

P.E.R.C. NO. 2015-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-004

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 Patricia C. Melia, on the brief)

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

DECISION

On July 10, 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 certification of George E. Mikros, Principal of Alexander Hamilton Preparatory Academy. 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.

The Grievant was a mathematics teacher at Alexander Hamilton Preparatory Academy during the 2011-12 school year. On September 15, 2011, Vice Principal Dr. Mari Celi Sanchez reminding the Grievant that her "lesson plans for this week are overdue" and that "Lesson plans are due every Monday via email." On October 6, 2011, a parent sent a written complaint about the Grievant to Dr. Sanchez, which included the following allegations:

I'm writing this letter to please ask you to switch [my son] to another Geometry class...unfortunately he is having a lot of difficulty understanding [Grievant]'s teaching methods, him skipping lessons and then quizzing them about something they haven't seen, and when asked by the students why are you doing this his answer is that nobody should question his teaching methods.

Something else that raised my concern was that yesterday, Wednesday, October 5, 2011 there was a confrontation in [my son]'s Geometry class between two classmates, these kids were screaming at each other and wanted to fight...but [Grievant] did absolutely nothing about it, he just stood there and not a single word came out of his mouth, not even an effort to try to stop the altercation and NO authority whatsoever.

On November 21, 2011, Dr. Sanchez e-mailed the Grievant with questions about his lesson plans in relation to how he assesses

his students. Dr. Sanchez stated: "Assessments should be spelled out clearly in lesson plans and you should articulate how you know your students are learning."

On November 23, 2011, Principal Mikros sent an e-mail to Assistant Superintendent of Curriculum and Instruction Jennifer Barrett regarding the following complaint from the mother of a ninth grade student of the Grievant: "She stated that her son does not understand his math teacher, his instruction, and his speaking of the English language. [The Parent] mentioned to me that she is planning with other groups of parents to come to the board and present their concerns."

On November 29, 2011, in response to the Grievant's weekly lesson plan e-mail, Dr. Sanchez stated: "Need to keep focusing on alternate forms of assessments and documenting them. Recorded."

On December 5, 2011, Harry Kelada, Teacher Coach, sent an e-mail to Dr. Sanchez regarding the Grievant, which stated:

- 1 - you are not clear when you ask a question and when you are explains something for three times, you ask the question and you answer it [sic]
- 2 - you are selecting the same students over and over not charing mor students [sic]
- 3 - I think classroom management is better and show lots of improvements [sic]
- 4 - you went over the example very fast and not allowing time for students to copy the question and the answer [sic]
- 5 - you think one example is good enough for the topic
- 6 - you never ask if there is any question about the new topic, before moving to activity
- 7 - when you gave them 5 min extra, it was lots of takes in the classroom not relate to what they should be doing [sic]

8 - [Grievant] the class activity was very confusion for most of the students, activity selection is very important as well as the sequence of it from easy, medium then hard [sic]

9 - talking about different topics not related to geometry because the activity is very not clear, please find some different resource to get activity and worksheets

On January 23, 2012, in response to the Grievant's weekly lesson plan e-mail, Dr. Sanchez stated: "Ok recorded. Remember to specify how you plan to review or cover topics." On February 3, 2012 in response to the Grievant's weekly lesson plan e-mail, Dr. Sanchez stated: "We need to see the open-ended Costa's questions in your plans."

Board Exhibit C includes a letter from Samuel Etienne, Supervisor of Mathematics 6-12 to Principal Mikros dated March 12, 2012 stating the following:

I am writing to advise and recommend withholding of [Grievant's] increment pay for next year. [Grievant] has not showed good command of classroom routine or engaging students in learning mathematics. These statements are based on walkthroughs, conversations with other administrators and based on formal observations conducted.

Board Exhibit C also includes a March 13, 2012 letter signed by Principal Mikros and Dr. Sanchez to Karen Murray, Executive Director of Human Resources/Labor Counsel stating:

This is to recommend increment withholding for [Grievant], Teacher-Mathematics at Alexander Hamilton Preparatory Academy - Annex for the 2012-2013 school year.

On March 16, 2012, Principal Mikros sent the Grievant the following e-mail regarding alleged problems observed during a walkthrough of his classroom at 3:42 p.m. on March 12:

On March 12th, I was conducting walk-throughs during period 10. I walked into your class at 3:42 p.m. and witnessed students talking amongst themselves. As I entered fully into the class, I noticed other students in the back of the classroom hanging out and having personal conversations. Within that group, there was a student seated on the floor and two other students listening to their iPods. During my visit, it was clear to me that there was no instruction of any kind. Students were not engaged in any assignment of math talk etc. I asked students to immediately go back to their seats and they did. I also reminded you that time (14 minutes) remained in the period and that you should be teaching the students. Due to my request, you made an attempt to teach.

At its June 28, 2012 meeting, the Board approved a resolution to withhold the grievant's increment for the 2012-13 school year "for performance and/or attendance." On August 1, 2012, the Association filed a grievance on behalf of the teacher contesting her increment withholding. On October 5, 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.

We first address the fact that the Board did not submit 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). N.J.S.A. 18A:29-14 provides, in pertinent part:

Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. **It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned.**

[emphasis added]

N.J.A.C. 19:13-2.2(a)3. provides, in pertinent part:

19:13-2.2 Contents of petition for scope of negotiations determination

(a)...Such petition shall contain the following:

* * *

3. A clear and concise explanation of the matter or matters in dispute, which shall include a statement of the pertinent facts, and, **in cases involving the withholding of an increment of a teaching staff member, shall be accompanied by a copy of the statement of reasons issued to the teaching staff member at the time the increment was withheld;...**

[emphasis added]

In cases where such statement of reasons is absent, 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.^{1/} See, e.g., Elizabeth Bd. of Ed., P.E.R.C. No. 2015-30, 41 NJPER 231

^{1/} The Commission is troubled that the Board has neglected its obligation under N.J.S.A. 18A:29-14 and we reserve the right to demand that future increment withholding scope of negotiations petitions strictly adhere to our N.J.A.C. 19:13-2.2(a) (3). filing rule regarding submission of the statement of reasons.

(¶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). Here, the internal March 12, 2012 letter from Supervisor Etienne to Principal Mikros recommended the increment withholding, which was followed by the March 13th letter from Mikros to the Board's Labor Counsel recommending the increment withholding. We consider those letters and the supporting documentation up to that point, but not the evaluations the Board completed later.

The March 12th letter stated that the Grievant has not shown "good command of classroom routine or engaging students in learning mathematics." Those are teaching performance concerns supported by: the multiple e-mail reminders/reprimands regarding the Grievant's alleged failure to timely submit lesson plans and/or deficiencies in her lesson plans; the parental complaints regarding problems with the teacher's ability to effectively communicate with students; and the notes of the teacher coach. 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).

Accordingly, considering the internal increment withholding letter 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