

P.E.R.C. NO. 2016-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LODI BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-023

LODI EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Lodi Board of Education for a restraint of binding arbitration of a grievance contesting the withholding of a teacher's longevity increment filed by the Lodi Education Association. The Commission finds that the reasons for the withholding are predominately disciplinary in nature.

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, Sciarrillo, Cornell, Merlino,
McKeever & Osbornbe, LLC, attorneys (Anthony P.
Sciarrillo, on the brief)

For the Respondent, Dennis Grieco, Staff Representative

DECISION

On October 2, 2015, the Lodi Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Lodi Education Association (Association). The grievance contests the withholding of a teacher's salary increment. Because the increment withholding is predominately disciplinary in nature, we decline to restrain arbitration.

The Board filed a brief and one exhibit. The Association filed a brief. The Board also filed a reply brief. These facts appear.^{1/}

1/ Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with
(continued...)

The Association represents all certified personnel within the school district excluding the superintendent of schools, principals, vice principals, and other newly created and existing administrative/supervisory positions. The Board and the Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2013 through June 30, 2016, as well as a memorandum of agreement (MOA) covering the same period. The grievance procedure ends in binding arbitration.

According to the Board's brief, the grievant is a tenured teaching staff member assigned to Lodi High School whose 2014-2015 Annual Performance Review (APR) revealed performance deficiencies. Specifically, the Board maintains that the basis for withholding the grievant's longevity increment was set forth in a letter dated March 18, 2015 from the Principal of Lodi High School to the grievant which summarized parts of the grievant's 2014-2015 APR. The body of the letter provides in full as follows:

This letter serves to memorialize our meeting on February 11, 2015 attended by you, Mrs. Breitwieser, and myself in regards to an incident that occurred on February 6, 2015. When I asked you why you weren't in your assigned class when Mrs. Yzqueirdo stopped in to do an observation, you mentioned that you had ran to your car to look for your wallet, you stated that you were gone for a few minutes and returned to class.

1/ (...continued)
the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

When I asked if you went from your car to class, you stated that you left the school grounds and went to Dunkin Donuts because you thought that you may have left your wallet there earlier that morning and that when you arrived at Dunkin Donuts you realized that your wallet was on the floor of your car. When asked if you returned straight to school after finding your wallet, you stated that once you found your wallet you went into Dunkin Donuts and bought a coffee and returned to school. A review of our security cameras shows you leaving the school grounds at 8:30 am and returning at 8:42 am. You are seen entering the building with two cups of coffee one of which you brought to room 107 where Ms. Manchego was substituting for Dr. Arella. A review of the security cameras on prior days revealed that on many occasions you leave the school grounds during your second period prep and return with coffee. On this particular date, you were scheduled to provide coverage during your second period prep. Your statements in our meeting contradict the story that you told to Mrs. Yzqueirido when she asked you where you were when she went to observe your class. You told her that you ran to the car to check for your wallet and omitted the fact that you left school grounds to go to Dunkin Donuts. When Mrs. Yzqueirido asked your cooperating teacher where you were she stated that you told her that you had to run to the bathroom. As per our discussion, your failure to inform the school administration that you were leaving school grounds during a time in which you had an assigned teaching duty and the fact that you went into Dunkin Donuts to purchase coffee and bring it back to a substitute teacher was inappropriate, unacceptable, and constitutes conduct unbecoming a staff member.

Please be advised that under no circumstances are you to leave school grounds during an assigned teaching period or duty without receiving approval from an administrator. This situation would have resulted in a better outcome if you consulted with the administration prior to leaving school grounds.

As per my letter to you dated January 28, 2015 (COPY ATTACHED) in reference to a case in which your actions were found to fit the NJ Anti-Bullying Bill of Rights definition of Harassment Intimidation or Bullying (HIB) a recommendation was made to the Superintendent to withhold your salary increment. I am recommending to

the Superintendent of Schools that the previously recommended Discipline is applied to this incident and that no further action is taken at this time. If another incident of this nature is to occur I may recommend additional discipline to the Superintendent.

Thank you for your anticipated cooperation.^{2/}

Other than the grievance papers and the Principal's letter, neither party submitted a certification or an exhibit related to the grievant's increment withholding.

On March 26, 2015, the Association filed a Request for Submission of a Panel of Arbitrators (AR-2015-544) claiming that the grievant's increment withholding and corrective action plan were "[d]isciplinary" in nature. This petition ensued.

The Board argues that the Superintendent of Schools recommended withholding the grievant's increment after the Principal of Lodi High School reported and documented the following instances of inadequate job performance and/or inappropriate conduct:

-inappropriate methods of classroom coverage and/or failure to provide instruction on February 11, 2015;^{3/}

2/ According to the Board's brief, the Principal's letter demonstrated a multitude of problems with the grievant's job performance and the decision to withhold the grievant's longevity increment was directly related to performance deficiencies in his 2014-2015 APR. However, the Board did not provide the Commission with the grievant's APR.

