

P.E.R.C. NO. 2015-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-083

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)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Samuel Wenocur, of counsel)

DECISION

On April 9, 2014, the Elizabeth Board of Education petitioned for a scope of negotiations determination. 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 her salary increment.

The parties have filed briefs and exhibits. The Board has filed the certifications of Superintendent Olga Hugelmeyer and former Mabel G. Holmes School No. 5 Annex Vice-Principal Linda Paterno. The Association has filed the certification of New Jersey Education Association Uniserv Representative Roselouise Holz. 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.

The grievant is a Pre-Kindergarten teacher assigned to the Holmes School Annex during the 2012-2013 school year. Paterno certifies that during the 2012-2013 school year, grievant received numerous formal written observations, evaluations, memoranda, and electronic correspondence regarding her teaching performance, as well as walkthrough observations performed by Paterno. On September 14, 2012, Paterno sent an e-mail to grievant regarding problems noted in her lesson plans.^{1/} On September 23, Paterno sent grievant an e-mail related to deficiencies in her daily classroom schedule that provided necessary revisions. On September 24, Early Childhood Master Teacher Tracy Dunn-Roodenburg sent an e-mail to grievant addressing issues with the arrangement of grievant's classroom and on September 25, provided written materials to assist grievant with her classroom arrangement. On September 30,

1/ Paterno's certification provides detailed information regarding the deficiencies noted and is not necessary to repeat at length for our purposes of determining whether the increment was withheld for disciplinary reasons or teaching performance.

Paterno sent another e-mail to grievant addressing deficiencies in her lesson plans and daily classroom schedule.

On October 1, 2012, Paterno certifies she conducted a walkthrough of grievant's classroom and submitted an e-mail report to grievant. This report rated grievant "unsatisfactory" in six of eight assessed areas. On October 12, Paterno issued a memorandum to grievant regarding her alleged failure to follow the daily classroom schedule and managing her students. On October 8, Paterno sent an e-mail to grievant regarding her alleged failure to follow prior directives regarding the content of her lesson plans and instructing her to correct the deficiencies. Paterno also advised grievant she and Dunn-Roodenburg were available to help and support her. On October 13 and 21, Paterno sent e-mails to the grievant addressing further deficiencies in her lesson plans.

On October 23, 2012, Paterno conducted a follow-up walkthrough observation of grievant's classroom to assess whether she had corrected the areas where she was previously rated "unsatisfactory" or "basic". Paterno rated grievant "unsatisfactory" in the following four out of eight assessed areas: Planning and Preparation; Classroom Environment; Engaging Students in Learning; and Communicating with Families. Paterno placed grievant on a 30-day written action plan to improve her performance that was provided on October 31.

On November 6, 2012, Paterno sent an e-mail to grievant requesting her lesson plans for the week of October 29. Grievant submitted the plans on November 9 and Paterno reviewed them and responded via e-mail identifying deficiencies. On November 13, Paterno issued a memorandum to grievant advising her that her classroom arrangement was again changed and not in compliance with established teaching methodologies and previous directives. On November 13, Paterno also sent a separate memorandum to grievant regarding her failure to submit revised lesson plans as previously requested. Paterno certifies that the grievant advised her she did not have time to complete the revised lesson plans.

On November 21, 2012, Paterno certifies she had to send a memorandum to grievant advising her of the inappropriate utilization of instructional time when Paterno walked into the classroom to discover grievant at her computer typing lesson plans when she was supposed to be teaching. On the same date, Paterno addressed continuing deficiencies with the lesson plans and advised grievant her plans were not aligned to the Division of Early Childhood requirements. Paterno again offered assistance.

On November 26, 2012, Paterno completed an unannounced formal observation of the grievant and issued a report on December 13. Grievant was rated "basic" in five areas,

"unsatisfactory" in one area, and "proficient" in two areas assessed. On November 27, Paterno issued a memorandum to grievant regarding her failure to implement curriculum requirements that had previously been identified as issues she must remedy. The memorandum noted:

I returned to your classroom during quiet time to discuss these items with you and inquire as to how you were conducting your question of the day and student sign in. You informed me that 'you hadn't gotten to it yet.' I inquired what I could do to help you and what you needed from your mater teacher and you replied you were 'having a bad year.' You directed me to a file box for student portfolios where I found several work samples for each child. I inquired about your anecdotal notes and you said 'they are on the computer but I don't have many. I am behind.' I reminded you of the upcoming due date for ELS and Progress reports.

As you know, instruction begins on the first day of school and continues until the last day of school. All elements of our Curriculum for Pre-K must be implemented on a daily/weekly basis to ensure we are providing a quality program for our students. I have attached protocols from the Division of Early Childhood Education re-iterating [sic] the curriculum and daily routine requirements. These protocols must be implemented in your classroom immediately.

