

P.E.R.C. NO. 2015-69

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-010

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 (Samuel B. Wenocur, 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 Yalitza Torres, Principal at Benjamin Franklin School No. 13 (School No. 13), and Superintendent Olga Hugelmeyer. The Association filed a brief, exhibit, and the certification of

Roselouise Holz, NJEA Uniserv 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 Social Studies teacher at School No. 13. On October 2, 2012, Torres conducted a formal observation of the Grievant's classroom. Torres rated the Grievant "Basic" in three components, and "Proficient" in one component as follows:

Basic

- Establishing a Culture for Learning
- Using Questioning and Discussion Techniques
- Engaging Students in Learning

Proficient

- Communication with Students

On January 10, 2013, Roger Gonzalez, Supervisor of Instruction, conducted a formal observation of the Grievant's classroom. Gonzalez rated the Grievant "Basic" in two components and "Proficient" in three components as follows:

Basic

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

Proficient

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

On January 12, 2013, Torres issued the following written memorandum to the Grievant entitled "Lesson Plans":

Teaching and learning cannot take place if you are not prepared to teach with a plan and a purpose. This is a reminder that you are to submit your lesson plans adhering to the schedule set forth at the beginning of the 2012-2013 school year and the implementation of the Teachers' S Drive. As noted, lesson plans are due on a **weekly basis**.

Your lesson plans were not submitted as requested since the implementation of the new procedures. Please submit all the above lesson plans by Tuesday, January 15, 2013.

In the future, lesson plans **MUST** be submitted in the **Teachers' S Drive** for my review no later than 4:00 p.m. on the due dates.

If I can be of further assistance, please see me immediately.

On February 27, 2013, Torres issued the following written reprimand to the Grievant entitled "Letter of Reprimand - Endangering Students":

Today, February 27, 2013 at approximately 1:30pm, I observed two of your students exiting your classroom holding a large cup of coffee. When I inquired why they had a cup of coffee, they replied, "[Grievant] asked us to warm up the coffee in the teachers' room."

As you are well aware, this is unacceptable. First, students should not be sent to do your personal errands. Second, your decision to assign them this task has placed them in the line of danger. Third, the teachers' room is a student free area and it is inconsiderate to the other staff members who may be utilizing the room. Please refrain from sending the

students on any type of errands. Lastly, students were scheduled to be in Social Studies.

[Grievant], in line with our district's five priorities, it is your professional responsibility to ensure that they are adhered to, particularly to increase school safety and discipline. In this area, you have demonstrated irresponsibility.

Due to this circumstance, you are hereby reprimanded for endangering our students and our school community. A copy of this memorandum will be placed in your personnel file. In the future, I trust you will follow all district policies and perform all your professional responsibilities more attentively. Further action will be taken should this pattern continue.

Please see me if I can be of further assistance.

On March 2, 2013, Torres Torres e-mailed the grievant with the following comments regarding his classroom:

I just did a walkthrough of your room.  
Please work together on the following:

- On the windows: Writing Anchor Charts  
bold colors
- Over the board four window panels:  
HIGHLIGHT ON EACH PANEL THE THEME (ELA  
AND SOCIAL STUDIES) PER MARKING PERIOD  
WITH ESSENTIAL QUESTIONS AND VOCABULARY.  
In addition, strategies that were  
introduced.
- ON THE DOORS: ACADEMIC VOCABULARY FOR  
WRITING, RUBRIC FOR OPEN ENDED  
RESPONSES, ETC.
- The room NEEDS LOVE and LIFE!

You are responsible for the classroom  
environment - NO EXCUSES.

On March 19, 2013, Torres signed a letter to the Board's Director of Human Resources, Aaron Goldblatt, with the following recommendation:

"This is to recommend increment withholding for [Grievant], Teacher - Social Studies, at Benjamin Franklin School No. 13 for the 2013-2014 school year." (Board Exhibit H).

At its May 9 meeting, the Board approved a resolution to withhold the grievant's increment for the 2013-14 school year "for performance and/or attendance." (Board Exhibit I). On September 24, the Association filed a grievance on behalf of the teacher contesting his 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. 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 following alleged deficiencies are teaching performance related: the Grievant's ratings of "Basic" in several teaching-related evaluation components; the Grievant's untimely submission of lesson plans; the Grievant's use of two students to warm up his coffee in the teachers' lounge; and the Grievant's visual learning environment.

The Association asserts that the increment withholding was disciplinary in nature and therefore arbitrable. It argues that the Board's written observations contained only "Proficient" and "Basic" scores, and that the Board's past practice has been to not recommend increment withholdings if no "Unsatisfactory" ratings were made. The Association contends that the February 2013 incident involving students carrying coffee to the teacher's lounge does not address the Grievant's actual teaching classroom performance, and is similar to previous Commission cases finding that allegations of in-class misconduct are arbitrable. It asserts that the Board's withholding procedure was flawed because it did not provide the required statement of reasons for the increment withholding, and Torres did not give any specific reasons in her internal letter recommending the withholding. 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).

