

P.E.R.C. NO. 2016-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-038

ELIZABETH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Board of Education for a restraint of binding arbitration of a grievance filed by the Association contesting the withholding of a teacher's salary increment, finding that the reasons for the withholding were predominately evaluative of teaching performance.

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, DeCotiis, Fitzpatrick & Cole, LLP, attorneys (Jonathan Williams, of counsel and on the brief; Arlene Quinones Perez, of counsel and on the brief; Lesley Sotolongo, on the brief)^{1/}

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

DECISION

On December 15, 2015, the Elizabeth Board of Education (Board) filed a scope of negotiations petition seeking a 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 predominately involves an evaluation of teaching performance, we restrain binding arbitration.

^{1/} When the petition was filed, the Board was represented by other counsel.

The Board filed a brief, exhibits, and the certification of the Principal of Benjamin Franklin School No. 13 (School 13). The Association filed a brief, exhibits, and the certification of the grievant. The Board also filed a reply brief. These facts appear.

The Association represents all certified personnel employed by the Board, including teachers. The Board and Association were parties to a collective negotiations agreement (CNA) in effect from July 1, 2012 through June 30, 2015. The grievance procedure ends in binding arbitration.

The grievant has been employed as a teacher by the Board since 2001. She was assigned to teach sixth grade Language Arts at School 13 during the 2012-2013 school year.

On September 27, 2012, the Principal conducted an unannounced classroom observation of the grievant and issued a summary report with her findings. The grievant's performance was assessed and scored^{2/} in several areas, including the following deficiencies:

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

Component 2d. Managing Student Behavior

Level: Basic

Comments: [The grievant] attempted many times to correct the behaviors in the classroom. However, the talking continued which lead [sic] to some distractions. As we discussed in our post conference, students should be able to do the following: Students can describe the standards of conduct and correct their own behavior. Utilize non-verbal signals to address students behavior. Address students privately.

Component 3b. Using Questioning and Discussion Techniques

Level: Basic

Comments: Questions are a mix of higher-order and questions with single correct answer. Some questions are unrelated to the learning outcomes. Teacher calls on many students, but only a small number actually participate in the discussion. We agreed: tum-talk [sic] will lead to more ELA discussions and less chatter. -prepare questions in advance for read-aloud.

Component 3c. Engaging Students in Learning

Level: Basic

Comments: During our post conference, we discussed areas of improvement such as creating questions for read aloud, tum-talk [sic], assigning roles to each student, etc. Implementing the above strategies will increase student engagement.

On January 13, 2013, the Supervisor of Instruction conducted a formal classroom observation of the grievant and issued a summary report with his findings. The grievant's performance was assessed and scored in several areas, including the following deficiencies:

Component 2d. Managing Student Behavior

Level: Basic

Comments: [The grievant] tried with uneven results, to monitor student behavior and responded to student misbehavior. There was inconsistent implementation of the standards of conduct.

Component 3a. Communication with Students

Level: Basic

Comments: [The grievant's] attempt to explain the instructional purpose had only limited success, and/or directions and procedures must be clarified after initial student confusion. On several occasions [the grievant] refused to re-iterate her directions and/or explanation to students who she deemed were off task. ...[The grievant's] explanation of the content may contain minor errors. Some portions were clear; other portions were difficult to follow. [The grievant's] spoken language was correct.

Component 3b. Using Questioning and Discussion Techniques

Level: Basic

Comments: [The grievant's] questions/prompts were a combination of low and medium quality, some related to the lesson objectives and of moderate cognitive challenge inviting a thoughtful response. [The grievant] attempted to engage all students in the discussion and to encourage them to respond to one another with uneven results. ...

On February 19, 2013, the Principal received a letter from K.M.'s^{3/} mother expressing concerns about the grievant's interactions with K.M. Specifically, K.M.'s mother:

3/ K.M. was a student in the grievant's homeroom and Language Arts class.

- claimed that the grievant had ignored her complaints and only responded to two of her emails;
- recounted a meeting on February 15, 2013 attended by several professional staff, including the grievant, regarding K.M.'s progress; and
- noted the complaints/issues that she and K.M. had with the grievant.^{4/}

On February 25, 2013, the Principal issued a memorandum to the grievant, labeled an "Official Written Reprimand," concerning the grievant's "inappropriate attitude and demeanor in the classroom." Specifically, the Principal stated:

The other day, a parent met with me to discuss concerns regarding her child. Apparently, the child has been experiencing some difficulties that developed from the disposition you display towards this child. This is not the first time that parents have raised concerns regarding your attitude and demeanor in the classroom. It is vital that you address this issue immediately by conducting yourself in a professional manner, and promote an attitude that reflects positively on your students.

