

P.E.R.C. NO. 2015-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-009

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

For the Respondent, Oxfeld Cohen, P.C., attorneys (William P. Hannan, of counsel)

DECISION

On August 14, 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 Christopher Mingoia, Principal at the Toussaint L'ouverture-Marquis de Lafayette School No. 6 (School No. 6), and Superintendent Olga Hugelmeyer. The Association filed a brief,

exhibit, 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 Spanish teacher at School No. 6. On December 20, 2011, Ileana Mena, Supervisor of World Languages, conducted a formal observation of the Grievant's classroom (observation report submitted January 18, 2012). Ms. Mena rated the Grievant "Basic" in four components, and "Unsatisfactory" in four components as follows:

Basic

- Creating an Environment of Respect and Rapport
- Establishing a Culture for Learning
- Communication with Students
- Engaging Students in Learning

Unsatisfactory

- Managing Classroom Procedure
- Managing Student Behavior
- Using Questioning and Discussion Techniques
- Using Assessment in Instruction

On January 10, 2012, Principal Mingoia conducted a formal observation of the Grievant's classroom (observation report

submitted January 12). Mingoia rated the Grievant "Basic" in three components, and "Unsatisfactory" in four components as follows:

Basic

- Creating an Environment of Respect and Rapport
- Establishing a Culture for Learning
- Communication with Students

Unsatisfactory

- Managing Classroom Procedure
- Using Questioning and Discussion Techniques
- Engaging Students in Learning
- Using Assessment in Instruction

On January 31, 2012, Mingoia placed the Grievant on an Instructional Action Plan (IAP) which included the following goals:

I. Classroom Instruction/Curriculum Planning

Goal:

- To visually display classroom rules and procedures that will aid in classroom management and students expectations for learning.
- To fully implement differentiated learning task by proficiency level while engaging non speakers and native speakers at a rigors [sic] levels.
- To follow the district World Language pacing guide as a guide in order for students to produce authentic work.

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II. Instructional Strategies

Goal:

- Using data, [Grievant] will make instructional adjustments to meet the needs of all her students. She will schedule, group, and place students on the appropriate teaching level using suitable authentic classroom materials.

On March 1, 2012, Ms. Mena conducted a formal observation of the Grievant's classroom (observation report submitted January

15). Ms. Mena rated the Grievant "Proficient" in one component and "Basic" in six components 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

On March 15, 2012, Principal Mingoa signed a letter to the Board's Labor Counsel with the following recommendation: "This is to recommend increment withholding for [Grievant], World Language Teacher, at school #6 for the 2012-2013 school year." (Board Exhibit G). 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." (Board Exhibit H). 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 her 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 arbitrable. It argues that the Board's written observations were not intended to improve performance because their timing shows that Mena did not conference with the Grievant about the December 2011 observation until January 18, 2012. The Association contends that this timing shows that the Grievant had no opportunity to accept the recommendations of the first observation in an effort to improve performance prior to the January 10, 2012 observation. The Association asserts that the increment withholding was not based on performance because the decision was made prior to the June 2012 completion of one of the IAP time frames. It argues that the withholding was premature because the March 1, 2012 observation indicated marked improvement over the previous observations. Finally, the Association asserts that the Board failed to conduct "pre-observation conferences" prior to formal observations as required when the Board participated in the state's evaluation pilot program as a "Pilot now" school.

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).

The record here contains no letters or documentation which provide a reason for the increment withholding. Principal Mingoia's July 24, 2014 Certification states the following:

13. On or about March 15, 2012, the recommendation was made that Grievant's increments for the 2012-2013 school year be withheld based on her poor teaching performance. See Exhibit G.

* * *

14. In view of Grievant's poor teaching performance, the Board, at its June 28, 2012 meeting, voted in favor of withholding Grievant's increment for the 2012-2013 school year. See Exhibit H.

* * *

21. To the best of my knowledge and belief, the decision to withhold Grievant's increment was based on evaluative, not disciplinary reasons.

Neither Exhibit G nor Exhibit H mention anything about "poor teaching performance" or refer to any performance-related issues or records such as observation reports. Therefore the record cited to by Mingoia's certification does not support his statements. For that reason, and because it was prepared after the filing of a grievance and this petition, we find Principal Mingoia's certification to be of very little value in determining the reason for the increment withholding. Accordingly we must consider all of the documents submitted by the parties to determine if they support the Board's assertion that the increment was withheld for predominately performance reasons.

Relying on the December 2011, January 2012, and March 2012 observation reports which repeatedly rated the Grievant "Basic" or "Unsatisfactory" in multiple teaching performance related components, we find that the record indicates that the Grievant's alleged deficiencies concern teaching performance and therefore the increment withholding was predominately based on an

evaluation of teaching performance. The Association did not provide any documentation which might have supported an alternate theory of non-performance reasons which may have predominated the decision.

As for the Association's allegations of procedural errors in the evaluation process, we find that these are also matters that fall within the educational expertise of the Commissioner of Education and may be raised in that proceeding.^{1/}

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

^{1/} Contrast increment withholding cases involving arbitrable allegations of contractual procedural violations that are severable from the increment withholding decision. 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).