

P.E.R.C. NO. 2016-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EDISON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-027

EDISON TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Edison Township Board of Education's request for a restraint of binding arbitration. The grievance contests the withholding of a paraprofessional's salary increment. Finding that N.J.S.A. 18A:29-14 does not provide an administrative forum to review the merits of a salary increment withholding from a paraprofessional, and absent any mandate requiring that salary increment disputes involving paraprofessionals be treated the same as those involving teaching staff, the Commission denies a restraint of binding 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, Busch Law Group, LLC, attorneys
(Ari D. Schneider, of counsel)

For the Respondent, Detzky Hunter & DeFillippo, LLC,
attorneys (Stephen B. Hunter, of counsel)

DECISION

On October 9, 2014, the Edison Township Board of Education (Board) petitioned for a scope of negotiations determination. The Board seeks to restrain arbitration of a grievance filed by the Edison Township Education Association (Association) claiming that the salary increment of a paraprofessional^{1/} was withheld without cause.

^{1/} Paraprofessional is spelled without a hyphen in Title 18A. We will use that spelling in this opinion.

The parties filed briefs, and exhibits. The Board filed a certification. These facts appear.^{2/}

The Association represents the Board's full and part time non-certificated employees including paraprofessionals.^{3/} The Board and the Association have a collective negotiations agreement (CNA) in effect from July 1, 2011 through June 30 2014. Article V provides in relevant part:

Just Cause Provision

No employee shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage, or denied renewal of contract without just cause pursuant to N.J.S.A. 34:13A-29, et seq. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure.

It is expected that all parties will exhibit professional behavior at all times.

Board policies applicable to support staff include:

2/ On June 29, 2015, an award was issued by an arbitrator sustaining the grievance and ordering restoration of the increment. We received the award and will incorporate pertinent factual findings.

3/ The titles in the collective negotiations unit are: attendance investigators, library aides, library assistants, paraprofessionals, teacher aides, administrative secretaries, school secretaries, clerical aides, security officers, registered nurses, licensed practical nurses, and excluding all other employees. Certificated employees are represented by the Association in a separate unit.

4150 Discipline

The Superintendent or designee shall deal with disciplinary matters on a case by case basis.

Discipline will include, as appropriate, verbal and written warnings, transfer, suspension, freezing wages, and dismissal; discipline will provide, wherever possible, for progressive penalties for repeated violations.

4152 Withholding of Increment

Salary increments for non-certified employees may be withheld upon the recommendation of a supervisor and the Superintendent and the approval of the Board.

The CNA provides for evaluations of paraprofessionals. The Board has two types of paraprofessionals; General Education and Special Education. The job requires either 60 college credits or an Associates degree.

The paraprofessional, a Board employee for 10 years, holds a bachelors degree. She had worked in a pre-school setting for four years prior to her assignment to a middle school for the 2013-2014 school year.

On March 11, 2014, a written reprimand was issued by the middle school principal to the paraprofessional. It chastised her for being "loud, dismissive and abrasive toward students" in a class that the Principal had observed. The document reminded the paraprofessional that she had received a verbal warning about similar conduct in November, 2013 and stated: "[I]f you act in

this manner again, you will be recommended to the Superintendent for further disciplinary action." In a written response the paraprofessional explained that her actions on that day were the product of frustration with the behavior of students who were disrupting the learning environment. However, she apologized and acknowledged that she should have selected a different and more professional way to handle the situation.

On April 1, 2014, a "Paraprofessional Evaluation Report" prepared and signed by the Supervisor of Special Education Services was issued to the paraprofessional.^{4/} It rated the paraprofessional as "Needing Improvement" (NI) in six categories.^{5/} It also contains written comments which the

4/ The arbitrator's award recites that the supervisor observed the paraprofessional's seventh grade science class on that same date.

