

P.E.R.C. NO. 2016-19

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-059

ELIZABETH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies 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 do not predominately relate to evaluation of teaching performance, the Commission declines to restrain 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 (Joshua I. Savitz, of counsel)

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

DECISION

On March 16, 2015, 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 asserts that the Board disciplined the teacher without just cause by withholding her salary increment for the 2012-13 school year.

The Board filed briefs, exhibits, and the certification of Yalitza Torres (Torres), who was principal of Benjamin Franklin School No. 13 (School No. 13) during the subject 2011-12 school year. The Association filed a brief. 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.

The Grievant is a sixth-grade math and language arts teacher at School No. 13. On September 28, 2011, Principal Torres conducted a formal observation of the Grievant's teaching. The performance level ranges are Unsatisfactory, Needs Improvement, Demonstrating Growth, and Mastered Skill. Of the twenty-two components of evaluation, the Grievant was rated "Demonstrating Growth" in fifteen areas and "Needs Improvement" in seven areas. She received neither the highest rating of "Mastered Skill" nor the lowest rating of "Unsatisfactory" in any of the components. The evaluation was as follows:

**A. Planning and Preparation**

"Demonstrating Growth"

- Content Knowledge
- Instructional Practice
- Curriculum Articulation
- Knowledge of Child/Adolescent Development
- Cultural Sensitivity
- Knowledge of Diverse Learning Styles

"Needs Improvement"

- Data-Driven Planning/Formative Evaluation
- Use of Classroom and School Resources

**B. Environment**

"Demonstrating Growth"

- Student/Teacher Interaction
- Student/Student Interaction

"Needs Improvement"

- Display of Student Work

- Management of Classroom Resources

**C. Instruction**

"Demonstrating Growth"

- Expectations for Student Learning and Achievement
- Clear Directions and Procedures
- Engaging Students in Learning
- Using Assessment in Instruction
- Reflecting on Instruction

"Needs Improvement"

- Use of Oral and Written Language
- Use of Questioning and Discussion Techniques

**D. Professional Responsibilities**

"Demonstrating Growth"

- Maintaining Accurate Records
- Participation in a Professional Community

"Needs Improvement"

- Professionalism

On November 21, 2011, Torres issued a memorandum to the Grievant entitled "Signing In" which stated:

Today, November 21, 2011, you did not sign in. Employees are required to sign in upon entering the school building sign out when leaving as mandated by the District. In the event of an emergency, this procedure is necessary to ensure your safety.

Also on November 21, Torres issued a memorandum to the Grievant entitled "TARDINESS" which stated, in pertinent part:

Please be advised that on November 21, 2011 you were late. Your attendance is being monitored.

In contributing to the success of our District's Vision and Mission Statement punctuality is essential. The accumulation of five (5) tardy marks to an assigned duty within a given school year will result in a deduction from your pay...Please keep in mind that constant tardiness may lead to increment withholding.

On January 26, 2012, Torres issued a "Letter of Reprimand - Endangering Students" memorandum to the Grievant for asking a student to retrieve her coffee from her car during homeroom. The letter stated, in pertinent part:

Today, January 26, 2012 at approximately 7:40am, three of your homeroom students were placed in the line of danger. One student was seen weaving in and out of the street as cars and buses were driving by, all the while being chased by a dog. When this student was questioned, she stated that you...told her to retrieve your coffee from your car, which was parked across the street from the school. In addition, two other students were waiting by the side door to open the door for the student assigned to retrieve your coffee.

As you are well aware, this is unacceptable. First, students should not be sent to do your personal errands. Second, your decision to assign them this task has placed them in the line of danger. Third, your actions have compromised the building and the welfare of everyone in the building. As per our discussion, please refrain from sending the students on any type of errands.

\* \* \*

Due to this circumstance, you are hereby reprimanded for endangering our students and our school community. A copy of this memorandum will be placed in your personnel file. In the future, I trust you will follow all district policies and perform all your professional responsibilities more attentively. Further action will be taken should this pattern continue.

On January 31, 2012, Torres issued another "TARDINESS" memorandum to the Grievant which stated, in pertinent part:

Please be advised that on January 31, 2012 you were late. Additionally, you were late

on November 21, 2011. Your attendance is being monitored.