As indicated in A Framework for Teaching by Charlotte Danielson, components in Domain 2 consist of the interactions that occur in a classroom that are non instructional. As part of this domain, the teacher is to establish a comfortable and respectful classroom environment, which cultivates a culture for learning and creates a safe place. This environment encourages students to take pride in their work and to assume responsibility for their learning.

^{4/} K.M.'s mother wrote two follow-up emails, on February 25 and March 13 concerning K.M.'s progress.

I recommend that you take professional development workshops to assist you. Also, your peers may be available to discuss various techniques that have been successful to them. Additional resources are also available on the internet.

Due to this circumstance, you are officially reprimanded. 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.^{5/}

Also on February 25, 2013, the Principal issued a memorandum to the grievant which stated in pertinent part:

A review of attendance records indicates that to date you have been absent from work for 12 days. Regular attendance is essential for achieving the district's mission and vision. This letter is intended to remind you that your attendance is being closely monitored. Due to your attendance, increment withholding may be recommended.

On March 2, 2013, the Principal conducted a walkthrough of the grievant's classroom.^{6/} The Principal certifies that "[t]he room did not . . . reflect an environment conducive to learning." Accordingly, the Principal sent an email to the grievant and another teacher requesting the following modifications:

5/ On March 26, 2013, the grievant filed a rebuttal to the Principal's memorandum denying "all [of] the accusations. . . ." On March 28, 2013, the Principal filed a response to the grievant's rebuttal.

6/ The grievant shared the classroom with another teacher.

- On the windows: Writing Anchor Charts bold colors
- Over the board four window panels: HIGHLIGHT ON EACH PANEL THE THEME (ELA AND SOCIAL STUDIES) PER MARKING PERIOD WITH ESSENTIAL QUESTIONS AND VOCABULARY. In addition, strategies that were introduced.
- ON THE DOORS: ACADEMIC VOCABULARY FOR WRITING, RUBRIC FOR OPEN ENDED RESPONSES, ETC.
- ON THE SMALL BOARDS: STUDENT WRITING SAMPLES. (this is an ENGLISH classroom?)
- Remove the miniature word wall that no one can see
- The room NEEDS LOVE and LIFE!

The Principal also certifies that the grievant's students had the following failure rates during the 2012-2013 school year:

- 1st marking period: 19 of 39 students failed (49%)
- 2nd marking period: 13 of 37 students failed (35%)
- 3rd marking period: 22 of 37 students failed (60%)

On March 19, 2013, the Principal recommended that the grievant's increment be withheld for the 2013-2014 school year. The "Non-Renewal/Increment Withholding Form" submitted by the Principal provides in pertinent part:

Attendance Record and Lateness:

-2/25/2013 - Attendance Notice

Evaluations:

- 1/13/2013 - NI^{7/}
- 9/27/2012 - NI

^{7/} NI stands for "Needs Improvement."

Corrective Memos/Reprimands/Warnings:

- 3/7/2013 - Interpersonal Relationship Training
- 3/2/2013 - Memo
- 2/25/2013 - Reprimand

Correspondence from Parents:

- 3/13/2013 - Letter
- 2/25/2013 - Email
- 2/19/2013 - Letter

Other Reasons:

In Charlotte Danielson's A Framework for Teaching, Domain 2: The Classroom Environment, teachers are to create a learning environment through positive interpersonal interactions, efficient routines and procedures, clear and consistent standards of conduct and a safe physical environment that supports the learning purposes. The classroom has no evidence of an environment of respect and rapport, no established culture for learning, and no organized physical space. In addition, there is lack of managed student behavior and classroom procedures. [The grievant's] poor classroom management and lack of planning and preparation has lead [sic] to low student performance. Her student performance had limited growth and more than sixty percent (60%) of her students are non-proficient (see attached correspondence). We have met on many occasions and corresponded to discuss alternatives to address this matter. [The grievant] continues to have difficulty with classroom management, student performance and planning and preparation in order to comply with requirements as part of her contract. Professional development workshops and peer discussions/observations have been recommended to improve her techniques. To date, no improvements in these areas have been evident hence affecting student classroom performance. A Corrective Action Plan has been developed for [the grievant].

The Principal certifies that although the grievant's "less than stellar attendance served to exacerbate her performance issues",^{8/} her primary concern with the grievant "was always her classroom instruction and interactions with students."

