

P.E.R.C. NO. 2016-82

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CLIFTON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-030

CLIFTON CUSTODIAL ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies 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 custodian's salary increment. 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, Cleary Giacobbe Alfieri Jacobs
LLC, attorneys (Yaacov Brisman, on the brief)^{1/}

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Randi Doner April, on the brief)

DECISION

On November 20, 2015, the Clifton Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Clifton Custodial Association (Association).^{2/} The grievance contests the withholding of a custodian's salary increment. Because the increment withholding is predominately disciplinary in nature, we decline to restrain binding arbitration.

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

^{2/} The Board filed an application for interim relief on December 10, 2015 but withdrew it on February 12, 2016.

The Board filed a brief, exhibits, the certification of its Business Administrator/Board Secretary (Business Administrator), the certification of its Supervisor of Custodians, and the certification of its attorney. The Association filed a brief.^{3/} The Board also filed a reply brief. These facts appear.

The Association represents all custodial and maintenance personnel within the school district excluding the High School Custodial Supervisor. The Board and the Association were parties to a collective negotiations agreement (CNA) in effect from July 1, 2011 through June 30, 2014. The parties' successor agreement has not yet been approved by the Board.

Article IV, entitled "Grievance Procedure," provides that grievances related to increment withholdings for disciplinary reasons shall be subject to binding arbitration. Article V, entitled "Employee Rights and Privileges," provides that employees shall not be disciplined or reduced in compensation without just cause. Article VII, entitled "Work Year," provides that employees shall be entitled to vacation and sick days.

The grievant is currently employed by the Board as a tenured head custodian. During his tenure, the grievant has only been

^{3/} Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

assigned to elementary schools that are in session from 8:50 a.m. to 3:20 p.m. His work hours are 7:00 a.m. to 4:00 p.m.

On September 19 and 20, 2013, the Supervisor of Custodians certifies that the grievant was observed leaving school early without permission or requesting leave. He also certifies that the grievant falsified documents on those days by signing out at 4:00 p.m. despite leaving school before that time. On September 25, the Supervisor of Custodians attended a meeting with the grievant, his union representative, and other school district staff to discuss the grievant's job responsibilities, request that he perform his assigned duties and obtain permission prior to leaving school early, and inform him that disciplinary action would be taken.

On November 18, 2013, the Supervisor of Custodians certifies that the grievant inappropriately left school from 7:15-7:35 a.m. He maintains that the grievant endangered the safety of students and staff by leaving the school's parking lot door unlocked and unsecured while primary age students and staff were in the building for the Extensions and Breakfast programs. A related memorandum also notes that "the normal Monday morning routine includes the boiler being fired up to warm the school" and warns the grievant that he must stop "leaving the school after opening the building. . .at least one to two times a week. . ."

On January 8, 2014, the Supervisor of Custodians certifies that the grievant did not arrive at work until 7:40-7:50 a.m. due to accident-related traffic. As a result, two primary age students, the teacher in charge of the Extensions program, and the breakfast server were forced to wait outside the school building.

On January 20, 2014, the Supervisor of Custodians certifies that a memorandum was sent to all custodians informing them that they failed to clean the cafeteria after the Boys and Girls Club meeting on January 16 and that the cafeteria windows were left open overnight. As head custodian, the grievant was responsible for supervising other custodians. On January 23, the Supervisor of Custodians attended a meeting with the grievant and the Principal to discuss the importance of making sure that all areas of the building were cleaned at the end of the day and that the building was secured and ready for use the next school day.

On June 27, 2014, the Business Administrator certifies that the grievant was evaluated in accordance with the Board's "Custodial Performance Form." The grievant was rated "Satisfactory" in every graded category and in his "Overall Performance Evaluation." However, the "Supervisory Comments" section notes that the following items need immediate attention:

- the grievant received a memorandum dated November 18, 2013 regarding leaving school during work hours;

-during a January 7, 2014 interview, administrators reinforced the importance of submitting paperwork in a timely manner in order to utilize leave time and the importance of being present for work; however, as of June 3, 2014, the grievant had not submitted paperwork for all of the leave time he had used;

-the grievant received a memorandum dated January 8, 2014 regarding being tardy for work;

-a memorandum dated January 20, 2014 was sent to custodial staff regarding cleaning up the cafeteria after the conclusion of the Boys and Girls Club meeting or before the breakfast program; also notes that cafeteria windows were left open overnight;

-submission of proper paperwork for days absent and remaining on school grounds and arriving in a timely manner for work.

