

P.E.R.C. NO. 2017-35

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CLINTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2017-012

CLINTON 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 contesting the withholding of a teacher's salary increment and the imposition of a corrective action plan. The Commission found that the reasons for the withholding and corrective action plan predominately involve an evaluation 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, Porzio Bromberg & Newman, P.C.,  
attorneys (Vito A. Gagliardi, Jr., on the brief)

For the Respondent, Mellk O' Neill, attorneys  
(Edward A. Cridge, on the brief)

DECISION

On September 15, 2016, the Clinton Township Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Clinton Township Education Association (Association). The grievance contests the withholding of a teacher's salary increment and the imposition of a corrective action plan. Because the Board's actions predominately involve an evaluation of the grievant's teaching performance, we restrain binding arbitration.

The Board filed a brief and exhibits. The Association filed a brief and exhibits. The Board also filed a reply brief.<sup>1/</sup> These facts appear.

The Association represents certified teaching staff members 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, 2017. The grievance procedure ends in binding arbitration.

The grievant is employed by the Board as a tenured teacher. During the 2015-2016 school year, he was assigned to teach physical education at Round Valley School.<sup>2/</sup>

On June 17, 2016, the Principal issued the following "End of year performance review" to the grievant:

On April 8, 2016 a sixth grade, female student made an allegation of inappropriate touching by [the grievant] in physical education class that was reported to another teacher. It was subsequently reported to school administration, who then notified the Superintendent, the School Resource Officer and Institutional Abuse at DCP&P. The [grievant] was placed on immediate suspension with pay, pending the completion of the investigation by Institutional Abuse and the Clinton Township Police. This investigation

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1/ 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." However, neither party filed a certification in this matter.

2/ Round Valley School has approximately 470 students in grades four, five and six.

took precedence over the District inquiry. Due to this suspension and investigation, [the grievant] has not completed the 2015-2016 school year and final marking period or close out procedures.

Concerns exist regarding this teacher's performance of his instructional practice.

-Classroom Environment/Domain 2: Specifically the repeated allegations of [the grievant's] touching of students during physical education class and additionally of student statements reported in the course of the second investigation (2016), that he is making the female students "uncomfortable." Some examples are: "last week he was looking like a stripper demonstrating stretching moves," "acts weird," "looks at her butt," during gym class at Round Valley School. There seems to be a clear disregard for the feelings and perceptions of the female students in his classes and their discomfort with the way he approaches instruction. In fact, the students make a clear distinction between . . . the co-teacher's behavior and how he demonstrates stretching, and [the grievant's] instructional techniques. [The grievant] stated that he does not recall touching any student, however, he admitted in his interview on June 10, 2016 (with [the] Principal...and AAO...) that he did touch the female student "by placing his fingers on her knee." The student described it as "touching her in a wrong way" and showed the teacher she reported it to as "[the grievant] put his hands on the front and back of her thigh." (4-8-16. . . report to Vice Principal). The student who witnessed the incident described it as "during stretches, the girl in front of me, well, he was going to help her but did it differently." The student identified the female student and repeated that "he was trying to help her but did it differently. In a weird way, he grabbed it." When asked if he witnessed this, the student confirmed that he had seen the event. The student also

demonstrated by placing his hands on both the back and front of his own thigh.

-Although the reports have been investigated and unfounded for sexual abuse by DCP&P, the behavior exhibited by [the grievant] (touching, proximity, staring) has created a classroom environment that the students interviewed, persistently perceive as uncomfortable and not conducive to creating a positive learning environment. The Domain 2 instructional component has been demonstrated to be lacking in creating an environment of respect and rapport and establishing a culture for learning.

-Planning & Implementation/Domain 1: [The grievant] has not submitted lesson plans according to prescribed building requirements as documented in On Course. Notifications through On Course lesson plans were sent on the following dates due to the fact that these weeks were missing: 11-17-15, 12-1-15, 12-9-15, 1-21-16, 2-4-16, 3-9-16, 4-4-16. During the course of the 15-16 school year, it was noted that weekly lesson plans had not been submitted on seven different occasions.

Concerns exist regarding investigations of [the grievant].

-April 2, 2015: Investigation by the Clinton Township Police when [a] student reported to a teacher that he overheard students saying "[The grievant] was a child molester."