On December 17, 2012, Paterno issued a memorandum to grievant regarding her failure to submit appropriate student progress reports which were due on December 10. According to Paterno, grievant submitted reports that failed to adhere to the Division of Early Childhood protocols and Paterno directed her to

resubmit the reports as soon as possible. Paterno sent two further e-mails requesting the revised reports by the end of the day December 14. On December 17, Paterno certifies that grievant advised her that she did not get to do the reports.

On January 21, 2013, Paterno advised grievant in an e-mail that she had to again rearrange her classroom as it was not properly set up. On February 11, Paterno issued a memorandum to the grievant documenting her repeated failure to timely submit her lesson plans. Grievant also received e-mails from Paterno and Dunn-Roodenburg related to deficiencies in her implementation of the curriculum in February and March 2013.

On March 4, 2013, Paterno certifies that she recommended that grievant's increment be withheld because of her poor teaching performance. On March 7, Paterno entered grievant's classroom and discovered she was not following the daily routine, but had the students watching cartoons during instructional time. Paterno followed-up this incident with a memorandum and directing grievant on what she needed to do to improve her performance.

On March 15, Paterno developed another 30-day written action plan for the grievant. Paterno certified that grievant refused to sign or acknowledge the plan. The plan was not implemented because grievant went out on medical leave shortly thereafter.

On May 9, 2013, the Board voted to withhold grievant's increment for the 2013-2014 school year. On September 24, the

Association filed a grievance contesting the increment withholding. On October 29, the Association demanded binding arbitration. This petition ensued.

The Board argues that arbitration must be retrained as grievant's increment was withheld for poor teaching performance. The Association responds that grievant's increment withholding was disciplinary noting that only one formal observation was performed early during the school year and characterizing the e-mails and memorandum issued by Paterno to the grievant as reprimands which were not intended to improve performance. The Association asserts that the Board true reason for the withholding was due to grievant's allergies related to poor air quality in the trailer where her classroom was located. The Association has provided correspondence from an attorney for the grievant to the Board citing her health issues due to her classroom and seeking accommodation. The Association asserts that grievant was moved to a classroom for the 2013-2014 school year and has received positive observation reports.

The Board replies that the reasons for the increment withholding are predominately due to ineffective teaching and the Commission does not consider arguments of pretext in increment withholding scope of negotiations cases. The Board also notes that it moved grievant out of the trailer the following year and conducted air quality tests on the trailer which were passed.

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.

We first address a threshold procedural issue. Where, as here, 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), 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). Here, we accept Paterno's 22-page certification and attached documentation in lieu of the statement of reasons. We note that multiple increment withholding scope of negotiations petitions have been filed with this Commission by the Elizabeth Board of Education related to the same time period and none contain the legally required statement of reasons.

Thus, we express our disappointment that the Elizabeth Board of Education appears to not be following the statutory procedural requirements of the increment withholding process, but note we have no authority to issue a remedy within the exclusive jurisdiction of the Commissioner of Education.

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 certification and attached exhibits we rely on here in lieu of a statement of reasons provides a narrative explaining Paterno's reasons for the increment withholding and references the grievant's evaluation, observations and deficiencies related to her teaching performance. Paterno's concerns regarding late lesson plans and progress reports are relevant to grievant's teaching performance. Old Tappan Bd. of Ed., P.E.R.C. No. 2011-39, 36 NJPER 419 (¶162 2010). Further, the majority of Paterno's concerns relate to inadequate lesson plans and a classroom schedule and environment that did not meet the curriculum standards. These are also related to teaching performance. Willingboro Bd. of Ed., P.E.R.C. No. 2006-88, 32 NJPER 166 (¶75

2006); Hainesport Township Bd. of Ed., P.E.R.C. No. 2014-15, 40 NJPER 189 (¶72 2013); Vernon Township Bd. of Ed., P.E.R.C. No. 98-44, 23 NJPER 569 (¶28,284 1997); Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003); Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 2000-28, 25 NJPER 442 (¶30194 1999); and New Providence Bd. of Ed., P.E.R.C. No. 98-91, 24 NJPER 108 (¶29053 1998).

Finally, as to the Association's argument that the increment was withheld due to grievant's alleged illness, in selecting a forum under N.J.S.A. 34:13A-27, we accept the board's reasons for a withholding and do not consider contentions that those reasons are pretextual or unsupported. Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003); Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996). We assume the Board will be bound by its asserted reasons before the Commissioner of Education and that the Commissioner has the power to entertain allegations that the asserted reasons are pretextual. Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008); Fanella v. Washington Tp. Bd. of Ed., 1977 S.L.D. 383 (Comm'n of Ed. 4/11/77) (withholding set aside where recommendation to withhold for failure to complete task was made before deadline for task completion). Accordingly, we restrain binding 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 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