

P.E.R.C. NO. 2017-44

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC CITY BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2017-001

PASSAIC EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the request of the Board of Education for a restraint of binding arbitration of grievances contesting the withholding of salary increments from eight teaching staff members. Finding that five of the staff members had their increments withheld based on evaluations of teaching performance, the Commission restrains binding arbitration of those five grievances. Finding that the Board did not demonstrate that the other increments were withheld based on evaluations of teaching performance, the Commission declines to restrain arbitration of those three grievances.

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)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum  
& Friedman, attorneys (Aileen O'Driscoll, on the brief)

DECISION

On July 1, 2016, the Passaic City Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of grievances filed by the Passaic Education Association (Association). The grievances contest the withholding of salary increments from eight teaching staff members. The Board asserts that the grievances were not timely filed and therefore arbitration should be restrained. Alternatively, it argues that in seven of the eight cases the increments were withheld based on teaching performance and, pursuant to N.J.S.A. 34:13A-27d, cannot be reviewed through binding grievance arbitration.

The parties filed briefs and exhibits. The Board did not file any certifications. The Association filed certifications from two of the teachers whose increments were withheld.<sup>1/</sup>

Initially, we decline to restrain arbitration based on the Board's assertion that the grievances were not timely filed. In a scope of negotiations proceeding we do not evaluate procedural defenses, including contractual time limits. See, generally, Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978); Cf. Gloucester City, P.E.R.C. No. 2006-3, 31

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<sup>1/</sup> 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." Further, in cases involving increment withholdings, N.J.A.C. 19:13-2.2(a)3 provides that the scope of negotiations petition "shall be accompanied by a copy of the statement of reasons issued to the teaching staff member at the time the increment was withheld." The Board's statement of facts recites that letters dated June 25, 2015 were sent to each of the grievants advising that, at the June 29 Board meeting, recommendations would be made that the Board vote to withhold their salary increments. Those letters, presumably reciting the basis for withholding each teacher's increment, were not filed with us. Even prior to the adoption of N.J.A.C. 19:13-2.2(a)3, we held in increment withholding cases, that where a board of education has not submitted a copy of the official statement of reasons for the withholding that was provided to the teaching staff member pursuant to N.J.S.A. 18A:29-14, the board must submit certifications from the principal actors in the dispute explaining the facts surrounding the withholding, the basis for the recommendation to the board, and the basis of the board's action. A union may subsequently file certifications in response to the Board's submissions. Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005) Here, in some cases, evaluation documents and forms that were prepared prior to the increment withholdings were submitted.

NJPER 238, 239 (¶91 2005), (declining to address arguments about whether the grievance was timely filed and whether time limits should be relaxed). Timeliness may be decided by the arbitrator if any of the grievances are eligible for binding arbitration.

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.<sup>2/</sup>

The Board concedes that its reasons for withholding the increment of "C.L."<sup>3/</sup> were unrelated to teaching performance. Thus we will not restrain arbitration of that grievance.

The Board asserts that the increments of the seven other teachers were withheld based on teaching performance. It notes that the Association has only replied to its arguments regarding teachers "T.H." and "G. B-M." Therefore, the Board reasons, the Association has not contested its assertion that the increments of the five other teachers were withheld for reasons related predominately to teaching performance.

We deal first with "T.H." With its initial brief, the Board submitted a one page "Teacher Walkthrough Form" and submitted two

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2/ After an arbitration award restoring the increment was appealed, Scotch Plains-Fanwood Bd. of Ed. and Scotch Plains-Fanwood Ed. Ass'n, 139 N.J. 141 (1995), endorsed how we resolve disputes under N.J.S.A. 34:13A-27.

3/ We refer to the teachers by initials as no determination has been made that there was cause to withhold the increments.

more such forms with its reply brief.<sup>4/</sup> These documents, T.H. certifies, were prepared by Principal "F.N."

With regard to the reasons T.H.'s increment was withheld, the Board's brief asserts:

- Classroom environment - Classroom interactions were not positive. Teacher responses to students were vague and at times ridicules his students; and
- Level of student work - Pure recall (knowledge level).<sup>5/</sup>

T.H. certifies that on December 17, 2014, he was dealing with a habitually late special education student who, after entering class late once again, immediately asked to go to the bathroom. T.H. told the student he first had to complete an assignment of a few minutes duration. The student became angry, refused to do the assignment despite the T.H.'s repeated directive, and then tried to force his way past the teacher. T.H. called security who removed the student from the classroom.

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4/ One form is dated either December 11 or December 17, 2014, but based on the statements of "T.H.," it appears to refer to events that occurred on the latter date. The forms submitted with the Board's reply brief are both dated December 1, 2014, one for Class period 5 the other for Class period 6. All three forms leave three of the six rating categories blank, although some handwritten comments were made for some of those categories. And, on the December 1, 2014 form for the period 6 science class, in two spaces with comments, the notation "3/9" appears. This reference is not explained by the Board.

