

P.E.R.C. NO. 2016-22

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-035

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 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 the grievant's 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.

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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 Castellucci, Jr., on the brief)

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

DECISION

On November 19, 2014, the Elizabeth Board of Education (Board) filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Elizabeth Education Association (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 the Superintendent of Schools (Superintendent), the Thomas Jefferson Arts Academy (Jefferson Academy) Principal (Principal), and the Director of Personnel. The Association filed a brief and

the certification of the Uniserv Representative for Region 15 of the New Jersey Education Association (Uniserv Representative). These facts appear.

The Association represents certified personnel within the school district including, but not limited to, teachers, librarians, nurses, attendance officers, guidance counselors, clerks, secretaries, lab assistants, security personnel, classroom assistants and computer technicians. 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 from July 1, 2012 through June 30, 2015. The grievance procedure ends in binding arbitration.

Article XI, EMPLOYEE EVALUATION, Section I of the CNA provides, in pertinent part:

- A. A teacher shall receive a copy of his/her evaluation report.
- B. A teacher shall have the right, upon request, to review the contents of his/her personnel file.
- C. No material derogatory to a teacher's conduct, service, character or personality shall be placed in his/her personnel file or used in an evaluations unless the teacher has had an opportunity to review the material. The teacher shall have the right to submit a written answer to such material.

Grievant is employed by the Board and was a mathematics teacher at Jefferson Academy during the 2011-2012 school year.

On December 7, 2011, the Supervisor of Secondary Education (Supervisor of Secondary Ed.) conducted a walkthrough observation of grievant and issued a summary report thereafter. Grievant was provided with the following constructive criticism:

**Component 2a. Creating an Environment of Respect and Rapport**

Patterns of classroom interactions, both between the teacher and students and among the students, are generally appropriate but may reflect occasional inconsistencies, favoritism, and disregard for students' ages, cultures, and developmental levels. Students rarely demonstrate disrespect for one another. Teacher attempts to respond to disrespectful behavior, with uneven results. Students were in groups of 4's and 3's. They were working on a hand out [the grievant] distributed to them on reflective property of geometric figure, over the x-axis. [The grievant] used patty paper to further help the vision and kinesthetic learner in class. The most advance[d] students were assisted [by] the weaker students in each group. While most of the students were actively engaged, some of them were very talkative and unproductive.

On January 24, 2012, the Supervisor of Secondary Ed. conducted a formal observation of grievant and issued a summary report thereafter. Grievant received a "basic" rating in five out of seven assessed areas.<sup>1/</sup> Grievant was provided with the following constructive criticism and recommendations:

Basic

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<sup>1/</sup> The scale for this evaluation included, from lowest to highest, ratings of "unsatisfactory," "basic," "proficient," and "distinguished."

**Component 2b. Establishing a Culture for Learning**

During the lesson the classroom culture is characterized by little commitment to the learning by the students. Student's engagement in the task at hand is inconsistent. During the lesson many students were talking throughout the lesson or responsible for their own learning and were very talkative.

**Component 2d. Managing Student Behavior**

During activities, several students conducted private conversations, to which [the grievant] did address unsuccessfully. Throughout the lesson, [the grievant] is generally aware of student behavior but may miss the activities of some students on electronic devices. [The grievant] is encouraged to monitor student behavior and devise techniques for students to remain on topic.

**Component 3b. Using Questioning and Discussion Techniques**

[The grievant] asked several questions of his students and many answered. However, he is encouraged further to solicit a more genuine discussion by employing techniques [that] requires students to ask questions of their peers. Although there was an attempt to engage students in genuine conversation, the results were uneven and inconsistent. Whereas, there was a few student to teacher interaction in answering questions, [the grievant] is encouraged to foster more student to student interaction through the use of questioning.

**Component 3c. Engaging Students in Learning**

The lesson has a recognizable structure. Activities and assignments are appropriate to some students and engage them mentally, but others are not engaged. [The grievant's] use of instructional groups was only partially appropriate to the students or only moderately successful in advancing the instructional outcomes of the lesson.

Although there was a discernible structure to the lesson, it was not completely successful. [The grievant] is encouraged to utilize cooperative learning strategies as Think-Pair-Share to increase more student engagement.