Please remember that upon entering the building, you are to report to the main office and sign in as required by the district....Please keep in mind that constant tardiness may lead to increment withholding.

On February 1, 2012, Torres issued another "TARDINESS" memorandum to the Grievant which stated, in pertinent part:

Please be advised that on February 1, 2012, you were late. In addition, you were also tardy on November 1, 2011 and January 31, 2012. In reviewing the sign-in book, I noticed that you signed in for the next day on January 31, 2012. Please remember that you are to sign in upon entering the building and signing out when you leave.

On February 7, 2012, Principal Torres wrote a letter to the Board's labor counsel entitled "Recommendation for Increment Withholding" which stated:

This is to recommend increment withholding for [Grievant], Sixth Grade Teacher, at Benjamin Franklin School No. 13 for the 2012-2013 school year.

The letter supplied no reasons for the increment withholding except for an attached "Non-Renewal/Increment Withholding Form" signed by Torres on February 7. The form stated the following under "Attendance Record and Lateness":

Ms. Torres met with [Grievant] regarding her tardiness. She has been given many opportunities to address and correct the issue.

The form listed the September 2011 Evaluation in the "Evaluations" section.<sup>1/</sup> The form listed the following reprimand memos from the 2011-12 school year in the "Corrective Memos/Reprimands/Warnings" section<sup>2/</sup>:

<u>Date</u>	<u>Comments</u>
2/1/2012, 1/31/2012	Tardy
1/26/2012	Reprimand-Endangering Students
11/21/11, 11/21/2011	Tardy/Signing In

In the "Other Reasons" section of the Increment Withholding Form, Torres provided the following explanation:

Ms. Torres met with [Grievant] on 1/26/2012 regarding her students being placed in line of danger (see attached reprimand).<sup>3/</sup>

At its June 28, 2012 meeting, the Board approved a resolution to withhold the Grievant's increment for the 2012-13 school year. On July 30 and August 1, the Association filed an initial grievance and level two grievance contesting the teacher's increment withholding for lack of just cause. On October 5, the Association demanded binding grievance arbitration. This petition ensued.

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1/ The form also listed one evaluation each from the previous two school years which were not submitted by the Board.

2/ The form also listed two reprimands from the previous school year for tardiness and lesson plans which were not submitted by the Board.

3/ The referenced January 26, 2012 "Endangering Students" reprimand regarding the coffee retrieval incident (discussed earlier) was not attached to the Increment Withholding Form as part of Exhibit I, but was supplied as Board Exhibit F.

The Board has not provided a statement of reasons for the Grievant's increment withholding issued at the time other than the February 7, 2012 internal Increment Withholding Form completed by Torres that accompanied her increment withholding recommendation letter to the Board's labor counsel.

The Board asserts that arbitration must be restrained as the Grievant's increment was withheld based on poor teaching performance. The Association responds that the increment withholding was primarily disciplinary and not based on her teaching performance.

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.

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., 304 N.J. Super. 459 (App. Div. 1997).

In determining the predominate basis for an increment withholding, we ordinarily look to the official statement of reasons given in the letter notifying a teaching staff member of a withholding. Here, 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). When a Board does not follow its legal obligation, the Commission will ordinarily require certifications from the principal actors attesting to the reasons for the withholding. See, e.g. 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).

However, if the record contains documents from the board of education that explain the basis for withholding and are more contemporaneous with the increment withholding action, we will accept and place greater reliance on those reasons rather than certifications prepared for litigation. See, e.g., Elizabeth Bd. of Ed., P.E.R.C. No. 2015-49, 41 NJPER 346 (¶110 2015) (where Board did not supply statement of reasons, the Commission relied on internal form from the Principal to the Board counsel

recommending withholding rather than Principal's certification filed after the scope petition); Summit Bd. of Ed., P.E.R.C. No. 2013-57, 39 NJPER 311 (¶107 2013) (paragraph in annual evaluation linking prohibited computer use to increment withholding constituted statement of reasons rather than Human Resources Director's certification filed with the scope petition); Bridgeton Bd. of Ed., supra (where Board did not supply statement of reasons, the Commission relied on a letter the superintendent wrote to the Board's counsel explaining the withholding); and Washington Tp. Bd. of Ed., supra (where Board did not supply statement of reasons, the Commission relied on a letter the executive vice principal wrote to the superintendent recommending increment withholding). Therefore, Principal Torres' February 7, 2012 internal increment withholding form is given greater weight in determining the reasons for the withholding than is her certification which was prepared after the grievance and scope petition were filed.