On March 28, 2013, the Principal created a Corrective Action Plan (CAP) for the grievant to improve her teaching deficiencies during the period from April 8, 2013 to June 10, 2013. Specifically, the grievant's CAP addressed two areas:

I. Classroom Instruction/Curriculum Planning

Goal: -To fully implement the 90 minute Language Arts Block and to successfully incorporate level Guided Reading into your daily routine.

-To incorporate High Order Thinking Questioning and Assignments that targets the higher levels of Blooms Taxonomy and/or Costa's Levels of Thinking and Questioning.

-To follow the district pacing guide and the Language Arts Common Core Standards.

-Focus on Domain 2: Classroom Environment.

II. Differentiated Instruction/Centers

Goal: -Using data, [the grievant] will make instructional adjustments to meet the needs of all her students. She will schedule, group, and plan centers for students that are appropriate using suitable classroom materials.^{9/}

8/ The Principal maintains that the grievant "cannot provide appropriate instruction to her students if she is not [present for class]."

9/ The grievant was also provided with specific strategies to help her attain these goals; resources/assistance that was available; the means for determining successful completion of each portion of the CAP.

The grievant certifies that from 2001-2012, she received positive instructional observations and year-end summative evaluations and never had an increment withheld. The grievant also certifies that from 2014-present, she received positive observations and summative evaluations and has not had an increment withheld. During the 2012-2013 school year, however, the grievant had attendance-related problems for the first time in her career due to a herniated cervical disc and degenerative disc disease. The grievant certifies that after receiving the Principal's "attendance notice" on February 25, 2013, the Board granted her request for a medical leave from April 15, 2013 to June 30, 2013.

The grievant further certifies that the Board's resolution indicates that her increment was withheld "for performance and/or attendance." However, she never received a statement of reasons for the increment withholding. The grievant certifies that the Board's criticism of her classroom management skills during the 2012-2013 school year was a pretextual basis for the increment withholding, maintaining that attendance was the real reason. The grievant also certifies that the Principal relied upon unsubstantiated criticism from one parent who never observed her teaching to recommend the increment withholding.

On May 9, 2013, the Board voted to withhold the grievant's increment for the 2013-2014 school year. The Board resolution

reflecting the withholding set forth the recommendation to withhold "for performance and/or attendance" of personnel who were thereafter listed in the resolution. On September 24, 2013, the Association filed a grievance claiming that the Board violated Article IV, Section A of the parties' CNA by withholding the grievant's increment without just cause. On October 18, the Association's Request for Submission of a Panel of Arbitrators (AR-2014-305) was filed. This petition ensued.

The Board argues that arbitration should be restrained because the grievant's increment was withheld for predominately evaluative reasons related to deficiencies in teaching performance. Specifically, the Board contends that the grievant was repeatedly found to be in need of improvement during the 2012-2013 school year with regard to her interactions with students and parents, managing student behavior, and establishing a classroom environment conducive to learning. Moreover, although the grievant also had attendance issues, the Board maintains that the Principal recommended the increment withholding for the 2013-2014 school year based primarily on poor teaching performance.

The Association argues that the primary reason for the Board's decision to withhold the grievant's increment related to absenteeism issues caused by legitimate, well-documented orthopedic problems. Further, the Association claims that the

Board's failure to provide the grievant with a statement of reasons substantiates its contention that the increment withholding was based upon absenteeism. The Association also maintains that the Board's reliance on an uncorroborated parental complaint further demonstrates that the increment withholding was not evaluative in nature.

In reply, the Board reiterates that there is no evidence in the record to support the contention that the grievant's increment was withheld due to absenteeism. The Board claims that although the grievant was warned pursuant to district policy, any medical-related absences occurred after the Principal had recommended the increment withholding based on deficient evaluations and observations. The Board also maintains that even if the grievant was not provided with proper notice of the reasons for the increment withholding, which it does not concede, technical defects will not void an increment withholding as long as the record demonstrates that the employee knew or should have known the reasons.

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 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 grievant or the Commission.^{10/} 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 (¶147 2015). Multiple increment withholding scope of negotiations petitions filed by the Board during the same period do not contain a statement of reasons. We express our disappointment in the Board's continued deficiency, but note we have no authority to issue a remedy within the exclusive jurisdiction of the Commissioner of Education.

The Principal's certification and the exhibits produced by the Board that we rely on here in lieu of a statement of reasons provide an explanation of the Board's reasons for the increment withholding. Although we need not determine whether every reason cited by the Board relates to teaching performance, we find that

^{10/} Pursuant to N.J.S.A. 18A:29-14, the Board was required to submit a statement of reasons to the grievant within ten days of the increment withholding. 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.

the Board's reasons focus predominately on an evaluation of the grievant's alleged teaching performance deficiencies.

