

P.E.R.C. NO. 2015-49

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-104

ELIZABETH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Elizabeth Board of Education for a restraint of binding arbitration of a grievance filed by the Elizabeth Education Association. The grievance contests the withholding of a teacher's salary increment. Finding that the reasons for the withholding do not predominately relate to evaluation of teaching performance, the Commission declines to restrain 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 (Nicholas Celso III, of counsel and on the brief; Joshua I. Savitz, on the brief and Patricia C. Melia, on the brief)

For the Respondent, Caruso Smith Picini, P.C., attorneys (Steven J. Kaflowitz, of counsel)

DECISION

On June 9, 2014, the Elizabeth Board of Education filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the Elizabeth Education Association. The grievance asserts that the Board disciplined a teacher without just cause by withholding his salary increment.

The parties have filed briefs and exhibits. The Board has filed certifications of Superintendent Olga Hugelmeyer and former Vice-Principal of Abraham Lincoln School No. 14 Kathy Badalis. The Association has filed the certification of John Anello, an attorney representing the grievant. The Board filed a responsive

certification of Heather Savage-Ford, Associate Counsel for the Board. These facts appear.

The Association represents teachers and certain other employees. The Board and Association are parties to a collective negotiations agreement (CNA) effective from July 1, 2009 through June 30, 2012 as well as a memorandum of agreement effective from July 1, 2012 through June 30, 2015. The grievance procedure ends in binding arbitration.

Grievant was hired in 2001 and was a fifth grade teacher assigned to Abraham Lincoln School No. 15 during the 2012-2013 school year. On January 9, 2013, grievant was observed by Michelle Calas, Principal. The performance level ranges are Unsatisfactory, Basic, Proficient, and Distinguished.<sup>1/</sup> Grievant was rated "Proficient" in creating an environment of respect and rapport and managing student behavior. He was rated "Basic" in: establishing a culture for learning; managing classroom procedure; organizing of physical space; communicating with students; use of questioning and discussion techniques; engaging students in learning; using assessment in instruction; and demonstrating flexibility and responsiveness.

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1/ Distinguished is the "Highest level of practice in this component; serves a model of practice". Proficient is "Evidence of consistent proficiency in this area of practice". Basic is "Practice relating to this component is inconsistent". And, Unsatisfactory "Denotes poor performance in this component".

On February 14, 2013, grievant was observed by Vice Principal Kathleen Badalis. He was rated "Proficient" in: creating an environment of respect and rapport; establishing a culture for learning; managing classroom procedure; managing student behavior; organizing physical space; using assessment in instruction; and demonstrating flexibility and responsiveness. Grievant was rated "Basic" in: communicating with students; use of questioning and discussion techniques; and engaging students in learning.

On February 21, 2013, grievant was evaluated by Michael Robel. He was rated "Proficient" in creating an environment of respect and rapport and managing student behavior. He was rated "Basic" in: establishing a culture for learning; communication with students; using questioning and discussion techniques; engaging students in learning; and using assessment in instruction.

On March 1, 2013, Principal Cunha filled out a Non-Renewal/Increment Withholding Form for the grievant. This form cites the reasons for Cunha's increment withholding recommendation to the Board. It states that grievant was absent 8.5 days; it provides the dates of the above-referenced evaluations; it cites two corrective memoranda issued on March 15

and March 18 relating to attendance and parental complaints.<sup>2/</sup> In other reasons, Cunha wrote, “[Grievant] has been moved to different classrooms due to constant complaints from parents. Two bullying investigations are in place currently. No progress on performance.”

The Board did not provide the March 18, 2013 memorandum authored by Cunha regarding grievant’s attendance. The March 15 memorandum was issued to the teacher from Badalis advising him of six parent complaints regarding comments made to students; detentions given out to students; and penalizing a student by having them sit out of swim class due to their behavior during a safety drill. The memorandum provides no specifics and recites the Board’s Core Beliefs and Commitments, Pledge of Ethics, and Guiding Principles.

The Board has also provided two Harassment, Intimidation and Bullying (HIB) Investigation Reports on cases filed by students against the grievant. The reports were both issued on March 13, 2013. The first report exonerates the grievant. The second finds that grievant created a hostile educational environment due to a student’s national origin. Grievant was found to have told a student, “If you don’t like America, why don’t you go back to your country?” During the investigation, the teacher stated that

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<sup>2/</sup> No explanation is provided by the Board for why the withholding form is dated March 1, 2013 and references memoranda issued after that date.

he made a comment to the student when he wouldn't salute the flag; the student is from Afghanistan and travels there often; and the student often says "anti-American things". The teacher elaborated that he had been in touch with the student's father on many occasions about the student's behavior without improvement. Another teacher who was in the classroom at the time of the alleged remark told the investigator that the student involved was a "tough" kid who hates America and once made the comment, "Planes crashing into buildings - isn't that a great thought." The teacher added that the particular student tests your patience and that the grievant is a stern teacher.

The HIB report substantiating the bullying allegations stated the following action would be taken against the grievant: parents contacted; teacher reassigned to a tutor position within the school; supportive services for students via social worker and guidance counselor; professional development; letter of reprimand; stringent monitoring by administration; and further administrative action as may be required by HR.

