

P.E.R.C. NO. 2016-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOBOKEN BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-026

HOBOKEN EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Hoboken Board of Education for a restraint of binding arbitration of a grievance filed by the Hoboken 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 to the extent it challenges the merits of the increment withholding. The Commission denies restraint of arbitration to the extent it challenges the Board's alleged procedural violation in not providing grievant with derogatory materials placed in her file.

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.

P.E.R.C. NO. 2016-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOBOKEN BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-026

HOBOKEN EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Porzio Bromberg & Newman, P.C.,
attorneys (Marie-Laurence Fabian, of counsel)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Samuel B. Wenocur, of counsel)

DECISION

On October 8, 2014, the Hoboken Board of Education (Board) filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Hoboken Education Association (Association). The grievance contests the withholding of a teacher's salary increment for the 2013-2014 school year. Because the increment withholding is based predominately on an evaluation of teaching performance, we restrain arbitration.

The Board filed briefs and exhibits.^{1/} The Association filed a brief, exhibits, the certification of grievant, and the certification of an Association representative. These facts appear.

The Association represents certified personnel within the district. The Board and Association are parties to a collective negotiations agreement (CNA) effective from July 1, 2011 through June 30, 2014, as well as a memorandum of agreement (MOA) covering the period from July 1, 2014 through June 30, 2016. The grievance procedure ends in binding arbitration.

Article XXII, PERSONNEL FILES, Section 3 of the CNA provides:

No material derogatory to a teacher's conduct, service, character or personality shall be placed in his personnel file unless the teacher has had an opportunity to review the material. The teacher shall acknowledge that he/she has had an opportunity to review the material by affixing his/her signature to the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. The teacher shall also have the right to submit a written answer to such material, and his/her answer shall be received by the Superintendent or his designee and attached to the file copy.

^{1/} Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall...[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

Grievant has been employed by the Board since 2004 and was a teacher at Thomas G. Connors Elementary School (Connors Elementary) from 2004-2014. During the 2013-2014 school year, grievant taught third grade. Presently, she teaches second grade language arts at Wallace Elementary School (Wallace Elementary).

On May 3, 2013, grievant's summative evaluation for the 2012-2013 school year was completed. Grievant received a "proficient" rating in 19 out of 22 assessed categories and two "distinguished" ratings.^{2/} However, she also received one "basic" rating for her professional responsibility with respect to maintaining accurate records. Grievant was advised to ensure that lesson plans and data, together with all required documentation, were submitted on time during the 2013-2014 school year.

During the 2013-2014 school year, the Principal sent grievant numerous correspondence regarding her late submission of regular and substitute lesson plans. Some of the correspondence stated that grievant's lesson plans were missing key components which reduced their effectiveness and needed revision. The Principal also advised grievant that she failed to align the objectives of some of her lesson plans with the school curriculum and/or current trends in the classroom and that same were

^{2/} The scale for this evaluation included, from lowest to highest, ratings of "unsatisfactory," "basic," "proficient," and "distinguished."

unsatisfactory and needed revision. In addition, the Principal sent grievant correspondence regarding her failure to submit a reflection regarding week one of the NJASK Academies and her Developmental Reading Assessment Second Edition (DRA-2) results.

On October 9, 2013, the Principal conducted an observation of grievant and issued a summary report thereafter. Grievant received an "effective" rating in 12 out of 16 assessed categories and three "highly effective" ratings.^{3/} However, grievant also received one "partially effective" rating for her classroom environment with respect to "establishing a culture for learning." Grievant was advised that the one display within her classroom was outdated and that evaluation of writing journals was missing. In "Areas for Growth," the Principal identified "establishing a culture for learning" and "maintaining accurate records." The Principal also specifically recommended that grievant "work closely with the data to make sound decision-making regarding lesson creation and activities," "provide individualized learning plans for students under your charge," and "[hand in] all work samples...on time (RE: DRA-2, Lesson Plans, Data Analysis, and Progress Reports) in the effort of making sound instructional decisions for the students under your charge."

^{3/} The scale for this evaluation included, from lowest to highest, ratings of "ineffective," "partially effective," "effective," and "highly effective."

On January 10, 2014, the Principal conducted a short observation of grievant and issued a summary report thereafter. Grievant received an "effective" rating in 8 out of 10 assessed categories and two "highly effective" ratings.^{4/} In "Areas for Growth," the Principal identified "establishing a culture for learning" and "maintaining accurate records" and specified that the "classroom teacher must ensure that all required items are submitted on time i.e. lesson plans (completed and in alignment to current curricular goals), CRT bi-monthly reflection and student posted work outside of the classroom setting." The Principal also specifically recommended that grievant ensure "that student work is changed on a consistent basis" and "that your lesson plan book is submitted on time and is in alignment to current trends evident in your classroom...[together with] curricular goals."

