

P.E.R.C. NO. 2016-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MARLBORO TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-048

MARLBORO TOWNSHIP 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. The grievance contests the withholding of a school nurse's salary increment. Finding that the reasons for the withholding predominately relate to an evaluation of the performance of nursing duties, the Commission restrains 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.

P.E.R.C. NO. 2016-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MARLBORO TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-048

MARLBORO TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Schenck, Price, Smith & King, LLP
attorneys (Marc H. Zitomer, of counsel and on the
brief)

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

DECISION

On January 25, 2016, the Marlboro Township Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Marlboro Township Education Association (Association). The grievance contests the withholding of a school nurse's salary increment. Because the increment withholding is predominately based on an evaluation of the performance of nursing duties, we restrain binding arbitration.

The Board filed a brief, exhibits, and the certification of its Superintendent of Schools (Superintendent). 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 professional staff, including registered nurses, employed by the Board. The Board and the Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2013 through June 30, 2016. The grievance procedure ends in binding arbitration.

Section I, Article IV, entitled "Employee Rights," provides that employees shall not be disciplined without just cause.

The grievant has been employed by the Board since the 1994-1995 school year. She is a tenured school nurse at Asher Holmes Elementary School responsible for ensuring the health and safety of students under her supervision.

The Superintendent certifies that on February 4, 2015, a student who was performing in the school chorus lost consciousness and fell down on the risers. At that time, the student was helped off the risers, placed in a chair, and carried on the chair to the grievant's office. The Superintendent certifies that the grievant subsequently examined the student and sent her back to class on her own. On February 5, the student's mother contacted school administration to express her concern at the grievant's handling of the incident involving her daughter. On March 9, the student's mother contacted the Board to reiterate the same concerns.

The Superintendent certifies that as result of this complaint, he conducted an investigation which revealed that the grievant's performance was flawed in many aspects. Specifically:

(1) the grievant failed to document in her report that the student was unresponsive and may have fainted;

(2) the grievant failed to interview staff members who witnessed the incident, leading to potentially incorrect information being conveyed to the student's parent, inaccurate nursing notes in the District's student information reporting system (Genesis), and an inaccurate accident report;

(3) the grievant's medical notes in Genesis do not match the events that occurred on February 4, 2015;

(4) nursing protocols were not properly executed;

(5) nursing protocols were neither performed nor documented in the nursing notes and accident report;^{1/} and

(6) a student who had just collapsed was sent back to class and the notes do not document the conversation that the nurse had with the child's teacher.

The grievant certifies that she has received excellent annual evaluations and written observations without exception, including during the 2014-2015 school year. Specifically with respect to the February 2015 incident, the grievant has provided her account of what she observed and how she responded. She certifies that she complied with the District's Standard Operating Procedures (SOPs) for School Nurses pertaining to the care and treatment of students who suffer from heat exhaustion

^{1/} The Superintendent notes that the student's mother appealed to have the accident report and nurse's notes corrected.

and/or a suspected syncope episode according to her examination of the student. The grievant also certifies that she reported her complete assessment to the student's mother on the day of the incident and that the student's mother subsequently called back and spoke with her daughter the same day.

The Superintendent certifies that he recommended the grievant's increment be withheld for the 2015-2016 school year as a result of the February 2015 incident. On May 5, 2015, the Board voted unanimously to withhold the grievant's increment. In a letter dated May 11, the Superintendent provided the grievant with a statement of reasons for the increment withholding.

On May 6, 2015, the Association filed the instant grievance alleging that the Board had disciplined the grievant without just cause and requested that her increment be reinstated. The grievance was denied at every step of the process. On June 19, the Association filed a Request for Submission of a Panel of Arbitrators (AR-2015-753) 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 an evaluation of her performance as a school nurse pursuant to her responsibilities under New Jersey law, the District's Health Services Manual, and the District's job description. The Board notes that the primary reasons for the increment withholding were

the grievant's failure to maintain proper and accurate records; failure to properly examine a student; failure to properly implement healthcare procedures; and her decision to return a student back to class. The Board maintains that all of these reasons are evaluative in nature because they pertain to the grievant's performance of her duties as a school nurse.

The Association argues that the instant increment withholding was not an evaluation of the grievant's performance as a school nurse. Among other cases, the Association cites Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992), Franklin Bor. Bd. of Ed., P.E.R.C. No. 99-2, 24 NJPER 407 (¶29186 1998), 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), and 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) for the proposition that the grievant's alleged failure to follow administrative procedures is not evaluative in nature, particularly where her observations and summative evaluation for the 2014-2015 school year were positive and did not refer to the subject incident.