**Component 3d. Using Assessment in Instruction**

Assessment is occasionally used to support instruction, through some monitoring of progress of learning by teacher and/or students. Questions/prompts/assessments are not used to diagnose evidence of learning. I asked many students questions about the work they were doing, most of them were unable to tell me. The one who was able to tell me had limited knowledge of the works they were doing. I would suggest [that the grievant] use an exit slip as one of the strategies to assess his students understand of the lesson.

On February 24, 2012, the Supervisor of Mathematics conducted a walkthrough observation of grievant and issued a report thereafter. Grievant received a "basic" rating in the only assessed category."<sup>2/</sup> Grievant was provided with the following constructive criticism and recommendations:

**Component 3c. Engaging Students in Learning**

There is a total of 17 students in the class. The teacher had asked that students complete a do now, complete a quiz, work on carnegie computer and introduce a project. Students worked in pairs except for three students who sat individually. The teacher walked around the class monitoring students work and collecting paper of students who complete their quiz. The task that students worked on were a mix of those that requiring [sic] thinking and recall. The instructional

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<sup>2/</sup> The scale for this evaluation included, from lowest to highest, ratings of "unsatisfactory," "basic," "proficient," and "distinguished."

groups that students were in did not help service the instructional purpose of the lesson. I would encourage students to either work in groups of four while they are working on the do now. However, when they are completing the quiz they should seat individually or in pairs if it's a partner quiz. Some of the students engage in the task, however a few other students were off task and needed guidance from either the teacher or their peer.

On February 28, 2012, the Supervisor of Secondary Ed. conducted a formal observation of grievant and issued a report thereafter. Grievant received two "unsatisfactory" ratings and one "basic" rating in the three assessed areas.<sup>3/</sup> Grievant was provided with the following ratings, constructive criticism and recommendations:

Basic

**Component 2b. Establishing a Culture for Learning**

The classroom culture is characterized by little commitment to the learning by student. Student engagement in the task at hand is inconsistent. [The grievant] displayed a Do Now on the star board for students on how to find the slope of a line given two points on the line and the formula. They were also asked to use the mid-point formula to find the mid-point of the line. 7 out of 22 students were doing the problems. Some of the students had their heads down, played on their cell phones. 12 minutes [in]to the class [the grievant] had a student on the board to write or show his answer to the Do Now, but the class did not pay attention to what was [written] on the board. [The

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<sup>3/</sup> The scale for this evaluation included, from lowest to highest, ratings of "unsatisfactory," "basic," "proficient," and "distinguished."

grievant] must ask students to explain their thought process when showing their works on the Board, communicate to students that they need to complete the Do Now within five minutes, use cooperative group in the class, and use the district non-negotiable instructional techniques.

Unsatisfactory

**Component 2d. Managing Student Behavior**

Teacher tries with uneven results, [sic] to monitor student behavior and respond to student misbehavior. There is inconsistent implementation of the standards of conduct. [The grievant] needs to follow the district policy regarding student's use of unauthorized electronics devices in class. Students need to pay attention when someone else is speaking, arrive to class on time for learning and stop shouting out at each other across the room.

**Component 3c. Engaging Students in Learning**

At the beginning of the class [the grievant] displayed a Do Now on the star board for students to work on. Students [were] supposed to use two points on a line and the formal to find the slope, mid-point of the line. 7 out of 22 students were engaged in the Do Now Activities and the remaining students in the class were engaged in their side conversations. 12 minutes [in]to the class, 5 students walked in late without a pass. [The grievant] asked a student to go on the board to do the Do Now; unfortunately most of the students did not pay attention to what was going on, on the board. The lesson has not clearly defined structure. Few students are intellectually engaged. [The grievant] spent most of the time on the board trying to explain the problems while students were talking very loud. He tried to ask many questions with uneven answer from the students. The instruction does not facilitate students constructing knowledge, allowing some students to be passive or compliant. There was no clear rule or routine to handle classroom behavior. [The



grievant]: needs to establish a culture of learning in the class by making students responsible for their own learning[;] needs to establish a routine to handle classroom behavior (action and consequences)[;] uses cooperative learning group in class[;] needs to be stop talking over students and establish his authority in the class[;] be diligent when giving Do Now at the beginning of the class, too much learning time lost.

