

P.E.R.C. NO. 2015-55

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-098

ELIZABETH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants 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 predominately relate to evaluation of teaching performance, the Commission restrains 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 and Patricia C. Melia, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Gail Oxfeld Kanef, of counsel)

DECISION

On May 6, 2014, the Elizabeth Board of Education filed a scope of negotiations petition seeking 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. Because the increment withholding is predominately based on an evaluation of teaching performance, we restrain arbitration.

The Board filed briefs, exhibits, and the certifications of Sulisnet Jimenez, Principal of Juan Pablo Duarte-Jose Julien Marti School No. 28, and Superintendent Olga Hugelmeyer. The

Association filed a brief, exhibits, and the certification of the Grievant. These facts appear.

The Association represents a broad-based negotiations unit of teachers and other certificated personnel, as well as non-certificated personnel. 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 (MOA) covering the period of July 1, 2012 through June 30, 2015. The grievance procedure ends in binding arbitration.

During the 2012-13 school year, the Grievant was employed as a fifth grade teacher at School 28. On November 29, 2012, Shante Rorie, Language Arts Literacy (LAL) Supervisor for Pre-K to Fifth Grade, conducted a formal classroom observation of the Grievant. The Grievant was rated "Unsatisfactory" in one component, "Basic" in four components, and "Proficient" in one component as follows:

Unsatisfactory

- Using Assessment in Instruction

Basic

- Establishing a Culture for Learning
- Communication with Students
- Using Questioning and Discussion Techniques
- Engaging Students in Learning

Proficient

- Creating an Environment of Respect and Rapport

On December 14, 2012, Vice Principal Nancy Georgette issued the following written memorandum to the Grievant entitled "Submitting Q2 grades":

On December 7 you were reminded by the Technology Department and a 2nd notice by the

same on December 14 to get your Q2 grades inputted. Mrs. Jimenez and Mrs. Helm also requested the same. It is your professional responsibility to enter these grades in a timely fashion as has been requested in the past. Please ensure that this is completed today.

On January 1, 2013, Georgette issued the following written memorandum to the Grievant entitled "powerschool gradebook":

As you know, there has been a stress that all of the following items be in place on a regular basis in the teacher's gradebook so that anyone who reviews the same (including parents) can understand its contents. In recent review of your gradebook one or more of the following changes need to be addressed....

- Three (3) grades need to be entered weekly into the teacher's gradebook
- Description under the category needs to be written clearer for one to understand the same

On January 18, 2013, Georgette conducted a formal classroom observation of the Grievant. The Grievant was rated "Basic" in five components, and "Proficient" in two components as follows:

Basic

- Establishing a Culture for Learning
- Managing Student Behavior
- Using Questioning and Discussion Techniques
- Engaging Students in Learning
- Using Assessment in Instruction

Proficient

- Creating an Environment of Respect and Rapport
- Communication with Students

On February 28, 2013, Georgette issued the following written memorandum to the Grievant entitled "Grade 5 NJ Mock Exam":

As you know, the Grade 5 NJ Mock scantrons were to be submitted to the coaches by

February 26, 2013; unfortunately, your plans were not submitted on time. Please know that this data is being collected district-wide to develop an intensification plan that will help in preparing our students for the upcoming NJASK and grade level success. As you know, it is your professional responsibility to submit requested information by the school/district on time. In the future please plan accordingly.

On March 15, 2013, Principal Jimenez conducted a formal classroom observation of the Grievant. The Grievant was rated "Unsatisfactory" in two components and "Basic" in five components as follows:

Unsatisfactory

- Using Questioning and Discussion Techniques
- Using Assessment in Instruction

Basic

- Creating an Environment of Respect and Rapport
- Establishing a Culture for Learning
- Managing Student Behavior
- Communication with Students
- Engaging Students in Learning

Also on March 15, 2013, Principal Jimenez and Vice Principal Georgette recommended to Director of Personnel Aaron Goldblatt that the Grievant's increment be withheld for the 2013-14 school year. Enclosed with that recommendation was Principal Jimenez's internal "Non-Renewal/Increment Withholding Form." That form provided the following information in support of the withholding:

Attendance Record and Lateness:

7 Tardies

Evaluations:

<u>Date of Evaluation</u>	<u>Ratings/Comments</u>	<u>Conf.</u>	<u>Rebuttal</u>
11/16/2012	See I Observation	Yes	No
12/9/12	Walkthrough		

1/21/2013	Unsatisfactory	Yes	Yes
12/12/12	See I Observation	Yes	

Corrective Memos/Reprimands/Warnings:

<u>Date</u>	<u>Comments</u>	<u>Author</u>
11/19/12	Lesson Plans	Nancy Georgette
12/14/12	Submitting Grades Q2	Nancy Georgette
1/1/13	Powerschool Gradebook	Nancy Georgette
2/28/13	Grade 5 NJ Mock Exam	Nancy Georgette

Other Reasons:

Unsatisfactory Professional Performance

At its May 9, 2013 meeting, the Board approved a resolution to withhold the Grievant's increment for the 2013-14 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.