On March 19, 2014, the Vice Principal conducted a short observation of grievant and issued a summary report thereafter. Grievant received an "effective" rating in 7 out of 10 assessed categories and two "highly effective" ratings.^{5/} However, grievant also received one "partially effective" rating with

^{4/} The scale for this evaluation included, from lowest to highest, ratings of "ineffective," "partially effective," "effective," and "highly effective."

^{5/} The scale for this evaluation included, from lowest to highest, ratings of "ineffective," "partially effective," "effective," and "highly effective."

respect to "using assessment in instruction." Grievant was advised that feedback to students was general, that students appeared to be only partially aware of the assessment criteria used to evaluate their work, and that few students assessed their own work. In "Areas for Growth," the Vice Principal identified "using assessment in instruction" and specified that grievant's "assessment piece...need[ed] to be clear to...students in order to reach a proficient rating." The Vice Principal also specifically recommended that the grievant "have an exit exercise for each center" and "make sure that...[she was] prompt with [her] submission of time sensitive District required material, i.e. lesson plans, sub plans."

On May 2, 2014, grievant's Domain 4 Professional Responsibilities Score for the 2013-2014 school year was completed. Grievant was rated as follows:

Ineffective

- Reflecting on Teaching
- Maintaining Accurate Records
- Communicating with Families
- Showing Professionalism

Partially Effective

- Participating in a Professional Community
- Growing and Developing Professionally^{6/}

Specifically, these ratings were based on grievant: submitting poorly written and untimely lesson plans; failing to accept

^{6/} The scale for this evaluation included, from lowest to highest, ratings of "ineffective," "partially effective," "effective," and "highly effective."

feedback and follow suggestions on improvement of instruction; failing to update her electronic student grade book during the 2013-2014 school year; failing to communicate with parents about students' academic performance; and failing to establish positive relationships with colleagues.

On June 10, 2014, grievant's teacher evaluation for the 2013-2014 school year was completed. Although grievant received an overall rating of "effective," she also received an "ineffective" rating for her professional responsibility.^{7/} Specifically, grievant was rated as follows:

Ineffective

-Showing Professionalism

Partially Effective

-Reflecting on Teaching

-Maintaining Accurate Records

-Communicating with Families

-Participating in a Professional Community

-Growing and Developing Professionally^{8/}

On April 3, 2014, grievant made a request to be transferred from Connors Elementary due to "fear of complacency," as she felt "that a change in school and environment [would] allow [her] to continue to grow as an educator and an individual."

^{7/} The scale for this evaluation included, from lowest to highest, scores of "ineffective," "partially effective," "effective," and "highly effective."

^{8/} No comments or recommendations were included in this evaluation.

On May 2, 2014, the Principal sent a memorandum to the Assistant Superintendent of Schools (Assistant Superintendent) recommending that grievant's increment for 2014-2015 be withheld and outlined the following four reasons for his recommendation:

(1) Failure to submit lesson plans on time to the building principal.

(2) Failure to comply with Regional Achievement Centers (RAC) recommendations in reference to designing lesson plans that are authentic and meet the needs of the individualized learners under her charge.

(3) Failure to comply with the recommendations from her Annual Evaluation 2012-2013 indicating that the teacher must submit all requested items on time.

(4) Failure to submit bi-monthly assessment results and DRA-2 results on time.

On May 13, 2014, upon the recommendation of the Superintendent of Schools (Superintendent), the Board voted to withhold grievant's increment. Also on May 13, the Board voted to grant grievant's request to transfer. On May 20, the Superintendent provided grievant with written notice that the Board had voted to withhold her increment.

On May 21, 2014, grievant filed an OPRA request for all documents reviewed by the Board in rendering its decision to withhold her increment. On June 3, the Board responded to grievant's OPRA request indicating that no documents were given to the Board.

On May 23, 2014, the Assistant Superintendent requested a meeting for the purpose of having grievant review and sign-off on each item that was placed in her personnel file.

