

P.E.R.C. NO. 2015-73

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONTGOMERY TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-016

MONTGOMERY TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Montgomery Township Board of Education for a restraint of binding arbitration of a grievance filed by the Montgomery Township Education Association. The grievance contests the withholding of a speech/language specialist'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, Fogarty & Hara, attorneys (Stephen R. Fogarty, of counsel and on the brief and David L. Disler, on the brief)

For the Respondent, Bergman & Barrett, attorneys (Michael T. Barrett, of counsel and on the brief)

DECISION

On September 15, 2014, the Montgomery Township Board of Education filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the Montgomery Township Education Association. The grievance contests the withholding of a Speech and Language Specialist's salary increment. Because the increment withholding was predominately related to teaching performance, we grant the Board's request to restrain arbitration.

The Board filed briefs, exhibits, and the certifications of its Business Administrator and Middle School Supervisor of Pupil Services (Grievant's Supervisor). The Association filed a brief,

exhibits and the certification of grievant. These facts appear.

The Association represents a broad-based unit of educational professionals including Speech and Language Specialists. The Board and the Association are parties to a collective negotiations agreement (CAN) effective from July 1, 2012 through June 30, 2015. The grievance procedure ends in binding arbitration.

Grievant has been employed by the Board since January 2, 2006 in the capacity of a Speech/Language Specialist who provides speech and language services to students with disabilities in accordance with their Individualized Education Program (IEP) at the Lower and Upper Middle Schools. Grievant's Supervisor certifies as follows. On March 13, 2014, she began to question the services provided by grievant when she was copied on an email from one of the District's teachers to grievant. The email inquired why P.C. had been removed from her class for the first time in March to receive services from grievant. The teacher indicated that P.C. had not previously been removed from her class when he should have been removed for services on numerous prior occasions. Grievant's Supervisor emailed grievant asking for an explanation and requesting that grievant provide her lesson plans and attendance records to document that she had been providing one thirty-minute speech and language session to P.C. since September 2013 to May 20, 2014 in accordance with his IEP.

She met with grievant on March 17, 2014 and grievant explained that she confused P.C. for his brother who also received services, and that P.C. had been receiving services regularly. However, upon Grievant's Supervisor's review of grievant's lesson plans and attendance records, she discovered numerous discrepancies. Specifically, on at least six different dates, grievant's attendance records indicated that she provided services when either grievant was absent from school, when the school was closed due to inclement weather, or when the students were absent from school. On two different dates, grievant's lesson plans provided that services were canceled, however the attendance records indicated that services were provided. Additionally, the attendance records indicated that P.C. did not begin to receive services until October 10, 2013, almost a month after they were required to begin. Grievant also failed to provide records from the period of February 1, 2014 to February 15.

Grievant's Supervisor also certified as follows regarding grievant's handling of services relating to a student named B.Q. In February 2014, Grievant's Supervisor reviewed e-mails between grievant and B.Q.'s mother in which grievant indicated that she had disclosed confidential information to an outside speech/language specialist who was not approved by the Board. Specifically, grievant provided the outside specialist with B.Q.'s

speech evaluation and met with the specialist in person to discuss B.Q.'s disability and additional services to be provided to B.Q. The District has a number of procedures to ensure that teachers and staff are in compliance with State and federal law. Which include obtaining written parental consent by having the student's parents execute an Authorization to Release form before disclosing confidential information to an outside party. The District requires that any specialist who believes that a student requires services with an outside therapist must first discuss it with the student's case manager, and obtain approval from a supervisor or Director before discussing it with student's parents. Grievant's Supervisor also discovered that grievant failed to comply with the requirements in B.Q.'s IEP by unilaterally administering testing on B.Q after his parents had explicitly expressed their intent to use the consideration period afforded by law to consider the proposed testing. On March 11 and 13, 2014, B.Q.'s mother sent emails to his case manager stating that she was upset that the additional testing had been conducted on B.Q. and that the testing was very stressful and damaging his self esteem, and had caused him to miss school and services. Further, grievant marked B.Q. absent on March 5, 2014 in both her attendance records and lesson plans, despite having performed the unauthorized testing. Grievant's supervisor met with grievant on April 23, 2014 and developed a Corrective Action

Plan which identified two areas in which grievant needed to improve. The first area was for her to improve her attendance records and lesson plans which were identified as being incomplete, illegible and/or indicated services were provided when school was not in session, when grievant was absent, or when the student was absent. The second area was for her to comply with State and federal special education regulations and procedures. The CAP indicated that she tested a student without parental consent, failed her obligation to send evaluations home to parents within ten days of an IEP meeting, did not complete progress reports in time, made decisions with regard to assessments to be conducted on a student without parental consent and without consulting the Child Study team, and disregarded how the District carries out its obligations to develop and propose a program for a student with a disability.