On September 10, 2014, the Supervisor of Custodians certifies that he was informed that the grievant had two conversations with the Principal concerning his failure to answer the door and to clarify his job responsibilities. At that time, the grievant was reminded that the Extensions Program begins at 7:00 a.m. and therefore he is needed to answer the door because teachers cannot hear the intercom or night bell.

On April 16, 2015, the Business Administrator certifies that she sent a letter to the grievant pursuant to N.J.S.A. 10:4-12b(8) indicating that the Board would be discussing the terms and conditions of his employment on April 22. On April 22, the

Board accepted the Business Administrator's recommendation to withhold the grievant's increment for the 2015-2016 school year.

On May 15, 2015, the Association filed the instant grievance alleging that the Board "decided to punish [the grievant] for being ill and using his allotted sick days for legitimate reasons", noting that administrators did not consider this issue important enough to address formally prior to the Board's action. The grievance was denied at every step of the process. On September 29, 2015, the Association filed a Request for Submission of a Panel of Arbitrators claiming that the grievant's increment was withheld without just cause. This petition ensued.

The Board argues that the grievant's increment withholding is not subject to binding arbitration because it was based on a performance assessment that was predominately evaluative in nature. The Board maintains that the grievant repeatedly failed, even after being provided notice of his deficiencies over the course of two years, to perform his job duties. Moreover, the Board claims that the grievant failed in his primary responsibility of protecting the health, safety and welfare of students and staff.

The Association argues that the Board has violated the just cause provision of Article V and the work year provision of Article VII related to vacation and sick leave, characterizing the increment withholding as retaliation for using contractually

allotted leave time as well as legally entitled workers' compensation time. The Association notes that the only disciplinary memoranda in the grievant's file are from September 2013 and pertain to leaving school early and falsifying documents, claiming that an arbitrator can review these facts together with the "Custodial Performance Form" that rated the grievant "Satisfactory" while highlighting his use of leave and workers' compensation time. Among other cases, the Association cites Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992) and Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001) for the proposition that the grievant's alleged violations of work rules are arbitrable based on Commission precedent that allegations of misconduct lend themselves to a "did or did not occur" assessment by an arbitrator.

The Board replies, maintaining that the Association cannot have it both ways - claiming on one hand that the withholding was disciplinary in nature, while conceding on the other hand that there were only two disciplinary notices in the grievant's file for the two-year period prior to the withholding. Contrary to the Association's claim, the Board argues that the grievant's June 2014 performance evaluation was anything but satisfactory based upon the "Supervisory Comments" section.

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.

Non-teaching staff may use binding arbitration to review the withholding of increments for disciplinary reasons and for performance-based reasons where the parties have so agreed.^{4/}

See Summit Bd. of Ed., P.E.R.C. No. 2013-57, 39 NJPER 311 (¶107 2013); see also, Randolph Tp. Bd. of Ed. v. Randolph Tp. Ed. Ass'n, 306 N.J. Super. 207, 212-213 (App. Div. 1997), certif. den. 153 N.J. 214 (1998); Atlantic City Bd. of Ed., P.E.R.C. No. 2003-72, 29 NJPER 180 (¶53 2003); Flemington-Raritan Bd. of Ed., P.E.R.C. No. 2003-64, 29 NJPER 113 (¶34 2003).

^{4/} "[N]on-disciplinary withholdings are not subject to mandatory arbitration. . . [and are] subject to the grievance procedures established by agreement between the employee's bargaining representative and the employer." Randolph Tp. Bd. of Ed. v. Randolph Tp. Ed. Ass'n, 328 N.J. Super. 540, 545 (App. Div. 2000), certif. den. 165 N.J. 132 (2000).

If there is a dispute over whether the reason for a withholding is predominately disciplinary or related predominately to the evaluation of job performance, we must make that determination. N.J.S.A. 34:13A-27. 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 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 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). 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 our approach for determining the appropriate forum for resolving a withholding dispute in Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991), where 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 first address the fact that the Board did not submit the statement of reasons for the withholding, which was required to be provided to the grievant within ten days of the withholding pursuant to N.J.S.A. 18A:29-14 and was required to be submitted to the Commission with the Board's scope of negotiations petition pursuant to N.J.A.C. 19:13-2.2(a)(3). 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. 2016-82

11.