At its May 9, 2013 meeting, the Board voted to withhold the grievant's increment for the 2013-2014 school year. On September 24, the Association filed a grievance contesting the teacher's increment withholding. On October 29, the Association demanded binding arbitration. This petition ensued.

The Board has not provided a statement of reasons for the grievant's increment withholding issued at the time to the teacher other than the March 1, 2013 "Non-Renewal/Increment Withholding" form.

The Board argues that arbitration must be restrained as the grievant's increment was withheld due to his ineffective teaching performance. The Association responds that the increment withholding was primarily disciplinary.<sup>3/</sup>

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.

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<sup>3/</sup> We will not consider the certification provided by the Association related to the settlement discussions between the parties' attorneys. The Commission follows the evidentiary rule that offers to compromise are not admissible to prove that a disputed claim has, or lacks, merit. See Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 283 (App. Div. 2007); State of New Jersey (Juvenile Justice Commission), P.E.R.C. No. 2012-24, 38 NJPER 205 (¶70 2011); Township of Mantua, P.E.R.C. No. 82-99, 8 NJPER 302, 303 (¶13133 1982).

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 (¶22057 1991), we articulated our approach to determining the appropriate forum. 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. [17 NJPER at 146]

In determining the predominate basis for a withholding, we ordinarily look to the official statement of reasons given in the



letter notifying a teaching staff member of a withholding. Here, the Board did not submit the statement of reasons for the withholding that is required to be given to the teacher within ten days of the withholding pursuant to N.J.S.A. 18A:29-14 and is required to be filed with its scope of negotiations petition pursuant to N.J.A.C. 19:13-2.2(a)(3). When a Board does not follow its legal obligation, the Commission will ordinarily require certifications from the principal actors attesting to the reasons for the withholding. See, e.g. Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008); Bridgeton Bd. of Ed., P.E.R.C. No. 2006-100, 32 NJPER 197 (¶86 2006); Woodbury Bd. of Ed., P.E.R.C. No. 2006-81, 32 NJPER 128 (¶59 2006); and Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005). However, if the record contains documents from the Board of Education that explain the basis for withholding and are more contemporaneous with the increment withholding action, we will accept and place greater reliance on those reasons rather than certifications prepared for litigation. See Summit Bd. of Ed., P.E.R.C. No. 2013-57, 39 NJPER 311, 313 (¶107 2013) (paragraph in annual evaluation linking prohibited computer use to increment withholding constituted statement of reasons rather than Human Resources Director's certification); See also Bridgeton Bd. of Ed., supra (where Board did not supply statement of reasons, the Commission relied on a letter the superintendent

wrote to the Board's counsel explaining the withholding); and Washington Tp. Bd. of Ed., supra (where Board did not supply statement of reasons, the Commission relied on a letter the executive vice principal wrote to the superintendent recommending increment withholding). Therefore, Principal Cunha's March 1, 2013 internal increment withholding form is given greater weight in determining the reasons for the withholding than is the certification of former Vice-Principal Badalis which was prepared after the grievance and scope petition were filed.

We are not persuaded in our increment withholding gatekeeping function by the labels, e.g. "reprimand" or "evaluation," given to the documents underpinning a school board's decision. Rather, as all increment withholdings are inherently disciplinary, we are concerned with whether the cited deficiencies are based on an evaluation of teaching performance. Edison Tp. Bd. of Ed., 304 N.J. Super. 459 (App. Div. 1997). The increment withholding form we rely on here in lieu of a statement of reasons provides that grievant's attendance was a factor. It notes the three evaluations the teacher had to date and states that the grievant was rated "basic", had a conference with the rater, and provided two rebuttals. The form also lists two corrective memos/reprimands/warnings issued to the teacher. One regarding parental complaints on March 15, 2013. This March 15 letter was supplied in the record and is disciplinary in nature

rather than evaluative. The second was not supplied, but is dated March 18 and is related to the grievant's attendance which also would be considered disciplinary. The narrative explaining the reasons for withholding states that "[Grievant] has been moved to different classrooms due to the constant complaints from parents. Two bullying investigations are in place currently. No progress on performance."

When viewed as a whole, we find, on balance, that the increment withholding was predominately disciplinary in nature. The grievant's attendance was a major concern for the Principal. The evaluations, although overall rated "Basic" on the form do not contain any "unsatisfactory" ratings and the record is void of an improvement plan to address any concerns with the grievant's teaching performance. The record actually reflects that the overall rating for the grievant in an observation conducted by Badalis on February 14 - two weeks before the increment withholding recommendation - was "Proficient". As for the two memoranda referenced in the increment withholding, they are dated after the form was submitted on March 1, 2013 by Principal Cunha. We are confident the date on the form is not an error as the cover memorandum signed by the Principal is also dated March 1. Thus, we do not find that the post-recommendation memorandum or the subsequent HIB investigations were motivating factors in the initial decision to withhold the increment. Even

if we consider the memorandum, they are predominately disciplinary in nature and would still permit the grievance to proceed to arbitration.

We stress that our role is one of gatekeeper: deciding which forum will review an increment withholding. The Board may raise all of its concerns about the grievant to the arbitrator.

ORDER

The request of the Elizabeth 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: January 29, 2015

Trenton, New Jersey