Principal Torres' July 24, 2014 Certification states the following:

14. On or about March 19, 2013, I made the recommendation that Grievant's increments for the 2013-2014 school year be withheld based on his poor teaching performance. See Exhibit H.

\* \* \*

15. In view of Grievant's poor teaching performance, the Board, at its May 9, 2013 meeting, voted in favor of withholding Grievant's increment for the 2013-2014 school year. See Exhibit I.

\* \* \*

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

Neither Exhibit H (the March 19, 2013 letter from Torres to Goldblatt quoted earlier) nor Exhibit I (the Board's resolution at its May 9, 2013 meeting) refer to performance-related issues

or records such as observation reports. Therefore the record cited to by Torres' certification does not support her statements. For that reason, and because it was prepared after the filing of a grievance and this petition, we grant Principal Torres' certification little weight 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.

Both the October 2012 and January 2013 observation reports summarized involve evaluations of teaching performance (engaging students, culture for learning, use of assessments, use of questioning and discussion, managing classroom procedures, and communication with students). The February 2013 memo critiquing the Grievant's visual learning environment in terms of decoration of the physical space and use of visual learning aids relates predominately to an evaluation of teaching performance. The Commission has found that alleged poor utilization of the physical classroom environment predominately involves an evaluation of teaching performance. See, e.g., Hainesport Township Bd. of Ed., P.E.R.C. No. 2014-15, 40 NJPER 189 (¶72 2013); Vernon Township Bd. of Ed., P.E.R.C. No. 98-44, 23 NJPER 569 (¶28,284 1997); Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003); Parsippany-Troy Hills Bd. of Ed., P.E.R.C.

No. 2000-28, 25 NJPER 442 (¶30194 1999); and New Providence Bd. of Ed., P.E.R.C. No. 98-91, 24 NJPER 108 (¶29053 1998).

The January 2013 lesson plans memo concerns failure to timely abide by a new administrative procedure for submission of lesson plans onto a computer drive (Teachers' S Drive). Where the only cited lesson plan deficiencies are strictly administrative, and not also related to the actual content or organization of the lesson plans, the Commission has found that such violations of administrative procedures or directives does not predominately relate to an evaluation of teaching performance. See E. Orange Bd. of Ed., P.E.R.C. No. 2014-49, 40 NJPER 343 (¶125 2014) (teacher's poor lesson planning and failure to teach based on approved lesson plans was performance-related, but administrative failures to timely submit lesson plans were not); Old Tappan Bd. of Ed., P.E.R.C. No. 2011-39, 36 NJPER 419 (¶162 2010) (increment withholding was performance related because "the majority of the Board's stated reasons go beyond whether duties were performed in a timely manner," such as inadequate lesson plans). Therefore, this memo is arguably not focused on teaching performance.

The February 2013 "endangering students" reprimand concerns misconduct for letting two students leave the classroom unattended and permitting them to engage in a potentially dangerous (carrying coffee and warming it up) activity which also

was allegedly disruptive to other teachers in the lounge. This memo is not primarily concerned with teaching performance because the Commission has found that such an incident of misconduct, without allegations of poor classroom management or control generally, is more akin to a violation of rules regarding leaving students unattended or improperly permitting or asking students to be somewhere or do something unrelated to learning. See, e.g., Old Bridge Bd. of Ed., P.E.R.C. No. 2008-15, 33 NJPER 230 (¶88 2007) (teacher used student to conduct personal union-related errand during class); Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001) (teacher left students unattended); Red Bank Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-23, 24 NJPER 474 (¶29221 1998) (teacher failed to adhere to school procedures for student hall pass use); Burlington Tp. Bd. of Ed., P.E.R.C. No. 94-77, 20 NJPER 71 (¶25031 1994) (teacher used students to act as her "eyes and ears" to help her spouse); and Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-72, 18 NJPER 64 (¶23028 1991) (teacher accused of allowing students to leave study hall and sleep in unattended classroom).

In sum, we have been presented with two evaluations focused on teaching performance issues, one memorandum focused on a teaching performance issue, one memorandum that is arguably not performance related, and one evaluation that is not focused on a teaching performance issue. Even though we disagree with the

Board's certification that all of these issues are predominately related to teaching performance, our own review still yields a balance of at least three performance-related documents out of the five cited by the Board and included in the record.

Accordingly, we find that the record indicates that the increment withholding was predominately based on an evaluation of teaching performance.

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.<sup>1/</sup>

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<sup>1/</sup> 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).

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 and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Wall was not present.

ISSUED: May 21, 2015

Trenton, New Jersey