-April 14, 2015: Reported to Institutional Abuse allegation of inappropriate touching. Unfounded.

-April 8, 2016: Reported to Institutional Abuse allegation of inappropriate touching. Unfounded.

In June 2015, the investigator at Institutional Abuse (SW) strongly suggested that Yoga be discontinued in the curriculum for the safety of all. [The grievant] and

all physical education teachers in the district were instructed on August 25, 2015 that yoga was being removed from the curriculum. Further discussion noted that teacher's hands should not be placed on students in any way. On August 26, 2015[, . . . the] (Supervisor of Instruction) discussed and reinforced with [another teacher] and [the grievant] (the physical education teachers at Round Valley School) that yoga would not be taught, nor should they engage in any activities where hands might be placed on students and endanger the safety of students and staff. On November 2, 2015, it was also an agenda item at the Unified Arts Articulation/Grade Level meeting as a reminder that "[y]oga is no longer a unit that we will be teaching in PE." In his interview on June 10, 2016, [the grievant] described the activity the day of the incident as "stretching" and then corrected to say "strengthening." The students interviewed by DCP&P described the incident reported in April 2016 as "yoga."

It was also specifically discussed with [the grievant] that continuing these "yoga" positions and "corrections" were placing him and the school in situations where both were vulnerable to allegations of misconduct (12-8-15 meeting with the Superintendent. . .) and must stop for the safety and well being of students and staff. [The grievant] did not agree with the removal of [y]oga from the curriculum, but appeared to understand the directive.

The school has received the finalized reports from DCP&P that state: "Sexual Abuse/Substantial Risk of Sexual Injury is Unfounded." However the report dated May 16, 2016 stated that, "It was determined that [the grievant] lightly touched [the student's] thigh to properly position her leg during a stretching exercise in gym class." This is unacceptable. The teacher was warned against this and in fact investigated previously for a similar type of allegation

(May 2015), which was also unfounded. Students cannot continue to be subjected to a situation that clearly makes them uncomfortable, if not actually placing them in danger or risk or harm. It is not creating a positive learning environment for these students.

In the course of these investigations, it has been demonstrated by [the grievant] that he has disregarded student perceptions, and in particular the nature of the complaint by the student. Putting hands on any student as an instructional practice is wrong and creates an untenable situation for the classroom environment and the school as a whole. It is with this concern for the classroom environment, consideration of the multiple student's feelings, perceptions and well being in mind, and an appearance of impropriety and lack of acceptable planning and preparation for instruction, that I am recommending to the Superintendent that [the grievant's] increment be withheld for the 2016-2017 school year.

On June 17, 2016 the Principal also issued a corrective action plan for the grievant to improve his teaching deficiencies during the 2016-2017 school year. The corrective action plan outlines the following "Areas of Identified Improvement":

No.	Areas Identified for Improvement	Sources of Information/ Evidence	Corresponding Component of Evaluation Practice Instrument
1	Creating an Environment of Respect and Rapport. Students statements and perceptions indicating the following: -Touching Students -Proximity during phys. ed lessons -"Staring at girls' butts."	-Student statements during Institutional Abuse Interviews, and interview with principal.  -Teacher acknowledgment of touching students during phys. ed class	Domain 2: Classroom Environment
2	Lesson Planning and Submission	-Oncourse Lesson Plans (7 documented notifications of missing weekly plans) -Administrative Observations (Procedures, resources, anticipated questions/misconceptions, assessment detail, peer communication phrases, and reflection)	-Domain 1: Planning and Preparation

The corrective action plan also outlines the following "Goals and Professional Responsibilities":