The Principal has certified that she made the recommendation to withhold the grievant's increment for the 2013-2014 school year based primarily on the grievant's classroom instruction and interactions with her students. The Principal's certification is supported by Exhibit P (the March 19, 2013 "Non-Renewal/Increment Withholding Form"), which provides written reasons for the increment withholding and references records (Exhibits B through N) contemporaneous with her recommendation.

Specifically, the September 27, 2012 and January 13, 2013 observation reports involve an evaluation of teaching performance (managing student behavior, communication with students, using questions and discussion techniques, and engaging students in learning). The Commission has found that the following concerns are relevant to teaching performance: ineffective instruction and poor classroom management of students; ineffective teaching techniques; maintaining classroom discipline; engaging student interest during class; failing to differentiate instruction to meet the learning needs of students; failing to properly communicate academic expectations and standards to students and their parents. See *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); Demarest Bd. of Ed., P.E.R.C. No. 99-36, 24 NJPER 514 (¶29239 1998), aff'd 26 NJPER 113 (¶31046 App. Div. 2000); Greater Egg Harbor Reg. High School Dist. Bd. of Ed., P.E.R.C. No. 95-58, 21 NJPER 116 (¶26071 1995), recon. den. P.E.R.C. No. 95-84, 21 NJPER 175 (¶26110 1995).

The Principal's March 2, 2013 observation and related email involves an evaluation of teaching performance (visual learning environment, in terms of decoration of the physical space, and use of visual learning aids in the classroom). The Commission has found that poor management or utilization of the physical classroom environment is a component of teaching performance. See Elizabeth Bd. of Ed., P.E.R.C. No. 2015-69, 41 NJPER 474 (¶147 2015); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-80, 42 NJPER 46 (¶13 2015); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-30, 41 NJPER 231 (¶76 2014).

The first memorandum dated February 25, 2013 from the Principal to the grievant relates to the grievant's classroom attitude and demeanor, an evaluation of teaching performance notwithstanding being labeled an "Official Written Reprimand." See Farmingdale Bd. of Ed., P.E.R.C. No. 2015-28, 41 NJPER 224 (¶74 2014). The Commission has found that deficiencies in

classroom environment and culture are relevant to teaching performance. See Elizabeth Bd. of Ed., P.E.R.C. No. 2015-80, 42 NJPER 46 (¶13 2015); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-55, 41 NJPER 401 (¶125 2015). Whether accurate or not, “[a]llegations of inappropriate comments to students in the classroom involve judgments about the appropriateness of the teacher’s comments and interactions with students.” Marlboro Tp. Bd. of Ed., P.E.R.C. No. 2010-5, 35 NJPER 284 (¶98 2009); see also, New Providence Bd. of Ed., P.E.R.C. No. 2013-40, 39 NJPER 227 (¶77 2012); Red Bank Reg. High School Bd. of Ed., P.E.R.C. No. 2010-90, 36 NJPER 231 (¶82 2010); Robbinsville Bd. of Ed., P.E.R.C. No. 2009-3, 34 NJPER 220 (¶75 2008).

However, the second memorandum dated February 25, 2013 from the Principal to the grievant notes the number of the grievant’s absences and states that “increment withholding may be recommended.” Thus, it is not an evaluation of performance per se under our case law. See Bergenfield Bd. of Ed., P.E.R.C. No. 2006-69, 32 NJPER 82 (¶42 2006), aff’d 33 NJPER 186 (¶65 App. Div. 2007); Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991).

Overall, the Board has presented two in-class evaluations focused on teaching performance, one physical classroom observation and related email evaluation focused on teaching performance, one memorandum related to interacting with students in the classroom that is performance-related, and one memorandum

related to absenteeism. Given that four out of five assessments were performance-related, we find that the record indicates that the increment withholding was predominately based on an evaluation of teaching performance.

As for the Association's claim that the Board's asserted reasons are pretextual, "[w]e will not look behind the cited reasons to see if they are pretextual" as "[t]hat is not a proper role for us in our function as forum gatekeeper." *Maurice River Tp. Bd. of Ed.*, P.E.R.C. 99-52, 25 NJPER 35 (¶30014 1998); see also, *Saddle River Bd. of Ed.*, P.E.R.C. 96-61, 22 NJPER 105 (¶27054 1996). "Where we find a withholding to be predominately related to the evaluation of teaching performance, the Commissioner of Education may evaluate a contention that the cited reasons are pretextual." *Id.* "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.* (citing *Kopera v. West Orange Tp. Bd. of Ed.*, 60 N.J. Super. 288, 294 (App. Div. 1960)).

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

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: May 26, 2016

Trenton, New Jersey