

P.E.R.C. NO. 2015-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-102

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
(Gail Oxfeld Kanef, of counsel)

DECISION

On May 21, 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 did not file a response.^{1/} 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 music teacher at School 28. On December 10, 2012, Dennis Argul, Supervisor of Music, conducted a formal classroom observation of the Grievant. The Grievant was rated "Unsatisfactory" in three components and "Basic" in four components as follows:

Unsatisfactory

- Creating an Environment of Respect and Rapport
- Managing Classroom Procedures
- Using Questioning and Discussion Techniques

Basic

- Establishing a Culture for Learning
- Communication with Students
- Engaging Students in Learning
- Using Assessment in Instruction

^{1/} By letter of June 23, 2014, counsel for the Association requested an extension until July 3 to file its response. The extension was granted, but no submission was made.

On December 18, 2012, Vice Principal Joan Tomek issued the following written memorandum to the Grievant entitled "Submitting Grades":

It is your professional responsibility to enter your Q2 grades in a timely fashion as has been requested in the past. Please ensure that the grades are completed today. If there is a discrepancy in the grades or you have already completed this task, please notify Ms. Jimenez or myself in writing.

On March 15, 2013, Vice Principal Nancy Georgette issued the following written memorandum to the Grievant entitled "recess incident 3-12-13":

On 3-12-13 during your scheduled lunch duty in the gymnasium two fights occurred. Unfortunately, one of our teachers was left alone to handle one of these fights, leaving her and a few students hurt. You shared that you left the gymnasium to bring the computer technician to your classroom in order for him to make some repairs. Please know that it is your responsibility to be on you duty post at all times as close supervision is necessary to avoid these types of situations.

Also on March 15, 2013, Principal Jimenez and Vice Principal Tomek 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:

11/19/12 5 days absent
2/8/13 11.50 days absent
3/4/13 12.50 days absent

9 Tardies

Evaluations:

<u>Date of Evaluation</u>	<u>Ratings/Comments</u>	<u>Conf.</u>	<u>Rebuttal</u>
12/10/2012	Unsatisfactory	Yes	Yes

Corrective Memos/Reprimands/Warnings:

<u>Date</u>	<u>Comments</u>	<u>Author</u>
12/18/12	Submitting Grades	Joan Tomek

The increment withholding forming listed nothing under the "Other Reasons" section.

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.

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 formal written observations/evaluations.

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, Jimenez's March 15, 2013 internal increment withholding form is given greater weight in determining the reasons for the withholding than is her May 30, 2014 Certification which was prepared after the grievance and scope petition were filed.

Next, we note that our analysis does not consider an evaluation of the Grievant from the previous school year.^{2/} References to a teaching staff member's performance during prior school years are only relevant to our inquiry if those evaluations were referenced in the statement of reasons issued at the time the increment was withheld. See Bergenfield Bd. of Ed.,

^{2/} The Board included as an exhibit an April 27, 2012 evaluation and referenced a portion of it in Jimenez's certification. That evaluation report rated the Grievant "Proficient" in five areas and "Basic" in one.

P.E.R.C. No. 2006-80, 32 NJPER 126, 127 (¶58 2006) (where documents from prior school years were not referenced in statement of reasons, they were not considered). Here, the Board's internal increment withholding form completed at the time of the withholding decision did not include any references to performance or evaluations from prior school years. We also do not consider a June 2013 "Summative Annual Observation" submitted by the Board which was obviously not relevant to the increment withholding decision because it was conducted after that decision was made and after the Board approved the withholding.

In sum, the relevant record consists of the March 15, 2013 internal increment withholding form (and documents referenced therein) and the recess/lunch duty incident reprimand of the same day. This record presents a mix of teaching performance and non-performance concerns. The internal increment withholding form recommended withholding based on: 1) one evaluation (the December 10, 2012 observation); 2) multiple notations of absences (totaling 12.5 days by March 4, 2013) and a reference to tardiness (9 tardies); and 3) a reference to the December 18, 2012 corrective memo regarding late submission of grades. The reprimand was for failing to report to recess/lunch duty. Standing alone, the cited evaluation included comments and ratings overwhelmingly related to the Grievant's teaching performance in the areas of classroom environment, classroom

management/procedures, communicating and engaging with students, questioning/discussion techniques, and use of assessment in instruction. We have regularly restrained arbitration in cases predominately involving such 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).

In contrast, the references to excessive absenteeism and tardiness implicate non-teaching performance reasons for the withholding. Furthermore, the teacher's alleged failure to remain on post throughout her scheduled recess/lunch duty involves a non-teaching performance reason. The Commission has consistently held that alleged infractions in the areas of absences/failure to report, tardiness/lateness to school or class, and leaving students unattended/unsupervised do not constitute evaluations of teaching performance. See, e.g., Atlantic City Bd. of Ed. and Atlantic City Ed. Ass'n, P.E.R.C. No. 2014-35, 40 NJPER 263 (¶101 2013), app. pending; Bergenfield Bd. of Ed. and Bergenfield Ed. Ass'n, P.E.R.C. No. 2006-69, 32 NJPER 82 (¶42 2006), aff'd 33 NJPER 186 (¶65 App. Div. 2007); Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389

(¶32144 2001); Atlantic City Bd. of Ed., P.E.R.C. No. 98-43, 23 NJPER 567 (¶28283 1997); Edison Tp. Bd. of Ed., supra, aff'd 304 N.J. Super. 459 (App. Div. 1997); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992); Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-72, 18 NJPER 64 (¶23028 1991); and Scotch Plains-Fanwood Bd. of Ed., supra.

The balance of the predominate basis for the increment withholding hangs on the characterization of the December 18, 2012 corrective memo for the Grievant's alleged untimely submission of second quarter grades. Alleged violations of administrative procedures or directives are found arbitrable when they are remotely related to teaching performance and/or based on more generally applicable Board policies. See, e.g., Montclair Bd. of Ed., P.E.R.C. No. 2000-1, 25 NJPER 361 (¶30155 1999); Willingboro Bd. of Ed., P.E.R.C. No. 98-51, 23 NJPER 607 (¶28298 1997). However, the Commission has repeatedly found that inadequate recording of grades, grade book deficiencies, failure to timely return graded work, and late submission of reports (e.g., grades, interim reports on student tardiness, student course recommendations) are all reasons for increment withholding that are sufficiently related to an evaluation of teaching performance. 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. Although administrative or procedural in nature, such recording and 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.

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 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