

P.E.R.C. NO. 2015-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-073

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 (classroom management, lesson structure and planning, engaging students, and use of questioning, assessment, and discussion), 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, Oxfeld Cohen, P.C., attorneys (Samuel B. Wenocur, of counsel)

DECISION

On March 19, 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 binding arbitration.

The Board filed briefs, exhibits, and the certifications of Jeff Roszkowski, Principal of Edison Career and Technical Academy, and Olga Hugelmeyer, Superintendent. The Association

filed a brief and the certification of Roselouise Holz, NJEA Uniserv representative. These facts appear.

The Association represents a broad-based negotiations unit of teachers and other certified personnel, as well as non-certified 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 assigned as a mathematics teacher for grades nine through twelve at Edison Academy. On October 26, 2012, Principal Roszkowski conducted a formal instructional observation of the Grievant. The Grievant's performance was evaluated across three components. The performance level ranges are Unsatisfactory, Basic, Proficient, and Distinguished, defined as follows:

Unsatisfactory: The classroom culture is characterized by a lack of teacher or student commitment to the learning, and/or little or no investment of student energy into the task at hand. Learning is not expected or valued.

Basic: The classroom culture is characterized by little commitment to the learning by teacher or student. Student engagement in the task at hand is inconsistent. The teacher appears to be only "going through the motions," and students indicate that they are interested in completion of a task, rather than quality.

Proficient: The classroom culture is a cognitively busy place where learning is valued by all. Students

understand their role as learner and consistently expend effort to learn by engaging in the task at hand. Instructional outcomes, activities and assignments convey high expectations for most students. Classroom interactions support learning.

Distinguished: The classroom culture is characterized by a shared belief in the importance of the learning. Instructional outcomes, activities and assignments convey high expectations for all students. Classroom interactions may extend learning. Students assume responsibility for high quality work by initiating improvements, making revisions, adding detail and/or helping peers. High expectations are internalized by students.

The Grievant was rated Basic in two components and Unsatisfactory in one component as follows:

Component 2c.: Managing Classroom Procedures

Level: Basic

Comments: "Some instructional time is lost due to only partially effective classroom routines and procedures. The teacher's management of instructional groups, transitions, and/or the handling of materials and supplies is inconsistent, leading to disruption of the learning. With regular guidance and prompting, students follow established routines. Students in only some groups are productively engaged in learning while unsupervised by the teacher. Only some transitions are efficient, resulting in some loss of instructional time. Systems for performing noninstructional duties are only fairly efficient, resulting in some loss of instructional time. Procedures for transitions, materials, and non-instructional duties seem to have been established, but their operation is rough. Small groups are only partially engaged while not working directly with the teacher. Procedures are confused or chaotic."

Component 3b.: Using Questioning and Discussion Techniques

Level: Basic

Comments: "[Grievant]'s questions/prompts are a combination of low and high quality, some related to the lesson objectives and of moderate cognitive challenge inviting a thoughtful response. He attempts

to engage all students in the discussion and to encourage them to respond to one another, with uneven results. [Grievant]'s questions are a combination of low and high quality, posed in rapid succession. Only some invite a thoughtful response. He makes some attempt to engage students in a genuine discussion rather than recitation, with uneven results. [Grievant] attempts to engage all students in the discussion, but with only limited success. Questions are rapid-fire, and convergent, with a single correct answer. Questions do not invite student thinking. Many questions are unrelated to the lesson outcomes. All discussion is between teacher and students; students don't speak directly to one another. [Grievant] only calls on students who have their hands up."

Component 3c.: Engaging Students in Learning

Level: Unsatisfactory

Comments: "The learning activities, materials resources, instructional groups and technology are poorly aligned with the instructional outcomes, are unsuitable to the students' developmental stage, or do not require students to think. The lesson has no clearly defined structure, or the pace of the lesson is too slow or rushed. Few students are intellectually engaged. Activities and assignments are inappropriate for students' age or background. Students are not mentally engaged in them. Instructional groups are inappropriate to the students or to the instructional outcomes. The lesson has no clearly defined structure, or the pace of the lesson is too rushed. Learning tasks require only recall or have a single correct response or method. The materials used ask students only to perform rote tasks. Only one type of instructional group is used (whole group) when variety would better serve the instructional purpose. Instructional materials used are unsuitable to the lesson and/or the students. The materials used clash with students' cultures. Few students are engaged in this lesson."