P.E.R.C. No. 2015-69, 41 NJPER 474 (¶147 2015); Summit Bd. of Ed., P.E.R.C. No. 2013-57, 39 NJPER 311 (¶107 2013); 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, the Business Administrator's December 8, 2015 certification and the Supervisor's December 9, 2015 certification attest to the circumstances surrounding the increment withholding and reference contemporaneous records that corroborate their representations. As this case involves a head custodian, the standard we apply based upon the Board's job description is: does the basis for the withholding predominately relate to an evaluation of the grievant-custodian's performance in "keeping the physical plant in clean, safe and good condition, as well as maintaining the grounds around the school to provide a neat and well-groomed appearance" in addition to his "leadership and organizational" skills and "ability to supervise and direct assigned personnel." See, e.g., Montclair Bd. of Ed., P.E.R.C. 2000-1, 25 NJPER 361 (¶30155 1999) (a case in which the Commission created a standard for determining whether the reasons for a non-teaching athletic director increment withholding predominately related to an evaluation of performance); Franklin

Bor. Bd. of Ed., P.E.R.C. No. 99-2, 24 NJPER 407 (¶29186 1998) (a case in which the Commission noted that the "teaching performance" standard used in N.J.S.A. 34:13A-27 could not be applied literally when an increment withholding dispute involves a "teaching staff member" who does not teach; the Commission created a standard for school nurses which focuses on whether a nurse is performing nursing duties reserved by education law statutes to certificated nurses).

Although we need not determine whether every reason cited by the Board is evaluative or disciplinary in nature, on balance we find that the Board's reasons focus on alleged violations of administrative rules and misconduct and are therefore predominately disciplinary in nature.

The incidents on January 20, 2014 and September 10 primarily relate to failing to direct/complete cafeteria clean up, failing to secure cafeteria windows, and failing to answer the door starting at 7:00 a.m. According to the Board's job descriptions, custodians and head custodians are responsible for maintaining the cafeteria and securing all windows as well as all other duties assigned by the Principal or Business Administrator. These incidents predominately relate to an evaluation of the grievant's performance of his duties as a custodian.

The incidents on September 19 and 20, 2013, November 18, 2013, and January 8, 2014, however, primarily relate to arriving

at work late, leaving work early, leaving school during work hours, and falsifying time records. The Commission has consistently held that tardiness, leaving work early, leaving school during work hours, and falsifying sign-out sheets/records are not issues of teaching performance in teacher increment withholding cases.^{5/} See, e.g., Elizabeth Bd. of Ed., P.E.R.C. No. 2016-19, 42 NJPER 189 (¶50 2015); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992); Lodi Bd. of Ed., P.E.R.C. No. 2016-58, NJPER (¶ 2016); 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). The Board also cited concerns about attendance and the timely submission of related paperwork in the grievant's June 27, 2014 "Custodial Evaluation Form." The Commission has held that concerns regarding attendance are not issues of teaching performance in teacher increment withholding cases. See, e.g., Elizabeth Bd. of Ed., P.E.R.C. No. 2015-49, 41 NJPER 346 (¶110 2015); Middlesex Bd. of Ed., P.E.R.C. No. 2000-86, 26 NJPER 217 (¶31089 2000). While the job description and responsibilities of a teacher are admittedly distinct from those of a custodian, we find the reasoning advanced by the Commission to be persuasive and equally applicable in this matter: "Rather than involving an evaluation

^{5/} We note that according to the Board's job descriptions, arriving on time is a job responsibility for custodians and head custodians.

of. . .performance, the withholding flows from [the grievant's] alleged failure to perform by virtue of. . .absences." Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. 91-67, 17 NJPER 144 (¶22057 1991). Accordingly, we find these issues to be predominately disciplinary in nature.

Finally with respect to the June 27, 2014 "Custodial Evaluation Form," the Board rated the grievant "Satisfactory" in every graded category including: job knowledge, quality of work, work efficiency, specialized knowledge, judgment, reliability, job commitment, and attendance. The Board also rated the grievant "Satisfactory" in his "Overall Performance Evaluation." The fact that some of the Board's reasons for the increment withholding were noted in the "Supervisory Comments" section of the form does not transform the incidents on September 19 and 20, 2013, November 18, 2013, and January 8, 2014, or the Board's concerns about attendance and the timely submission of related paperwork, into an assessment of the grievant's performance rather than accusations of violations of administrative rules and misconduct. Although these concerns do not predominately involve an evaluation of the grievant's job performance, we recognize that they can affect aspects of job performance and note that the choice of forum for reviewing the Board's determination does not limit its right to raise legitimate concerns.

On balance, we find that the Board's reasons for the increment withholding are predominantly disciplinary in nature.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: May 26, 2016

Trenton, New Jersey