5/ The Board's brief cites a comment by a special education student who opined that the work was easy because all they had to do was copy it.

According to T.H., almost immediately thereafter, Principal F.N. entered his classroom with a walkie-talkie and conducted his walk-through writing on the form that T.H. had raised his voice.

In addition, T.H. asserts that his increment was withheld because of his opposition to a directive issued by Principal F.N. just prior to the end of the first marking period that no special education student should be given a failing grade. T.H. gave failing grades to three students.<sup>6/</sup> Thereafter the special education counselor reminded T.H. about Principal F.N.'s directive.<sup>7/</sup> T.H. replied that the counselor could change the grades, but he would not.<sup>8/</sup>

We have held that challenges to directives regarding minimum grades are not mandatorily negotiable. See Middletown Tp. Bd. of Ed., P.E.R.C. No. 2016-7, 42 NJPER 111 (¶31 2015). However, we have not held that a teacher's opposition to such a policy is related to his or her teaching performance.

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6/ T.H. notes that he was teaching science, a one semester course covering two marking periods only, rather than a year long course which has four marking periods.

7/ Although T.H.'s certification references Principal F.N.'s e-mail as an exhibit, it was not submitted to us. However, the Board does not specifically deny that such a directive was issued or refute T.H.'s statements concerning his interaction with the special education counselor.

8/ An addendum to T.H.'s certification references observation documents issued prior to December, 2014. The Board has neither submitted them (as it is required to do by rule) nor referred to them. Thus we do not consider that information.



Based upon the record before us we are unable to say that the Board's reason for withholding T.H.'s increment was predominantly related to teaching performance.<sup>9/</sup> We also note that unlike most other teachers involved in this case, the Board did not submit a comprehensive evaluation of T.H.'s performance for the 2014-2015 school year. We will not restrain the Association's demand to arbitrate its grievance that T.H.'s increment be restored. We note that every interaction between a teacher and a special education student does not necessarily implicate teaching performance. See North Arlington Bd. of Ed., P.E.R.C. No. 97-28, 22 NJPER 366 (¶27192 1996).

In contrast to T.H. the Board has submitted a more comprehensive observation document concerning G. B-M. which was prepared in May 2015 and contains 22 separate "components" to rate the teacher with a space for comments in each instance. The Board's brief only refers to these six components:

1. Establishing a culture for learning - Partially effective (the teacher's energy for the work was neutral, this was evidenced by her late arrival into the classroom. In addition, her primary concern appeared to be task completion, as she did not engage nor encourage student engagement with regards to the assignment);
2. Managing classroom procedures - Partially effective (only some students were engaged in the assignment and

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<sup>9/</sup> The only comment on allegedly deficient instruction is the notation that a special education student said that the work was easy.

appeared to follow said routines. Not all students had their text books put and some did not start writing down the answers to the assignment. This was never addressed by the teacher.

3. Communications with students - Partially effective (the teacher did not explain/clarify what was required);
4. Using questioning and discussion techniques - Ineffective (the teacher framed questions to promote students answering the questions. Questions did not promote student thinking. At no point were students asked to explain their answers. In addition the dialogue/discussion was between student and teacher);
5. Engaging students in learning - Partially effective (some students appeared to be intellectually engaged while others were passively engaged... There was very little student participation); and
6. Demonstrating flexibility and responsiveness - Partially effective (The teacher did not know how to assist the students. This was evident in the constant repetition of the question).

The Board fails to note the teacher was rated "Effective" in "Creating an Environment of Respect and Rapport." It also does not mention that the other 15 components were filled in with the notation "insufficient evidence." The Board does not explain the significance of "insufficient evidence."<sup>10/</sup>

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<sup>10/</sup> With its reply brief, the Board submitted another evaluation of G. B-M., which asserts that she was rated 2.56 within the range of partially effective (1.85 to 2.64). This document was not referenced in the Board's initial brief listing its purported reasons to withhold her increment. The later evaluation does not state whether it reflects the lowering of her rating because of Principal F. N.'s belief about her fund-raising activities. We do not accept factual representations from persons who do not have personal knowledge, including attorneys.

The Association submitted a certification from G. B-M. She asserts that after Principal F.N. told her to cease fund-raising for a school club, both inside and outside of school, she obeyed his directive. However, G. B-M. states that in June 2015, on the day of her evaluation, he said, "I am recommending your increment be withheld because you refused to stop fund-raising for the club inside and outside of the school after I told you not to." She asserts that Principal F.N. told her he had lowered her rating on one of the categories on her annual evaluation because he believed she disobeyed his fund-raising directive. G. B-M. states that after that change she resumed her fund-raising.<sup>11/</sup> The Board's reply brief does not address G. B-M.'s assertions regarding Principal F.N.'s statements that he was recommending her increment be withheld because she was still fund-raising.