On June 12, 2012, grievant's teacher evaluation for the 2011-2012 school year was completed. Grievant received a "proficient" rating in 14 out of 22 assessed categories.<sup>4/</sup> However, grievant also received eight "basic" ratings as follows:

Basic

- Demonstrating Knowledge of Content and Pedagogy
- Creating an Environment of Respect and Rapport
- Establishing a Culture for Learning
- Managing Classroom Procedures
- Managing Student Behavior
- Using Questions and Discussion Techniques
- Engaging Students in Learning
- Using Assessment in Instruction

Grievant was provided with the following constructive criticism and recommendations:

You need to exhibit more enthusiasm in the classroom for this will create a more positive learning environment where the students will follow what you model. You must move away from a teacher oriented lesson to one that is more student oriented in its planning. Asking one word answers or definition questions toward the end of the class will eventually cause the students to lose interest in the activity, become

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<sup>4/</sup> The scale for this evaluation included, from lowest to highest, ratings of "unsatisfactory," "basic," "proficient," and "distinguished."

disengaged and off-task. Use a variety of instructional strategies that effectively challenge and engage the students that also account for different needs and learning styles of your students. Ask a variety of questions that promote the students critical thinking, higher order thinking skills.

On March 9, 2012, the Principal sent a memorandum to the Executive Director of Human Resources/Labor Counsel recommending that grievant's increment for 2012-2013 be withheld. According to the Principal's certification,<sup>5/</sup> grievant demonstrated significant performance deficiencies during the 2011-2012 school year and the decision to withhold his increment was based on evaluative reasons. Those deficiencies included, but were not limited to:

- struggling with presenting organized lessons;
- failing to utilize accepted educational pedagogy;
- failing to follow school district curriculum;
- failing to address the needs of students;
- and

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5/ There appears to be a discrepancy between the Principal's certification and the observation/evaluation reports provided as exhibits in the Board's Appendix of Documents (Appendix). The Principal certifies that there are four different ratings, from lowest to highest, as follows: (a) unsatisfactory; (b) needs improvement; (c) demonstrating growth; and (d) mastered skill. However, the observation/evaluation reports in the Board's Appendix indicate that the ratings actually are, from lowest to highest, as follows: (a) unsatisfactory; (b) basic; (c) proficient; and (d) distinguished. In any event, we surmise that a rating of "basic" is the second to lowest grade, that a rating of "proficient" is the second to highest grade, and that a rating of "distinguished" is the highest grade.

-failing to properly utilize instructional time.

The Principal certifies that despite receiving formal written observations, evaluations, correspondence, and memoranda from his superiors in this regard,<sup>6/</sup> grievant's performance during the 2011-2012 school year failed to improve.

On June 28, 2012, the Board voted to withhold grievant's increment. On August 1, the Association filed a grievance requesting that grievant's increment be restored for the 2012-2013 school year. On October 18, the Association's Request for Submission of a Panel of Arbitrators was filed. 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 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.

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<sup>6/</sup> The Principal certifies that the results of all observation reports, and the annual evaluation, for the 2011-2012 school year were shared with grievant.

As such, we do not consider the contractual merits of the grievance or whether there was just cause for this 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 grievance is not subject to binding arbitration because grievant's increment was withheld due to his ineffective teaching performance and, therefore, predominately involves an evaluation of his job performance.

The Association argues that the Board's decision to withhold grievant's increment was predominately disciplinary in nature based upon the Board's disparate treatment of grievant, the timing of the observations/evaluations and the Principal's increment withholding recommendation, and the fact that

grievant's performance was more than acceptable during the 2011-2012 school year according to his annual evaluation. In addition, the Association argues that the grievance is arbitrable because of the Board's failure to follow collectively negotiated provisions regarding evaluation procedures.<sup>7/</sup>

The Board replies that its stated reasons for the increment withholding must be accepted without consideration of the Association's procedural claims and/or suggestion(s) that same are pretextual. Further, the Director of Personnel certifies that although walkthrough and informal observations do not count towards a teacher's yearly summative ratings, the CNA does not prohibit same and the Board is not precluded from using walkthrough and informal observations as evidence that a teacher is ineffective.