On December 12, 2012, Principal Roszkowski and Vice Principal Fatimah Bey conducted formal instructional observations of the Grievant. Principal Roszkowski rated the Grievant

Proficient in one component, Basic in nine components, and Unsatisfactory in four components as follows:

Proficient:

- Component 4e.: Growing and Developing Professionally

Basic:

- Component 1b.: Demonstrating Knowledge of Students
- Component 1c.: Setting Instructional Outcomes
- Component 1e.: Designing Coherent Instruction
- Component 2a.: Creating an Environment of Respect and Rapport
- Component 2b.: Establishing a Culture for Learning
- Component 2d.: Managing Student Behavior
- Component 4b.: Maintaining Accurate Records
- Component 4c.: Communicating with Families
- Component 4d.: Participating in a Professional Learning Community

Unsatisfactory:

- Component 3a.: Communication with Students
- Component 3b.: Using Questioning and Discussion Techniques
- Component 3c.: Engaging Students in Learning
- Component 3d.: Using Assessment in Instruction

Vice Principal Bey's observation on the same day gave the Grievant the same ratings as above, except she did not rate her in Component 4d. (Participating in a Professional Learning Community), but did rate her in Component 4a. - Reflecting on Teaching - in which she found the Grievant Unsatisfactory.

On February 13, 2013, Samuel Etienne, Supervisor of Mathematics grades 6-12, conducted a classroom observation of the Grievant which Roszkowski certifies was a "formal observation." Holz, for the Association, certifies that Etienne's observation was only a walkthrough that typically lasts about five minutes and is not to be considered in increment decisions. Etienne

rated the Grievant in one area - Component 3c.: Engaging Students in Learning - in which he found the Grievant Unsatisfactory.

By letter of March 12, 2013, Roszkowski and Bey recommended to Director of Personnel Aaron Goldblatt that the Grievant's increment for the 2013-14 school year be withheld. Principal Roszkowski's March 15, 2013 "Non-Renewal/Increment Withholding Form" indicated the dates of the Grievant's evaluations that school year and characterized each as "Unsatisfactory." The "Other Reasons" section of the increment withholding form stated:

Major classroom management issues where [Grievant] needs to vastly improve. [Grievant] needs to build better relationships and rapport with his students. He needs to improve on his lesson structure, transitions, lack of student engagement and learning, lesson planning and lack of differentiation of instruction for the students.

By letter of March 28, 2013, Etienne wrote the following to Principal Roszkowski:

I am writing to advise and recommend that [Grievant]'s increment pay for the next school year 2013-2014 be withheld. [Grievant] classroom procedures and students engagement has been unsatisfactory for this school year.

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 Grievant contesting his 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 evaluations repeatedly showed performance that was unsatisfactory or in need of improvement in the areas of teaching strategies/techniques, knowledge of content, class planning and preparation, and classroom management. The Board asserts that the "Other Reasons" listed by Principal Roszkowski in the March 15, 2013 Increment Withholding form (classroom management, relationships with students, lesson structure, transitions, lesson planning, student engagement and learning) show that the Grievant's increment was predominantly withheld based on evaluation of teaching performance.

The Association asserts that the increment withholding was disciplinary in nature and therefore should be arbitrable. It argues that the Board's written observations were not intended to

improve the Grievant's performance because the Board did not develop action plans to improve his performance and did not provide the Grievant with adequate time to address his alleged performance issues before recommending the withholding in March 2013, months before it was necessary to do so.

The Association further asserts that the Board's decision to withhold the Grievant's increment was rife with procedural issues related to the evaluation and observation processes. It cites the lack of recommendations in observation reports, the failure of the Board to develop a 30 or 90 action plan for teachers to improve performance, lax timing in preparing observation reports, many of which took months to complete from the date of the in-class observation, the dragged out observation report process in conjunction with the sped up increment withholding process, and the reliance on Etienne's "walkthrough" observation as a basis for the increment withholding. The Association argues that the Commission has found that such grievances regarding failure to follow procedural rules during a teacher's evaluation are mandatorily negotiable and arbitrable.

The Board replies that the Association has failed to cite any contractual provision, policy, regulation, or statute that would require the Board to provide the Grievant with a performance action plan or other procedural requirements it alleges were violated. It acknowledges that certain evaluation

procedures may be negotiable, but asserts there are none at issue here, so arbitration should be restrained.

We hold that the substantive decision to withhold Grievant's increment must be reviewed by the Commissioner of Education. The reasons cited by the Board all concern teaching performance. We will therefore restrain arbitration. We also note that the Association's allegations of procedural and substantive errors related to the evaluations of the Grievant are also matters that fall within the educational expertise of the Commissioner of Education that may be raised in that proceeding.

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. Commissioner Jones voted against this decision. Commissioner Bonanni was not present.

ISSUED: November 20, 2014

Trenton, New Jersey