Grievant's account of the pertinent events leading to her increment withholding differs from her supervisors. With regard to the discrepancies in her attendance records and lesson plans, grievant certifies that the attendance book is not an official book required to be maintained by the District, and that the lesson plans contain more formal notations of student contact and dates of services etc. Grievant further certifies that there were some date errors in her attendance book but the errors were "of no real moment" as the book itself is unofficial and just

kept for personal purposes. With regard to her handling of B.Q.'s case, grievant certified that B.Q.'s parents and case manager agreed that her reaching out to the outside specialist was a good idea, however, after the outside specialist worked up a cost estimate of \$3,000.00, the Director of Pupil Services was extremely upset. The Director asked grievant to talk the parents out of the testing which generated a meeting with the parents on March 5, 2014. Grievant left that meeting under the impression that B.Q. would do further testing and that the testing was authorized by his parents. The additional testing done on B.Q. involved a very short ten to twelve question test.

On April 21, 2014, grievant received written notice that a recommendation would be made to the Superintendent for an increment withholding for the 2014/15 school year. The notice details all of the events laid out in grievant's supervisor's certification. On May 16, 2014, grievant received another written notice informing her that on May 13<sup>th</sup>, the Board voted to withhold her increment for the 2014/15 school year. The letter stated:

After considering the concerns expressed by your supervisors in the April 21, 2014 Evaluative memorandum, and specifically concerning your failure to meet your professional responsibilities in the areas of record keeping, ethical conduct, and compliance with applicable regulations and Board policies and procedures, the Board affirmed the Superintendent's recommendation to withhold your employment and adjustment

increments for the 2014-2015 school year.

The Board shares the Superintendent's concerns about the discrepancies in your record and lesson plans, which at a minimum reflect an inattention to detail and careless record keeping and at its worst, a misrepresentation about the provision of speech and language services to students on days in which you were absent. Of greater concern are the spectrum of issues regarding the provision of speech and language services to a student where you failed to obtain the required authorization and consent for the release of information to an outside therapist. Such transgressions violate federal and State law concerning access to confidential pupil records. Finally, your failure to obtain consent before conducting testing on a child is a clear violation of State regulations of which you are certainly aware. Your conduct placed the District at risk for potential liability.

In June 2014, the Association filed Level 2 and Level 3 grievances, requesting a reversal of the increment withholding and advancement on the salary guide for the 2014-2015 school year. On June 30, the Association filed a Request for Submission of a Panel of Arbitrators. This petition ensued.<sup>1/</sup>

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

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<sup>1/</sup> On August 5, the parties agreed to stay the arbitration pending the outcome of this scope proceeding.



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.

In determining whether an increment was withheld for disciplinary reasons or teaching performance, we require the statement of reasons issued to the grievant. Here, the statement of reasons and all the documentation supporting the Board's petition provide three primary reasons for the withholding of grievant's increment. The first reason is due to the discrepancies discovered in grievant's attendance records and lesson plans. This reason does not concern the substantive content of the lesson plans, but rather administrative discrepancies which at best equate to sloppy record keeping and at worst equate to fraudulent record keeping. In Atlantic City Bd. of Ed., P.E.R.C. No. 2014-35, 40 NJPER 275 (¶106 2013), aff'd, 2015 N.J. Super. Unpub. Lexis 207. we found that an increment withholding was predominately disciplinary when it was due to a grievant having falsified school district home instruction forms to reflect that she provided instruction longer than was actually provided. While we acknowledged that the allegations were of serious misconduct, we found that they did

not require the expertise of the Commissioner of Education to resolve. See also Clifton Bd. Of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992). Here, we apply the same rationale and find that the first reason for the increment withholding was disciplinary.

However, we find that the second and third reasons for the increment withholding - - grievant's alleged failure to obtain the required consent and authorization for the release of B.Q.'s information to an outside specialist and unauthorized testing of B.Q.- - relate squarely to teaching performance. While grievant does not "teach" in the traditional sense, she provides speech and language services for students with various disabilities in accordance with students' IEPs. The second and third reasons may concern a possible breach of administrative rules and/or State and Federal law. However, more importantly for purposes of this matter, both reasons touch greatly upon grievant's professional judgments about how B.Q.'s services should be implemented. Moreover, given that grievant services students with disabilities, there is a heightened need for confidentiality with regard to the sensitive content of students' IEPs. Also of great concern is the impact that unauthorized testing could have on a student, and how unauthorized testing could affect the overall continuity and effectiveness of services. Wharton Bd. Of Ed., P.E.R.C. No. 2008-69, 34 NJPER 259 (¶91 2008); Freehold Reg. H.S.

Dist. Bd. of Ed., P.E.R.C. No. 2008-48, 34 NJPER 47 (¶14 2008).

Therefore, on balance, we find that the reasons for the withholding relate predominately to grievant's teaching performance.

ORDER

The Montgomery Township Board of Education's request 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: May 21, 2015

Trenton, New Jersey