

P.E.R.C. NO. 2015-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-005

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.

P.E.R.C. NO. 2015-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-005

ELIZABETH EDUCATION ASSOCIATION,

Respondent.

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

DECISION

On July 29, 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 arbitration.

The Board filed briefs, exhibits, and the certifications of Belinda M. Abruzzese, Principal at the George Washington School No. 1 (School No. 1), and Superintendent Olga Hugelmeyer. The Association filed a brief, exhibits, 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 2011-12 school year, the Grievant was employed as a Mathematics teacher at School No. 1. On December 12, 2011, Samuel Etienne, Supervisor of Mathematics, conducted a walkthrough observation of the Grievant's classroom (observation report submitted December 17). Mr. Etienne rated the Grievant "Basic" in the areas of "Creating an Environment of Respect and Rapport Using Assessment in Instruction," "Managing Student Behavior," and "Engaging Students in Learning." Mr. Etienne's report made the following comments:

"...I noticed two students were out of their seats play fighting...the teacher was assisting other students with their work assignment while the kids were play fighting. Multiple students continued to get out of their seats throughout the course of the lesson....Teacher does not address disrespectful interactions among students"

On December 19, 2011, Vice Principal Melissa Espana-Rodriguez conducted a formal observation of the Grievant's eighth

grade math class (observation report submitted December 20). Ms. Espana-Rodriguez rated the Grievant "Unsatisfactory" in seven areas of observation as follows:

Unsatisfactory

- Creating an Environment of Respect and Rapport
- Establishing a Culture for Learning
- Managing Classroom Procedures
- Communication with Students
- Using Questioning and Discussion Techniques
- Engaging Students in Learning
- Using Assessment in Instruction

Ms. Espana-Rodriguez made the following "Overall Comments" at the end of the observation report:

"[Grievant] is strongly recommended to participate in Professional Development that consists of techniques in classroom management, discussion, development of groups, interventions and communication skills within the classroom. These items are extremely important to have at a satisfactory level in order to provide quality instruction. [Grievant] also needs to improve on his relationships with his students."

On March 16, 2012, Principal Abruzzese signed an internal "Non-Renewal/Increment Withholding Form" recommending that the Grievant's increment be withheld. That form provided the following information in support of the withholding:

Evaluations:

<u>Date of Evaluation</u>	<u>Ratings/Comments</u>
Dec. 17, 2011	Basic
Dec. 20, 2011	Basic/Unsatisfactory
Jan. 27, 2012	Basic
Jan. 13, 2012	Walkthrough Notes

Other Reasons:

Ineffective Instruction; Poor classroom management;
Administrative recommendation for [Grievant] to be
transferred for ineffective teaching

At its June 28, 2012 meeting, the Board approved a resolution to withhold the grievant's increment for the 2012-13 school year. 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. 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 ratings of "Basic" and "Unsatisfactory" in several teaching-related evaluation components indicate teaching performance deficiencies.

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. 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 "pre-observation conferences" prior to formal observations as allegedly required when the Board participated in the state's evaluation pilot program as a "Pilot now" school; the apparent start time of the December 12, 2011 observation six minutes prior to the end of the school day; the comments in the December 19, 2011 evaluation which match the wording for a "Basic" rating according to the report's grading rubric but which Ms. Espana-Rodriguez instead assigned "Unsatisfactory" ratings; the lack of evidence of the January 2012 evaluations cited by the Board in its internal increment withholding form; and the Board's failure to consider the Grievant's significant improvement demonstrated by an April 2012 evaluation and a June 2012 annual performance report which were issued prior to the increment withholding. Citing Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397, 398 (App. Div 1991), aff'd 130 N.J. 312 (1992), 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.

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).

In cases where such statement of reasons is absent, the Commission ordinarily requires 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, Principal Abruzzese's March 16, 2012 internal increment withholding form is given greater weight in determining the reasons for the withholding than is her July 24, 2014 Certification which was prepared for this case.

The increment withholding form we rely on here in lieu of a statement of reasons cites four evaluations, two from December 2011 which the Board submitted as exhibits and are summarized above, and two from January 2012 which the Board did not submit.

As noted earlier, the December 2011 observation reports rated the Grievant "Unsatisfactory" or "Basic" in: creating an environment of respect and rapport; establishing a culture for learning; managing classroom procedures; communication with students; using questioning and discussion techniques; engaging students in learning; and using assessment in instruction. The form also noted "ineffective instruction" and "poor classroom management" as reasons for the withholding. These alleged deficiencies concern teaching performance. We have regularly restrained arbitration in cases predominately involving allegations of problems with engaging students, 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; Englewood Bd. of Ed., P.E.R.C. No. 2006-33, 31 NJPER 353 (¶140 2005); 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). We have also found that allegations of poor classroom management (e.g., control, discipline, or supervision of students) is a component of teaching performance. See, e.g., Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 2000-28, 25 NJPER 442 (¶30194 1999); Morris Bd. of Ed., P.E.R.C. No. 99-84, 25 NJPER 162 (¶30074 1999); New Providence Bd. of Ed., P.E.R.C. No. 98-91, 24 NJPER 108 (¶29053 1998); Wood-Ridge Bd. of Ed., P.E.R.C. No.

98-41, 23 NJPER 564 (¶28281 1997); Hillside Bd. of Ed., P.E.R.C. NO. 97-39, 22 NJPER 389 (¶27210 1996); Bernardsville Bd. of Ed., P.E.R.C. No. 94-83, 20 NJPER 82 (¶25037 1994); Wayne Tp. Bd. of Ed., P.E.R.C. No. 93-107, 19 NJPER 272 (¶24137 1993); Bergen Cty. Voc. Schools Bd. of Ed., P.E.R.C. No. 91-70, 17 NJPER 150 (¶22060 1991); and Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991). Accordingly, as the internal increment withholding form and supporting evaluations indicate that the increment withholding was predominately based on an evaluation of teaching performance, we restrain arbitration.

As for the Association's allegations of procedural and substantive errors related to the evaluations of the Grievant, we find that under these circumstances they are also matters that fall within the educational expertise of the Commissioner of Education which may be raised in that proceeding. In some cases, the Commission has applied Lacey, supra, to find that alleged violations of evaluation procedures were arbitrable and severable from otherwise non-arbitrable increment withholding determinations based on teaching performance. See, e.g., Paterson State Op. Sch. Dist., P.E.R.C. No. 2011-57, 37 NJPER 9 (¶4 2011); Woodbury Bd. of Ed., P.E.R.C. No. 2006-81, 32 NJPER 128 (¶59 2006); Englewood Bd. of Ed., P.E.R.C. No. 2006-32, 31 NJPER 352 (¶139 2005); and Willingboro Bd. of Ed., P.E.R.C. No. 2001-68, 27 NJPER 236 (¶32082 2001). However, those cases are

distinguishable because they involved specific procedural contract provisions which the unions grieved in addition to the increment withholding decision. In contrast, here the Association did not cite in its grievance, request for arbitration, or its brief any contractual procedural provisions alleged to have been violated separate from the just cause challenge to the increment withholding.

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 Voos voted in favor of this decision. None opposed. Commissioner Wall was not present.

ISSUED: April 23, 2015

Trenton, New Jersey