5/ a. Cooperates with the implementation of classroom procedures;

b. Is actively engaged with students to meet the goals & objectives for overall effectiveness of the academic program;

c. Demonstrates the capacity to ensure a safe and healthy environment;

d. Exhibits positive behavior toward children, parents, staff, etc.;

e. Conducts self as a positive role model in the school;

f. Assists students with understanding, interpreting and adhering to rules and regulations.

arbitrator found pertained to the classroom incident discussed in the March 11, 2014 written reprimand.^{6/}

On April 8, 2014 the paraprofessional wrote a response to the NI ratings and written comments on the evaluation. On May 2, 2014 the paraprofessional received a "Rice Notice"^{7/} advising, "[T]he Board will retire into closed session to discuss a matter which may affect your employment status with the Board." On May 12, the Superintendent notified the paraprofessional that, at its May 7 meeting, the Board had voted to withhold the paraprofessional's increment. The Superintendent's letter concisely states: "Your increment has been withheld due to the reasons stated in your [April 1], 2014 Paraprofessional Evaluation Report."

On May 13, 2014 the Association filed a grievance asserting that the withholding of the increment was a disciplinary action taken without just cause and that the movement from a written reprimand to an increment withholding violated Policy 4150 calling for progressive discipline. The grievance was denied at all steps of the grievance procedure and on September 22, 2014,

^{6/} The principal testified that, after March 11, 2014, other staff said that the paraprofessional again addressed students in a loud manner. Those persons did not testify and the arbitrator found that the Board did not prove that further inappropriate behavior occurred after March 11.

^{7/} Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977), certif. den. 76 N.J. 238 (1978).

the Association demanded arbitration (Docket No. AR-2015-181). This petition ensued.

After the parties filed their initial briefs, we asked them to comment on the relevance of Randolph Tp. Bd. of Ed. and Randolph Ed. Ass'n,, 328 N.J. Super. 540 (App. Div. 2000) rev'g and rem'g P.E.R.C. No. 99-45, 25 NJPER 14 (¶30005 1998), overturning the Commission's refusal to restrain arbitration of a grievance challenging the withholding of increments from two tenured secretaries. The parties were also asked to address the impact of statutes (N.J.S.A. 18A:27-10.1 et seq.) pertaining to paraprofessionals that took effect in 2010.^{8/} The laws provide:

N.J.S.A. 18A:27-10.1

The Legislature finds and declares that as school districts that receive federal funding under Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 6301 et seq.) come under greater pressure to meet standards and demonstrate higher student performance, teachers in those districts are being forced to focus more on curriculum and student test preparation. In response to this pressure, the paraprofessionals that assist teachers are assuming greater responsibility for supporting students in the classroom and the school environment. Paraprofessionals perform a critically important role in providing a thorough and efficient education to the State's public school students. It is therefore fitting and proper to establish measures to enhance employment stability and

^{8/} N.J.S.A. 18A:27-10.4 is not pertinent to this dispute. It allows paraprofessionals, who are simultaneously pursuing college degree programs to obtain certification as a teacher, to perform student teaching in their districts.

promote professional development for these individuals.

N.J.S.A. 18A:27-10.2. Contract, written notice relative to employment of paraprofessional.

a. As used in this section, "paraprofessional" means an individual who is employed in a school district as a school aide or classroom aide who assists a teaching staff member with the supervision of pupil activities.

b. On or before May 15 in each year, a paraprofessional continuously employed since the preceding September 30 in a school district that receives funding under Title I of the federal Elementary and Secondary Education Act of 1965 (20 U.S.C. § 6301 et seq.) shall receive either:

(1) a written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education; or

(2) a written notice from the chief school administrator that employment will not be offered.

N.J.S.A. 18A:27-10.3. Dismissal, reduction in compensation; conditions

a. As used in this section, "paraprofessional" means an individual who is employed in a school district as a school aide or classroom aide who assists a teaching staff member with the supervision of pupil activities.

b. A paraprofessional employed in a school district that receives funding under Title I of the federal Elementary and Secondary

Education Act of 1965 (20 U.S.C. § 6301 et seq.) shall be dismissed or reduced in compensation during the term of a contract only for just cause, and may not be dismissed for arbitrary or capricious reasons. A paraprofessional who is dismissed or reduced in compensation shall receive notice of the basis for the dismissal or reduction in compensation and have an opportunity to be heard.

c. Nothing in this section shall be construed to grant tenure to a paraprofessional, interfere with the provisions of a collective bargaining agreement, or affect any other right or remedy that may be available to a school district or paraprofessional pursuant to law.

