

P.E.R.C. NO. 2015-80

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-021

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; Deborah J. Bracaglia, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Gail Oxfeld Kanef, of counsel)

DECISION

On September 23, 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 three certifications of Superintendent Olga Hugelmeyer. The Association filed a brief, exhibit, and the certification of the Grievant. 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 2010-11 school year, the Grievant was employed as a sixth grade teacher at the Juan Pablo Duarte-Jose Julian Marti School (School No. 28). On February 28, 2011, former Director of Staff Development Rachel Goldberg conducted a formal observation of the Grievant's classroom (Board Exhibit B). In addition to providing written critiques and suggestions for improvement, Goldberg rated the Grievant "Unsatisfactory" in two components, "Needs Improvement" in ten components, and "Demonstrating Growth" in seven components as follows:

Unsatisfactory

- Data-Driven Planning/Formative Evaluation
- Engaging Students in Learning

Needs Improvement

- Content Knowledge
- Instructional Practice
- Curriculum Articulation
- Knowledge of Child/Adolescent Development
- Knowledge of Diverse Learning Styles
- Student/Teacher Interaction
- Student/Student Interaction
- Expectations for Student Learning and Achievement
- Clear Directions and Procedures
- Use of Questioning and Discussion Techniques

Demonstrating Growth

- Cultural Sensitivity
- Use of Classroom and School Resources
- Display of Student Work
- Management of Classroom Resources
- Use of Oral and Written Language
- Maintaining Accurate Records
- Professionalism

At its June 30, 2011 meeting, the Board approved a resolution to withhold the grievant's increment for the 2011-12 school year "for performance and/or attendance." (Board Exhibit H). On September 7, the Association filed a grievance on behalf of the teacher contesting his increment withholding. On October 31, the Association demanded binding arbitration. This petition ensued.

Superintendent Hugelmeyer certifies that the Grievant's performance during the 2010-11 school year remained less than satisfactory, and that to the best of her knowledge and belief, "the decision to withhold [Grievant]'s 2011/2012 increment was predominately based on evaluative and not disciplinary reasons." The Grievant certifies that the February 2011 observation report rates him "Needs Improvement" in several categories related to the school district's failure to provide him with support for his ELL (English Language Learning) students. He certifies that because he is not certified to teach ELL, he is not qualified to adapt his curriculum for these students, and his evaluation is therefore procedurally deficient.

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 alleged deficiencies cited in the February 2011 observation report concern teaching performance issues in multiple areas of planning, preparation, instruction, and classroom environment.

The Association asserts that the increment withholding was procedurally flawed because the February 2011 observation report indicates that the Grievant was evaluated in a field in which he is not certified. It argues that not only should the increment withholding be arbitrable, but that its assertions regarding flawed evaluation procedures are 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).

There are no documents on record prior to Superintendent Hugelmeyer's September 17, 2014 certification which supply us with a statement or list of reasons for the recommendation to withhold the Grievant's increment. Because Hugelmeyer's certification was prepared after the filing of a grievance and the commencement of this petition, we grant it 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 teaching performance reasons.

Here, the February 28, 2011 classroom observation report is the only document from the 2010-11 school year which the Board claims as a basis for its increment withholding decision.^{1/} That observation report rated the Grievant "Needs Improvement" or "Unsatisfactory" in numerous predominately teaching performance related components. More specifically, of the nineteen components in which the Grievant was rated, only six could even arguably be non-performance related depending on the specific facts and circumstances (maintaining accurate records, professionalism, use of classroom and school resources, management of classroom resources, student/teacher interaction, and student/student interaction), while the remaining thirteen are more directly focused on teaching performance components in the broader categories of planning, preparation, instruction, and classroom environment. Accordingly, 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.

In the absence of an official statement of reasons issued at the time of the increment withholding recommendation or decision,

^{1/} The Board also submitted evaluation documents from prior school years, but we only consider these relevant to our inquiry if referenced in a statement of reasons issued at the time of the withholding. As there was no such statement, our analysis does not include these documents. See Bergenfield Bd. of Ed., P.E.R.C. No. 2006-80, 32 NJPER 126, 127 (¶58 2006).

the Association did not provide any documentation which might have overcome the February 2011 observation report to support an alternate theory of non-performance reasons which may have predominated the Board's 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.^{2/}

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 Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: June 25, 2015

Trenton, New Jersey

^{2/} 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).