The Board replies, maintaining that the Association has cited case law which is completely distinguishable from this matter and does not pertain to the increment withholding of a school nurse. The Board also reiterates that it has proffered

compelling and undisputed evidence that the withholding at issue was evaluative and not disciplinary. The Board argues that even if the grievant's evaluations over the past several years have been positive, this has no bearing on the fact that her performance on the day in question fell below expectations and led to the increment withholding.

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.

For purposes of determining which employees are covered by N.J.S.A. 34:13A-27 and its increment withholding provisions, N.J.S.A. 34:13A-22 defines "teaching staff member" to include "school nurse." In Orange Tp. Bd. of Ed., P.E.R.C. No. 2006-14, 31 NJPER 291 (¶114 2005), the Commission stated:

We have recognized that the "teaching performance" standard used in N.J.S.A. 34:13A-27 cannot be applied literally when an increment withholding dispute involves a "teaching staff member" who does not teach. School nurses are -by statute - teaching staff members, but they do not have full-time teaching responsibilities. Thus, we have formulated a performance standard that is not limited to classroom teaching. See Franklin Bor. Bd. of Ed., P.E.R.C. No. 99-2, 24 NJPER 407 (¶29186 1998). This standard focuses on whether a nurse is performing nursing duties reserved by education law statutes to certificated nurses. . . . [W]e [have] held that the Commissioner of Education, not an arbitrator, must review disputes over the performance of nursing duties reserved by education law statutes to certificated nurses.

We find that the stated reasons for the increment withholding predominately focus on an evaluation of the grievant's performance of nursing duties under the education laws. Moreover, "despite being initiated through a parental complaint and subsequent investigation occurring outside of the formal evaluation process[,] the Commission has "frequently recognized that deficient. . .performance does not necessarily have to appear on evaluation documents. . .and that even after all observations. . .have been completed, an increment may still be withheld for. . .performance reasons which must be reviewed by the Commissioner of Education." Farmingdale Bd. of Ed., P.E.R.C. No. 2015-28, 41 NJPER 224 (¶74 2014); see also, Roxbury Tp. Bd. of Ed., P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994) (restraining arbitration of an increment withholding where the board's cited reasons centered on its subjective educational judgment despite the fact that the board did not rely on observations or an annual performance report).

Although we need not determine whether every reason cited by the Board relates to performing nursing duties reserved by education law statutes to certificated nurses, paragraph eight of the Superintendent's certification accurately summarizes the central bases for the increment withholding. Specifically, concerns about the grievant's alleged failure to maintain proper and accurate records are performance-related. Record keeping is

a statutory duty allocated to a certificated school nurse. See Franklin Bor. Bd. of Ed., P.E.R.C. No. 99-2, 24 NJPER 407 (¶29186 1998); see also, N.J.S.A. 18A:40-4 (a health record of each pupil shall be kept in which the findings of each examination shall be entered); N.J.A.C. 6A:16-2.3(b)(3)(iii) (the role of the school nurse includes maintaining student health records); N.J.A.C. 6A:16-2.4 (health records must include findings of health histories and medical examinations).

Concerns about the grievant's alleged failure to properly perform a medical examination and appropriately implement healthcare procedures are performance-related. Medical examinations of pupils are a statutory duty allocated to the medical inspector or certificated school nurse. See N.J.S.A. 18A:40-4 (the medical inspector or nurse shall examine every pupil to learn whether any physical defect exists); see also, N.J.A.C. 6A:16-2.3(b)(3)(ii) (the role of the school nurse includes conducting health screenings and monitoring vital signs and general health status for emergent issues for students suspected of being under the influence of alcohol and controlled dangerous substances). Implementation of healthcare procedures for students in the event of an emergency is a regulatory duty allocated to the school nurse. See N.J.A.C. 6A:16-2.3(b)(3)(xiv) (the role of the school nurse includes assisting in the

development of and implementing healthcare procedures for students in the event of an emergency).

Concerns about the grievant's alleged unsound decision to send a student back to his/her classroom are performance-related. Judgment as to whether a pupil is ill and needs to go home is a statutory duty allocated to the school physician or certificated school nurse. See Franklin Bor. Bd. of Ed.; see also, N.J.S.A. 18A:40-7 (when there is evidence of departure from normal health of any pupil, the principal shall upon the recommendation of the school physician or school nurse exclude such pupil from the school building).

The cases cited by the Association are inapposite in the context of a school nurse's increment withholding. "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. 96-61, 22 NJPER 105 (¶27054 1996) (citing Kopera v. West Orange Tp. Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960)); see also, Maurice River Tp. Bd. of Ed., P.E.R.C. 99-52, 25 NJPER 35 (¶30014 1998).

ORDER

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

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