Based upon the record, we cannot conclude that the withholding of G. B-M.'s salary increment was predominantly related to teaching performance. If Principal F.N. stated, as the teacher certifies, that she had disobeyed his directive regarding fund-raising and was recommending the withholding of her increment for that reason, than the withholding is based upon alleged insubordination, a reason unrelated to classroom performance. See Hackettstown Bd. of Ed., P.E.R.C. No. 2003-48,

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<sup>11/</sup> The Association's brief asserts that G. B-M. also reacted similarly to T.H. regarding the no failing grade policy. However, her certification does not discuss that issue.

29 NJPER 22 (¶6 2003); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992). We therefore decline to restrain arbitration.

With respect to the other five teachers, the Board filed evaluative documents. Its brief recites some of the ratings and comments, but omits categories in which the teachers received high marks.

E. B.

- Establishing a culture for learning - Partially effective (students exhibit a limited commitment to complete the work on their own; many students indicate that they are looking for an easy path);<sup>12/</sup>
- Managing classroom procedures - Ineffective (students not working with the teacher, are not productively engaged);
- Managing student behavior - Partially effective (the teacher attempts to maintain order in the classroom, referring to classroom rules, but with uneven success);
- Communications with students - Ineffective (the teacher makes a serious content error that will affect students' understanding of the lesson; students indicate through their questions that they are confused about the learning task);
- Using questioning and discussion techniques - Ineffective (the teacher does not ask students to explain their thinking);

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<sup>12/</sup> There were two other elements to this category and E.B. received ratings of 3 "effective." Describing E.B.'s rating as "partially effective" is misleading, especially as E.B.'s overall rating for "Establishing a Culture for Learning" was "3" "Effective."

- Engaging students in learning - Partially effective (some students are intellectually engaged in the lesson); and
- Using assessment in instruction - Ineffective (the teacher gives no indication of what high-quality work looks like).

P.C.

- Planning and preparation - Objective was not posted in the classroom; lesson plans were not current;
- Classroom environment - No students' work displayed on anchor charts;
- Instructional Delivery - Activities were not aligned to CCSS. There were no connections made between teacher and students. Limited instruction by teacher; and
- Level of student work - Basic recall.

N. J-S.

- Using questioning and discussion techniques (use of scripted open ended questions);
- Engaging students in learning (students need to know what is the task and what is determined for them to do; ensure that students are intellectually engaged and they are allowed to explain their thinking; allow students to self-reflect after questioning);
- Using assessments in introduction (monitor your students' learning by eliciting evidence of students' understanding; when giving feedback to your students, feedback must be constant and specific; students need to know how they will be assessed and how you will know if the objective of the lesson was met); and
- Managing classroom procedures (when distributing materials, students should know the roles, routines, and what they have to do to prevent loss of instructional time).

M.S.

- Planning and preparation - No objectives for DOL posted
- Level of student work - basic recalling information and understanding information
- Class engagement - Many students actively reject the assigned task or substitute another activity.

J.W.

- Designing coherent instruction - Partially effective (only some of the instructional outcomes are addressed in the planned assessment);
- Establishing a culture for learning - Partially effective (the teacher's energy for the work is neutral, not indicating a high level of commitment);
- Using questioning and discussion techniques - Partially effective (the teacher calls on many students, but only a small number actually participate in the discussion; the teacher asks students to explain their reasoning, but only some students attempt to do so);
- Engaging students in learning - Partially effective (some students are intellectually engaged in the lesson; few of the materials and resources require student thinking or ask students to explain their thinking);
- Using assessment in instruction - Partially effective (there is little evidence that the students understand how their work will be evaluated; feedback to students is vague and not oriented toward future improvement of work); and
- Reflecting on teaching - Partially effective (the teacher has a general sense of whether or not instructional practices were effective; the teacher offers general modifications for future instruction).

The Association has not responded to the Board's statements regarding the performance of these five teachers. We will thus

accept the Board's assertion that in these instances it acted based on teaching performance. See Upper Saddle River Bd. of Ed., P.E.R.C. No. 91-69, 17 NJPER 148 (¶22059 1991). If these withholdings are appealed to the Commissioner of Education the Board will be bound by those reasons. See Mahwah Tp. Bd. Of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008). We will restrain arbitration of the grievances contesting the increments withheld from these five teachers.

## ORDER

The request of the Passaic City Board of Education for a restraint of binding arbitration is granted as to the grievances filed on behalf of teachers E.B., P.C., N. J-S., M.S., and J.W. The request is otherwise denied.<sup>13/</sup>

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Wall voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Bonanni recused himself.

ISSUED: January 26, 2017

Trenton, New Jersey

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<sup>13/</sup> As we noted at the outset of our analysis, because the timeliness of the filing of the grievances or the demands for arbitration are outside our scope of negotiations jurisdiction, the Board may raise that defense with respect to any or all of the grievances.