The Board asserts that in light of a paraprofessional's classroom functions and the Legislature's recognition of their vital role in educating students, they should be treated the same as teaching staff members for purposes of increment withholding appeals.

The Association argues that its grievance is legally arbitrable.^{9/} It points out that, in cases decided by the Commission subsequent to the Randolph court ruling, grievances challenging increment withholdings involving non-teaching staff have been permitted to proceed to arbitration whether the basis

^{9/} We reject the Association's assertion that because the Board did not seek an interim restraint of arbitration, thus allowing the arbitration to proceed, it cannot pursue its scope of negotiations petition. A petition filed prior to an arbitration hearing, as occurred here, can be pursued even if arbitration proceeds to an award. Thus, Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983) does not apply.

for the withholding is disciplinary or is based on job performance. It asserts that while N.J.S.A. 18A:27-10.1 notes the role of paraprofessionals in the educational process, the law also states that it seeks to "enhance employment stability and promote professional development" for them. The Association further points out that the laws: do not equate paraprofessionals with teaching staff members; bars paraprofessionals from acquiring tenure, and protects them from discipline, including reduction in compensation, absent just cause.

We have not previously had a case involving the appropriate forum to review an increment withheld from a paraprofessional.

Based on the separate references to teaching staff member and paraprofessional in N.J.S.A. 18A:27-10.1 et seq., and the omission of paraprofessional from the definition of "teaching staff member" in N.J.S.A. 18A:1.1, we conclude that N.J.S.A. 18A:29-14 does not provide an administrative forum to review the merits of salary increment withholdings from paraprofessionals.^{10/} Conversely, N.J.S.A. 18A:27-10.3(c) provides in relevant part:

Nothing in this section shall be construed to . . . interfere with the provisions of a collective bargaining agreement, or affect any other right or remedy that may be available to a school district or paraprofessional pursuant to law.

^{10/} We could find no Commissioner of Education, or court decision which determined whether an increment was properly withheld from a paraprofessional.

Randolph Tp Bd. of Ed. does not mandate that we treat a salary increment dispute involving a paraprofessional the same as those involving teaching staff. The Court in Randolph based its holding on a determination that the grievance procedure in the parties' CNA excluded review of increment withholdings. It distinguished E. Brunswick Bd. of Ed. and E. Brunswick Ed. Ass'n, P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd 11 NJPER 334 (¶16120 App. Div. 1985), certif. den. 101 N.J. 280 (1985) where the Court affirmed a Commission order allowing arbitration of a grievance challenging an increment withholding involving a non-professional to proceed:

In affirming, we noted that East Brunswick's collective bargaining agreement did not by its terms exclude increment withholding from arbitration, unlike the present case.

[328 N.J. Super. at 546]

Summit Board of Education, P.E.R.C. No. 2013-57, 39 NJPER 311 (¶107 2013), holds:

Non-teaching staff may use binding arbitration to review the withholding of increments for disciplinary reasons and for performance based-reasons where the parties have so agreed. See N.J.S.A. 34:13A-26 et seq.; Randolph Tp. Bd. of Ed. v. Randolph Tp. Ed. Ass'n, 306 N.J. Super. 207 (App. Div. 1997); Atlantic City Bd. of Ed., P.E.R.C. No. 2003-72, 29 NJPER 180 (¶53 2003); Flemington-Raritan Bd. of Ed., P.E.R.C. NO. 2003-64, 29 NJPER 113 (¶34 2003).

Absent a statute providing different forums for review of increment withholdings based on classroom/job performance and

those based on other reasons, a paraprofessional may challenge an increment withholding through binding arbitration.^{11/}

ORDER

The request of the Edison Township Board of Education for a restraint of binding arbitration is denied.^{12/}

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioners Bonanni and Wall were not present.

ISSUED: November 19, 2015

Trenton, New Jersey

^{11/} If this dispute had involved a teaching staff member, we would likely have restrained arbitration. Readington Tp. Bd. Of Ed., P.E.R.C. No. 2006-5, 31 NJPER 242 (¶93 2005) (yelling and using inappropriate language directed at students related to teaching performance).

^{12/} Accordingly, the arbitration award was legally arbitrable. We make no further rulings on the merits of the award.