	Demonstrable Goals	Staff Member Responsibilities	Supervisor Responsibilities	Completion Date
1	Teacher will model respectful interactions by not touching students at anytime as per BOE policy 3281. <sup>3/</sup>	Reading, review and discussion with administrator of Policy and Regulation #3218.  Policy and Regulation #3281: (Inappropriate staff conduct. Inappropriate touching by staff member to a pupil. "To provide guidance and direction to avoid actual and/or the appearance of inappropriate conduct.")  Policy and Regulation #3211: Code of Ethics: (The educator recognizes the magnitude of responsibilities inherent in the teaching process including the desire for respect and confidence of our students.)	Read, review and discuss BOE Policy #[3281] with teacher	Pending Reinstatement
2	Create a smaller classroom setting of student to teacher ratio	Familiarizing self with content level for 4th, 5th, and 6th grades.	-Reassign teacher to Health Instructor position -Puberty unit will be instructed through health office	Pending Reinstatement
3	Lesson plan will be submitted weekly per district guidelines.	-Create and submit lesson plans per district guidelines. -Maintain teacher website. -Reflect on teaching practice.	-Review lesson plans and discuss any needed revisions. -Encourage self-reflections	Pending Reinstatement

On June 20, 2016, the Board voted to withhold the grievant's salary and adjustment increment for the 2016-2017 school year. The Board informed the grievant of the reasons for its decision in a letter dated June 21:

WHEREAS, the Superintendent of Schools has recommended that [the grievant's] employment and adjustment increment be withheld due to unacceptable performance related issues that have been discussed with the employee,

NOW THEREFORE BE IT RESOLVED that [the grievant's] employment and adjustment increment are hereby withheld, effective for the 2016/17 school year, and . . .

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<sup>3/</sup> Board Policy #3281 is entitled "Inappropriate Staff Conduct."



As required by NJ 18A:29-14, I am formally notifying you of this action. The reasons for this action were documented in your summative evaluation completed on June 17, 2016 by your Principal.

Concerns exist regarding your instructional performance as noted in the Danielson Teachscape:

- Domain 1: Planning and Preparation
- Domain 2: Classroom Environment
- These are further detailed in the employee's Corrective Action Plan dated June 17, 2016 (see attached).

On July 5, 2016, the Association filed a grievance claiming that the Board violated Article XV, Section 1 of the parties' CNA by withholding the grievant's increment and imposing a corrective action plan without just cause. The Board denied the grievance at each step of the process. On August 30, the Association filed a Request for Submission of a Panel of Arbitrators (AR-2017-100). This petition ensued.

The Board argues that its reasons for withholding the grievant's increment and issuing a corrective action plan - namely, inappropriately touching students during physical education class and failing to submit lesson plans on seven different occasions - are not legally arbitrable because they are based upon an evaluation of the grievant's teaching performance during the 2015-2016 school year. The Board also maintains that it has a managerial prerogative to observe and evaluate employees

and that dissatisfaction with employee performance does not transform a performance evaluation into disciplinary action.

The Association maintains that pursuant to N.J.A.C. 6A:10-2.5,<sup>4/</sup> only teachers who receive an annual summative evaluation rating of "ineffective" or "partially effective" must be placed on a corrective action plan. Given that the grievant was rated "effective" - and nearly achieved a rating of "highly effective" - for the 2015-2016 school year, the Association argues that there was no evaluative reason for the grievant to be placed on a corrective action plan or for his increment to be withheld. The Association also argues that the reasons identified for the Board's actions are disciplinary in nature and that the Commissioner of Education's expertise is not necessary in a just cause determination.

In reply, the Board reiterates that its actions were based upon an evaluation of the grievant's teaching 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

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<sup>4/</sup> N.J.A.C. 6A:10-2.5(a) provides: "For each teaching staff member rated ineffective or partially effective on the annual summative evaluation, as measured by the evaluation rubrics, a corrective action plan shall be developed by the teaching staff member and the chief school administrator or the teaching staff member's designated supervisor."

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 the withholding.

Disputes involving the withholding of an employee's increment for predominately disciplinary reasons are subject to binding arbitration. N.J.S.A. 34:13A-26 to -29. Conversely, 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. N.J.S.A. 34:13A-27d.

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. 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 have been deemed inherently disciplinary, we are concerned with whether the cited deficiencies are based on an 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). However, our power is limited to determining the appropriate forum for resolving a withholding dispute; we do not and cannot consider whether there was just cause for a withholding. 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.

