She notes she has all positive performance

evaluations for the past five years, and she believes that her increment withholding was done purely to punish her.

On September 3, 2013, McGeehan informed the grievant that on August 28 the Board voted to withhold her salary increment for the 2013-14 school year. The letter provided the following statement of reasons for the increment withholding:

The action of the Board in withholding your salary increment was based on the following conduct and deficiencies:

1. Failure to make sure that required modifications for standardized tests were implemented for students with learning disabilities.
2. Failure to be familiar with and follow requirements of students IEP's;
3. Failure to follow directions of supervisors;
4. Failure and/or refusal to cooperate with school officials in responding to a State investigation.

On September 6, 2013, the Association filed a grievance contesting the increment withholding. On October 21, 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 must be restrained because the grievant's increment was withheld predominately based on the the evaluation of her teaching performance. It asserts significant knowledge of the educational process is required to: determine whether grievant's failure to follow required students modifications; failure to follow requirements of student IEP's, failure to follow directions of her supervisor; and failure to cooperate with school officials regarding a State investigation are performance issues warranting an increment withholding.

The Association responds that the stated reasons for the increment withholding do not involve teaching performance, but involve disciplinary issues and alleged violations of administrative procedures following the testing incident. Citing Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992) and Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001), the Association argues that increment withholdings for alleged violations of administrative procedures, work rules, and other misconduct or insubordination have been found arbitrable.

The Board replies that grievant's positive classroom observations and evaluations have no bearing on the nature of the increment withholding in this case. Citing Millville Bd. of Ed., P.E.R.C. No. 98-48, 23 NJPER 601 (¶28295 1997), Newton Bd. of Ed., P.E.R.C. No. 96-3, 21 NJPER 271 (¶26175 1995), and Florham



Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 159 (¶24081 1993), the Board argues that the Commission has found increments were withheld for performance reasons even when the primary basis was just one classroom incident.

We serve a limited gatekeeping function. Our task is limited to determining if the Board acted for reasons related to an evaluation of teaching performance, not whether the Board had just cause to discipline the teacher. Here, the reasons set forth by the Superintendent all concern the failure of the teacher to provide calculators and her subsequent conduct during the investigation. These reasons do not concern an evaluation of teaching performance. The DOE has already determined that calculators were required and not provided for the students. The record indicates the teacher has positive performance evaluations void of concerns for deficiencies in instruction or classroom management. The record further indicates that the grievant's increment was recommended prior to the testing mistake. Thus, we conclude the increment withholding was for predominately disciplinary reasons and may be reviewed through binding arbitration.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: August 14, 2014

Trenton, New Jersey