

P.E.R.C. NO. 2015-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2014-107

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 Joseph D. Castellucci, Jr., on the brief)

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

DECISION

On June 4, 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.

The Board filed briefs, exhibits, and the certifications of Carlos M. Lucio, Principal of Dr. Antonia Pantoja School No. 27, and Superintendent Olga Hugelmeyer. The Association filed a brief and the certification of Roselouise Holz, NJEA Uniserve Representative. 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 sixth grade teacher at School 27. An October 9, 2012 observation of the Grievant rated her "Proficient" in four components and "Basic" in four components as follows:

Proficient

- Demonstrating Knowledge of Students
- Creating an Environment of Respect and Rapport
- Communication with Students
- Reflecting on Teaching

Basic

- Managing Classroom Procedures
- Managing Student Behavior
- Engaging Students in Learning
- Using Assessment in Instruction

A December 13 observation of the Grievant rated her "Proficient" in eight components and "Basic" in five components as follows:

Proficient

- Demonstrating Knowledge of Content and Pedagogy
- Demonstrating Knowledge of Students
- Setting Instructional Outcomes
- Establishing a Culture for Learning
- Managing Student Behavior
- Communication with Students
- Maintaining Accurate Records
- Communicating with Families

Basic

- Managing Classroom Procedures
- Using Questioning and Discussion Techniques
- Engaging Students in Learning
- Using Assessment in Instruction
- Participating in a Professional Learning Community

A February 12, 2013 observation of the Grievant rated her "Proficient" in two components and "Basic" in seven components as follows:

Proficient

- Creating an Environment of Respect and Rapport
- Managing Classroom Procedures

Basic

- Demonstrating Knowledge of Content and Pedagogy
- Setting Instructional Outcomes
- Establishing a Culture for Learning
- Communication with Students
- Using Questioning and Discussion Techniques
- Engaging Students in Learning
- Participating in a Professional Learning Community

A March 5 observation of the Grievant rated her "Proficient" in one component, "Basic" in six components, and "Unsatisfactory" in one component as follows:

Proficient

- Creating an Environment of Respect and Rapport

Basic

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

Unsatisfactory

- Reflecting on Teaching

On March 8, Principal Lucio rated the Grievant "Unsatisfactory" in "Designing Coherent Instruction" for her alleged failure to submit lesson plans by the required dates.

On March 13, 2013, Principal Lucio 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 an internal Increment Withholding form. In the "Attendance Record and Lateness" section, the form provided the Grievant's total sick days used and days tardy in each of the previous five school years (2008-2013). In the "Evaluations" section, the form listed the following items spanning the 2008-2013 school years: 13 evaluations; 2 reprimands regarding displaying student work; 2 reprimands for lesson planning/sub folders; 1 reprimand for grades/parent conferences; 1 reprimand for classroom condition; 16 reprimands for attendance and/or tardiness; and 1 reprimand for missing school property.

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 Lucio certifies that she recommended the Grievant's 2013-14 increment be withheld based on poor teaching

performance as indicated in the March 13, 2013 internal Increment Withholding form.

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 teaching deficiencies.

The Association asserts that the increment withholding is arbitrable because the Board's written observations were disciplinary and not intended to improve the Grievant's teaching performance. It argues that the Board's failure to conduct an improvement plan prior to recommending the withholding shows that the increment was not withheld for evaluative reasons.

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 13, 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 multiple references (sixteen) to the Grievant's attendance and tardiness problems involve non-teaching performance reasons for the withholding. See, e.g., Atlantic City Bd. of Ed., P.E.R.C. No. 98-43, 23 NJPER 567 (¶28283 1997); Scotch Plains. Additionally, the cited reprimand for missing school property involves a type of misconduct that does not relate to an evaluation of teaching performance. All told the Board cited seventeen (17) of these non-teaching performance issues. However, the Board also cited thirteen teaching observations/evaluations and six reprimands for alleged deficiencies related to an evaluation of teaching performance (lesson plans; display of student work; classroom condition; and grades/parent conferences). Therefore, the Board cited nineteen (19) total teaching performance related issues.

Comparing the two categories indicates that teaching performance reasons predominated the increment withholding decision.

Furthermore, viewing only issues cited from the 2012-13 school year yields four observations/evaluations versus one attendance reprimand. 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, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: March 26, 2015

Trenton, New Jersey