On May 27, 2014, the Association filed a grievance requesting a reversal of the increment withholding, advancement on the salary guide for the 2014-2015 school year, and removal of all references to increment withholding from grievant's personnel file. On June 30, the Superintendent rejected the grievance as outside the ambit of the grievance procedure in the CNA.^{9/} On September 18, the Interim Superintendent of Schools also rejected the grievance. On September 29, the Association filed a Request for Submission of a Panel of Arbitrators. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which

^{9/} Grievant certifies that at the end of the 2013-2014 school year, she boxed up her possessions and left them in her Connors Elementary classroom closet with a note that she would retrieve same when her classroom at Wallace Elementary was ready. When grievant returned to Connors Elementary on August 19, 2014, the Principal walked her to the basement where he showed grievant that her belongings had been put in garbage containers.

might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

As such, we do not consider the contractual merits of the grievance or whether there was just cause for the withholding.

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. and Edison Tp. Principals and Supervisors Ass'n, P.E.R.C. No. 97-40, 22 NJPER 390 (¶27211 1996), aff'd 304 N.J. Super. 459 (App. Div. 1997). Pursuant to 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. See N.J.S.A. 34:13A-27a. Where a board cites multiple reasons, but shows that it acted primarily for certain reasons, we will weigh those concerns more heavily in our analysis. Woodbridge Tp. Bd. of Ed., P.E.R.C. No. 2009-53, 35 NJPER 78 (¶31 2009). However, 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. Montgomery Tp. Bd. of Ed., P.E.R.C. No. 2015-73, 41 NJPER 493 (¶152 2015).

We articulated the process for making an increment withholding determination in Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991):

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 argues that the rationale behind grievant's increment withholding for the 2014-2015 school year was primarily evaluative and, therefore, not arbitrable.

The Association responds that the grievance is arbitrable because the increment withholding was predominately disciplinary in nature. Specifically, the observation reports and summary evaluation for grievant's teaching performance in 2013-2014, in

addition to 2014-2015 observation reports, indicate that she was/is an effective performer. Moreover, the Association contends that the Principal's hostility toward grievant was in retaliation for grievant's request to transfer schools.

Additionally, the Association argues that the grievance is arbitrable because the Board violated Article XXII when it failed to give grievant the opportunity to review and sign any derogatory material before it was placed in her personnel file.

In reply, the Board reiterates that the reasons for the withholding relate to teaching performance. Additionally, the Board maintains that the grievant's claim about not following Article XXII is outside the scope of the grievance.

We find that the stated reasons for the increment withholding predominately focus on an evaluation of grievant's alleged teaching performance deficiencies. Concerns about timeliness and tardiness, including failure to submit timely and relevant regular and substitute lesson plans, are relevant to teaching performance. See Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 98-153, 24 NJPER 339 (¶29160 1998); see also Old Tappan Bd. of Ed., P.E.R.C. No. 2011-39, 36 NJPER 419 (¶162 2010); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-54, 41 NJPER 398 (¶124 2015); Willingboro Bd. of Ed., P.E.R.C. No. 2006-87, 32 NJPER 165 (¶74 2006); Englewood Bd. of Ed., P.E.R.C. No. 2006-33, 31 NJPER 353 (¶140 2005); Salem City Bd. of Ed., P.E.R.C. No.

2001-3, 26 NJPER 357 (¶31142 2000). Failure to make adequate progress on recommendations and failure to adequately record student grades are also teaching performance concerns. Woodbury Bd. of Ed., P.E.R.C. No. 2006-81, 32 NJPER 128 (¶59 2006).

We decline to look behind the Board's stated reasons to see if a discriminatory or improper motive was at work. We assume that the Board will be bound by its asserted reasons before the Commissioner of Education and that the Commissioner has the power to set aside a withholding induced by an improper motive. Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996); see also Kopera v. West Orange Tp. Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

However, procedures associated with the withholding of an increment are mandatorily negotiable so long as they do not significantly interfere with the substantive right to withhold an increment. Englewood Bd. of Ed., supra. Therefore, we find that the Association's allegation regarding the Board's procedural violation in not providing grievant with derogatory materials placed in her file is mandatorily negotiable. No showing has been made in this case that compliance with the alleged requirement that grievant be given the opportunity to review, acknowledge, and submit a written answer to any derogatory material before it was/is placed in her personnel file would have significantly interfered with the Board's asserted prerogatives.

While the alleged procedural allegation was not fully set out in the grievance, we may look beyond the initial grievance documents to determine the essence of a union's claim and, in this instance, the Association's claim related to Article XXII was fully briefed by the parties. City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); see also North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707 (¶16245 1985).

ORDER

The request of the Hoboken Board of Education for a restraint of binding arbitration is granted to the extent the grievance challenges the merits of the increment withholding. The request is denied to the extent the grievance challenges the alleged procedural violation(s) related to Article XXII.

BY ORDER OF THE COMMISSION

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

ISSUED: September 24, 2015

Trenton, New Jersey