3/ Although the Board's brief states that the incident occurred on February 11, 2015, the Principal's letter indicates that the incident occurred on February 6, 2015 and that the grievant met with the Principal on February 11, 2015. For
(continued...)

- inadequate communication to supervisors about leaving the school and failing to cover a classroom on February 11, 2015;
- inappropriate methods of student management and/or student communications resulting in a HIB violation in January 2015; and
- any other examples of inadequate job performance and/or inappropriate conduct in 2014-15 that may be described or referred to in [the] Principal's March 18, 2015 letter.

The Board maintains that the grievant's increment withholding was predominately related to an evaluation of his teaching performance.

The Association argues that the grievant's increment withholding was predominately disciplinary in nature. The Association maintains that the Board does not refer to the grievant's teaching performance, annual summative rating scores, or observations, instead focusing almost exclusively on the incident recounted in the Principal's letter. The Association also argues that longevity increments should be treated like education-based increments rather than adjustment increments, claiming that this matter is legally arbitrable because longevity increments should not be subject to withholding under N.J.S.A. 18A:29-14.^{4/}

3/ (...continued)
purposes of our decision, we assume that the incident occurred on February 6, 2015.

4/ In South Harrison Tp. Bd. of Ed., P.E.R.C. No. 96-84, 22 NJPER 242 (¶27126 1996), we restrained arbitration of a grievance to the extent it related to a longevity increment
(continued...)

The Board replies, reiterating that the reasons set forth above for withholding the grievant's increment were predominately related to an evaluation of his performance.

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.

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

4/ (...continued)
withholding, noting that longevity payments are construed by the Commissioner of Education to constitute employment increments and that pursuant to N.J.S.A. 18A:29-14, a board of education may withhold the employment increment or the adjustment increment, or both, of any teaching staff member. Accord Pascack Valley Reg. Bd. of Ed., P.E.R.C. No. 2015-45, 41 NJPER 336 (¶106 2015). Accordingly, we find this aspect of the Association's argument to be without merit and reject it.

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 may only 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). We are not persuaded in our increment withholding gatekeeping function by the labels given to the documents (e.g. "reprimand" or "evaluation") 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. 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.

Initially, we address the fact that the Board did not submit a statement of reasons for the withholding to the Commission.^{5/} In cases where a 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 the withholding which are more contemporaneous with that decision than certifications prepared for purposes of litigation. See, e.g., Elizabeth Bd. of Ed., P.E.R.C. No. 2015-69, 41 NJPER 474

^{5/} Pursuant to N.J.A.C. 19:13-2.2(a)(3), the Board was required to submit the statement of reasons to the Commission with its scope of negotiations petition.

(¶147 2015). Here, we express our disappointment that the Board does not appear to have followed the regulatory procedural requirements of the increment withholding process.

Based upon the limited facts and/or exhibits provided by the Board, including the lack of any documentation pertaining to an evaluation of the grievant's teaching performance other than the Principal's letter, we find that the reasons for withholding the grievant's increment were predominately disciplinary in nature and are appropriate for review before an arbitrator rather than the Commissioner of Education.

With respect to the alleged HIB violation in January of 2015, we find that the proofs submitted are insufficient to make a determination regarding whether this aspect of the increment withholding was predominately related to an evaluation of teaching performance or was disciplinary in nature.

With respect to allegedly leaving a class unattended for at least twelve minutes without adequate coverage and without notifying school administration, we find the circumstances in this matter analogous to other cases in which the Commission has found that the increment withholding was predominately disciplinary in nature. Elizabeth Bd. of Ed., P.E.R.C. 2016-19, 42 NJPER 188 (¶50 2015); see, e.g., 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) (teacher failed to appear

for home-school instruction and falsified school district tracking forms); 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) (teacher left school or was outside the building on multiple occasions when she was assigned to work with students or to provide in-class support; teacher left school early and was absent for partial or full days without providing adequate documentation; teacher was found asleep, or was not present, on multiple occasions while there were students in her classroom); Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001) (teacher allegedly left students unattended in order to telephone a parent from another part of the school and one student assaulted/injured another student during this time; teacher divided her students among four other classrooms in order to make a telephone call and was later found talking with another teacher in the hallway while her students were unattended); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992) (teacher left school before the end of the day despite prior written warnings and falsified sign-out sheet; teacher failed to attend back-to-school nights despite prior written warnings; teacher threatened superior).

Moreover, we find the cases cited by the Board to be distinguishable as they predominately relate to substantive

evaluations of classroom management and/or supervision of students.

Accordingly, the Board's request to restrain arbitration is denied.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: February 25, 2016

Trenton, New Jersey