We find that the stated reasons for the increment withholding, as set forth in the Board's June 21, 2016 letter, predominately relate to an evaluation of the grievant's teaching performance. "While the Board has not relied on observation reports . . . , the cited reasons for the withholding center on its subjective educational judgment concerning an allegation of an inappropriate interaction with students during a physical education class . . . ." Roxbury Tp. Bd. of Ed., P.E.R.C. No. 94-80, 20 NJPER 78 (¶25034 1994); see also, Farmingdale Bd. of Ed., P.E.R.C. No. 2015-28, 41 NJPER 224 (¶74 2014).

Specifically, the June 17, 2016 performance review and corrective action plan focus on the grievant's alleged inappropriate touching of students during gym class. The Commission has restrained arbitration in similar cases involving allegations of "improper touching of students in a physical education class or classroom." Hazlet Bd. of Ed., P.E.R.C. No. 95-59, 21 NJPER 118 (¶26072 1995) (restraining arbitration of an increment withholding based in part upon allegations that a physical education teacher inappropriately touched students during gym class where a DYFS investigation concluded that the allegations were unfounded); see also, Roxbury Bd. of Ed. (restraining arbitration of an increment withholding based in

part upon allegations that a physical education teacher inappropriately touched female students where a DYFS investigation found no evidence of criminal misconduct).

The June 17, 2016 performance review and corrective action plan also cite the grievant's alleged failure to submit lesson plans on seven different occasions. "Although [its] findings have varied depending on the facts of each case, the Commission has found that the failure to submit, or to timely submit, lesson plans is relevant to teaching performance in the context of an increment withholding." Elizabeth Bd. of Ed., P.E.R.C. No. 2016-54, 42 NJPER 366 (¶104 2016); see also, Salem City Bd. of Ed., P.E.R.C. No. 2001-3, 26 NJPER 357 (¶31142 2000) (restraining arbitration of an increment withholding based in part upon alleged failure to submit timely and relevant lesson plans).

Turning to the corrective action plan that was issued to the grievant, the New Jersey Supreme Court has held that a school board has a managerial prerogative to observe and evaluate employees. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982). Disciplinary reprimands, however, may be contested through binding arbitration. N.J.S.A. 34:13A-29; N.J.S.A. 34:13A-5.3. 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), the Commission distinguished between evaluations of teaching performance and disciplinary reprimands:

We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore nonnegotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary.

We find that the stated reasons for the increment withholding also form the basis for the corrective action plan. Whether or not the Board's concerns about the grievant's performance were prompted by one or more student complaints that Institutional Abuse ultimately determined were unfounded does not change the nature of the underlying concerns (i.e., alleged

inappropriate touching of students during gym class and failure to submit lesson plans on seven different occasions) or the Board's right to address them with an improvement plan. See, e.g., Freehold Reg. High School Dist. Bd. of Ed., P.E.R.C. No. 2007-30, 32 NJPER 363 (¶153 2006) (restraining arbitration of a grievance challenging the board's substantive right to issue a corrective action plan); Plainsboro Tp., P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008) (restraining binding arbitration of a grievance challenging the issuance of a performance improvement plan setting forth specific activities to correct performance deficiencies). Dissatisfaction with employee performance does not transform an evaluative document into a reprimand. See Knowlton Tp. Bd. of Ed., P.E.R.C. No. 2003-47, 29 NJPER 19 (¶5 2003).

Moreover, although N.J.A.C. 6A:10-2.5(a) requires a board of education to place teachers who receive an annual summative evaluation rating of "ineffective" or "partially effective" on a corrective action plan, it does not prohibit a board of education from placing other teachers who receive an annual summative evaluation rating of "highly effective" or "effective" on a corrective action plan in order to enhance performance. In fact, among other things, N.J.A.C. 6A:10-2.5(e) specifies that a corrective action plan must "[a]ddress areas in need of improvement identified in the educator evaluation rubric,"



"[i]nclude specific, demonstrable goals for improvement," and "include responsibilities of the evaluated employee . . . for the plan's implementation." See N.J.S.A. 34:13A-5.3 ("standards or criteria for employee performance" are non-negotiable); see also, Bethlehem Tp. Bd. of Ed., 91 N.J. at 46-47 ("there can be no negotiation on the subject of criteria for evaluating teaching staff"). Accordingly, we find that the corrective action plan issued to the grievant predominately constitutes an evaluation of teaching performance.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: December 22, 2016

Trenton, New Jersey