The increment withholding form we rely on here in lieu of a statement of reasons provides that the Grievant's tardiness was a major factor in addition to her alleged endangerment of students when they retrieved coffee from her car. The narrative sections of the form specifically address tardiness and the coffee/endangerment incident. Other parts of the form list five reprimands from the 2011-12 school year for tardiness (three

reprimands), signing in, and the coffee/endorsement incident. The only evaluative material cited on the form is the listing of three evaluations, only one of which took place during that school year. All five of the cited reprimands were supplied by the Board and summarized earlier in this decision, as was the one observation report/evaluation conducted by Torres earlier in the school year.

The Commission has consistently held that a teacher's tardiness is not an issue of teaching performance. Elizabeth Bd. of Ed., P.E.R.C. No. 2015-59, 41 NJPER 424 (¶132 2015); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-55, 41 NJPER 401 (¶125 2015); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-48, 41 NJPER 344 (¶109 2015); Woodbridge Tp. Bd. of Ed., P.E.R.C. No. 2009-53, 35 NJPER 78 (¶31 2009); Atlantic City Bd. of Ed., P.E.R.C. No. 98-43, 23 NJPER 567 (¶28283 1997). We have also held that deficiencies in adhering to administrative sign-in/sign-out procedures are not teaching performance issues. Atlantic City Bd. of Ed. and Atlantic City Ed. Ass'n, P.E.R.C. No. 2014-35, 40 NJPER 263 (¶101 2013), *aff'd* 41 NJPER 312 (¶101 2015); Bergenfield Bd. of Ed. and Bergenfield Ed. Ass'n, P.E.R.C. No. 2006-69, 32 NJPER 82 (¶42 2006), *aff'd* 33 NJPER 186 (¶65 App. Div. 2007); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992). As for the January 26, 2012 "Endangering Students" reprimand referenced and discussed in the increment withholding form, we have previously

found that such misconduct centered around violations of rules pertaining to the supervision or safety of students is not primarily an issue of teaching performance. See, e.g., Elizabeth Bd. of Ed., P.E.R.C. No. 2015-69, 41 NJPER 474 (¶147 2015) (reprimand for leaving students unattended to heat up teacher's coffee in teachers' lounge and carry it back to the classroom is not an evaluation of teaching performance); Old Bridge Bd. of Ed., P.E.R.C. No. 2008-15, 33 NJPER 230 (¶88 2007) (teacher used student to conduct personal union-related errand during class); Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001) (teacher left students unattended); Red Bank Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-23, 24 NJPER 474 (¶29221 1998) (teacher failed to adhere to school procedures for student hall pass use); Burlington Tp. Bd. of Ed., P.E.R.C. No. 94-77, 20 NJPER 71 (¶25031 1994) (teacher used students to act as her "eyes and ears" to help her spouse); and Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-72, 18 NJPER 64 (¶23028 1991) (teacher accused of allowing students to leave study hall and sleep in unattended classroom).

When viewed as a whole, we find, on balance, that the increment withholding was predominately disciplinary in nature, and not predominately based on an evaluation of teaching performance. The record reflects more non-teaching allegations of infractions or deficiencies than teaching performance

concerns. The Principal's emphasis in her internal increment withholding form completed at the time of the decision was on chronic tardiness, violation of sign-in/out rules, and an incident of misconduct surrounding students retrieving her coffee. No educational expertise is needed to determine whether the alleged violations and misconduct occurred and justified the withholding. We therefore hold that the withholding is not predominately based on an evaluation of teaching performance and may be reviewed by an arbitrator. The Board may raise all of its concerns, both teaching and non-teaching related, to the arbitrator.

ORDER

The request of the Elizabeth Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: September 24, 2015

Trenton, New Jersey