We first address a threshold procedural issue. Where, as here, the Board has not submitted the statement of reasons for the withholding that is required to be given to the teacher

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<sup>7/</sup> The Uniserv Representative has certified that if a teacher is at risk for an increment withholding, typically he/she is first placed on a 60 or 90 day improvement plan that includes directions for improving teaching performance and scheduled meetings to monitor the teacher's performance during and after the plan. The Uniserv Representative also certifies that the Board's past practice is not to recommend increment withholding based upon ratings of "basic" and "proficient." Lastly, the Uniserv Representative certifies that Board officials confirmed that walkthroughs and informal evaluations were not supposed to be considered in a teacher's summative reports.

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), the Commission will ordinarily require certifications from the principal actors attesting to the reasons for the withholding. Elizabeth Bd. of Ed., P.E.R.C. No. 2015-54, 41 NJPER 398 (¶124 2015); see also 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); Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005). Here, we accept the Principal's 9-page certification, the Superintendent's 2-page certification, the Director of Personnel's 3-page certification, and the Board's Appendix in lieu of the statement of reasons. We note that multiple increment withholding scope of negotiations petitions have been filed with this Commission by the Board related to the same time period and none contain the legally required statement of reasons. Here again, we express our disappointment that the Board appears to not be following the statutory procedural requirements of the increment withholding process, but note we have no authority to issue a remedy within the exclusive jurisdiction of the Commissioner of Education.

We are not persuaded in our increment withholding gatekeeping function by the labels, e.g. "reprimand" or

"evaluation," given to the documents underpinning a school board's decision. Rather, as all increment withholdings are inherently disciplinary, we are concerned with whether the cited deficiencies are based on an evaluation of teaching performance. Edison Tp. Bd. of Ed.

The certifications and Appendix we rely on here in lieu of a statement of reasons provide a narrative explaining the reasons for the increment withholding. We find that same predominately focus on an evaluation of grievant's alleged teaching performance deficiencies. Although we need not determine whether every reason cited by the Board relates to teaching performance, the following concerns are all relevant to teaching performance: ineffective instruction as observed in the classroom; maintaining classroom discipline; effectively managing the classroom; failing to align lesson plans and teaching with a school district's approved curriculum and New Jersey curriculum standards; failing to properly utilize instructional time; failing to address the needs of students; failing to utilize accepted educational pedagogy; and failing to engage students. New Providence Bd. of Ed., P.E.R.C. No. 98-91, 24 NJPER 108 (¶29053 1998); South Harrison Tp. Bd. of Ed., P.E.R.C. No. 96-36, 22 NJPER 20 (¶27007 1995); Wood-Ridge Bd. of Ed., P.E.R.C. No. 98-41, 23 NJPER 564 (¶28281 1997); Bergenfield Bd. of Ed., P.E.R.C. No. 2006-80, 32 NJPER 126 (¶58 2006); 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); East Orange Bd. of Ed., P.E.R.C. No. 2014-33, 40 NJPER 258 (¶99 2013); Paterson School Dist., P.E.R.C. No. 94-115, 20 NJPER 258 (¶25129 1994); Millville Bd. of Ed., P.E.R.C. No. 98-48, 23 NJPER 601 (¶28295 1997); Middlesex Bd. of Ed., P.E.R.C. No. 2005-80, 31 NJPER 177 (¶72 2005); New Providence Bd. of Ed.

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., P.E.R.C. No. 2006-33, 31 NJPER 353 (¶140 2005). Therefore, we find that the Association's allegation regarding the Board's procedural violation in not providing grievant with derogatory materials placed in his file and/or used in evaluation is mandatorily negotiable. No showing has been made in this case that compliance with the alleged

requirement that grievant be given the opportunity to receive, review, and submit a written answer to any derogatory material 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 XI 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 Elizabeth 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 XI.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioner Voos voted against this decision. Commissioners Jones and Wall were not present.

ISSUED: October 29, 2015

Trenton, New Jersey