Principal Jimenez certifies that although the Grievant had tardiness issues, she recommended that the Grievant's increment be withheld based primarily on her poor performance as documented by the observations, walkthroughs, and corrective memoranda cited in the March 15, 2013 internal Increment Withholding form.

The Grievant certifies that on May 14, 2013, she received a letter from the Board indicating that her increment would be withheld for "attendance and/or performance." On or about May 22, she inquired about the specific reasons for the withholding but received no response. She certifies that the Board docked her paycheck for tardiness during the 2012-13 school year and she believes the primary reason for the withholding was tardiness.

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.

The Board asserts that arbitration must be restrained because the Grievant's increment was withheld predominately based on evaluation of her teaching performance as indicated by written observations and evaluations showing deficiencies in: teaching strategies/techniques; knowledge of content; class planning/preparation; and classroom management.

The Association asserts that because the Board failed to provide the Grievant with a specific reason for her increment withholding, the Commission must construe the Board's ambiguous "attendance and/or performance" reason in favor of the Association. It argues that the Commission must find that the reason for the withholding was the Grievant's tardiness, which falls into the "attendance" category and is arbitrable.

We first address the fact that the Board has not submitted 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). In such cases, the Commission will ordinarily require certifications from the principal actors attesting to the reasons for the withholding, but will also accept and rely on other documents explaining the basis for withholding which are more contemporaneous with that decision than the certifications

prepared for litigation. See, e.g., Elizabeth Bd. of Ed., P.E.R.C. No. 2015-30, 41 NJPER 231 (¶76 2014); Summit Bd. of Ed., P.E.R.C. No. 2013-57, 39 NJPER 311, 313 (¶107 2013); 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). Therefore, the March 15, 2013 internal increment withholding form is given greater weight in determining the reasons for the withholding than is the Certification which was prepared after the grievance and scope petition were filed.

The increment withholding form's reference to the Grievant's tardiness involves a non-teaching performance reason for the withholding. See, e.g., Atlantic City Bd. of Ed., P.E.R.C. No. 98-43, 23 NJPER 567 (¶28283 1997). However, the multiple observations referenced in the form predominately implicate alleged deficiencies in teaching performance. As noted earlier, these observations all rated the Grievant "Unsatisfactory" or "Basic" in: using assessment in instruction; establishing a culture for learning; using questioning/discussion techniques; and engaging students in learning. We have regularly restrained arbitration in cases predominately involving allegations of problems with engaging students, following lesson plans, communicating content, or carrying out the curriculum. See,

e.g., Elizabeth, supra; East Orange Bd. of Ed., P.E.R.C. No. 2014-49, 40 NJPER 343 (¶125 2014); Woodbury, supra; North Caldwell Bd. of Ed., P.E.R.C. No. 2001-76, 27 NJPER 290 (¶32105 2001); and Randolph Tp. Bd. of Ed., P.E.R.C. No. 99-94, 25 NJPER 238 (¶30100 1999). Furthermore, the corrective memoranda for alleged untimely submission of grades, powerschool gradebook, and NJ Mock scantrons all sufficiently relate to an evaluation of teaching performance. Though administrative in nature, the Commission has found such recording or reporting requirements are so intertwined with performance of teaching duties that alleged deficiencies are appropriate for review before the Commissioner of Education rather than an arbitrator. See Woodbridge Bd. of Ed., P.E.R.C. No. 2009-53, 35 NJPER 78 (¶31 2009); Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008); Mercer Cty Vo/Tech Schools Bd. of Ed., P.E.R.C. No. 2008-26, 33 NJPER 265 (¶101 2007); Willingboro Bd. of Ed., P.E.R.C. No. 2006-88, 32 NJPER 166 (¶75 2006); and Woodbury, supra.

Accordingly, considering the internal increment withholding form and supporting documentation, we restrain arbitration because the reasons for the increment withholding were predominately based on an evaluation of teaching performance.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: February 26, 2015

Trenton, New Jersey