

P.E.R.C. NO. 2015-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-100

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, on the brief and Patricia C. Melia, on the brief)

For the Respondent, Bucceri and Pincus, attorneys (Gregory T. Syrek, of counsel)

DECISION

On May 8, 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 based predominately on an evaluation of teaching performance, we restrain arbitration.

The Board filed briefs, exhibits, and the certifications of Ileana Mena, Supervisor of World Languages, and Superintendent Olga Hugelmeyer. The Association filed a brief. 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 high school Spanish teacher at Halsey Academy. On February 15, 2013, Ms. Mena completed a formal observation of the Grievant. The Grievant was rated "Unsatisfactory" in two components, "Basic" in seven components, and "Proficient" in two components as follows:

Unsatisfactory

- Designing Coherent Instruction
- Setting Instructional Outcomes

Basic

- Using Assessment in Instruction
- Engaging Students in Learning
- Communication with Students
- Organizing Physical Space
- Establishing a Culture for Learning
- Demonstrating Knowledge of Resources
- Demonstrating Knowledge of Content and Pedagogy

Proficient

- Managing Student Behavior
- Creating an Environment of Respect and Rapport

Mena provided the following comments in the "Areas for Improvement" sections of the observation report:

Communication with students should be primarily in target language, with usage of English only for support and or clarification when other strategies are not successful (realia, TPR). Questioning should be open ended to facilitate student oral/written language development.

[Grievant] needs to address classroom in 'Direct Instruction' and clearly state and explain lesson objectives to ensure all students understand the objectives and the components of the work to be completed. In addition, student grouping, in addition to being organized by ACTFL proficiency levels needs to be cooperative in nature. During the group/cooperative portion of lesson, no student should be...[remainder of sentence cut off in exhibit]

[Grievant] should align instruction and instructional outcomes to NJDOE Model Curriculum for World Languages, Student Learning Objectives, District WL Pacing Guide and Lesson Plan format. Lesson objectives should be clear and clearly visible to all students and visitors.

On February 21, 2013, the Grievant was put on an "Instructional Action Plan" (IAP) with a timeline of March 14, 2013. The plan included goals of: delivering meaningful, coherent instruction according to the EPS/World Language lesson plan format; implementing the World Languages model curriculum and common core standards; adhering to departmental thematic unit pacing guides; visually displaying relevant thematic material and student work; and differentiating instruction according to student proficiency levels. Among other things, the plan required the weekly submission of lesson plans to the Grievant's supervisor, vice principal, and principal.

On March 8, 2013, Mena e-mailed the Grievant regarding his failure to submit his lesson plans that week per the IAP. Mena certifies that despite her observational comments and repeated warnings, the Grievant's performance "remained less than satisfactory," the Grievant "continued to put forth a lackluster effort," and therefore she recommended the Grievant's increment be withheld "primarily based on his poor teaching performance."

Mena's March 14, 2013 internal "Non-Renewal/Increment Withholding Form" cited the February 15 evaluation/observation and the February 21 IAP. The "Other Reasons" section of the increment withholding form stated:

Previous unsatisfactory observations and corrective plans such as guided collegial visits, suggestions for effective discipline not addressed. Lesson planning not in accordance with NJDOE World Languages Model Curriculum.

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, 2013, the Association filed a grievance on behalf of the teacher contesting her increment withholding. On October 29, 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 predominately based on evaluation of his teaching performance. It argues that the Grievant's ratings of "Basic" and "Unsatisfactory" in several components in the areas of teaching strategies/techniques, knowledge of content, class planning/preparation, and classroom management indicate teaching performance deficiencies.

The Association asserts that the Board's reasons for the increment withholding focus on failure to comply with directives and an action plan, and are therefore predominately disciplinary and should be determined through the arbitration process.

We first address a threshold procedural issue. 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, Mena's March 14, 2013 internal increment withholding form is given greater weight in determining the reasons for the withholding than is her May 6, 2014 Certification which was prepared after the grievance and scope petition were filed.

The increment withholding form we rely on here in lieu of a statement of reasons cites deficient lesson planning that does not comport with curriculum objectives, and references the Grievant's 2013 evaluation/observation. As noted earlier, that observation report rated the Grievant as "Unsatisfactory" or "Basic" in instruction design and outcome, using assessments in instruction, engaging and communicating with students, establishing a culture for learning, organizing physical space, and demonstrating knowledge of resources, content, and pedagogy. These alleged deficiencies underpinning the increment withholding decision all concern teaching performance. 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; East Orange Bd. of Ed., P.E.R.C. No. 2014-

49, 40 NJPER 343 (¶125 2014); Woodbury; Englewood Bd. of Ed.,

P.E.R.C. No. 2006-33, 31 NJPER 353 (¶140 2005); 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). Accordingly, as the internal increment withholding form

and supporting evaluation indicate that the increment withholding

was predominately based on an evaluation of teaching performance,

we restrain arbitration.

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 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