

P.E.R.C. NO. 2019-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MAHWAH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2017-032

MAHWAH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Board's request for a restraint of binding arbitration of the Association's grievance contesting the Board's decision not to restore the grievant's increment by placing her on the salary guide step she would have been on had her increment not been withheld in the previous year. The Commission holds that N.J.S.A. 18A:29-14, as interpreted by the courts, the Commission, and the Commissioner of Education, allows a school board discretion to restore increments, but does not compel a board to restore previously withheld increments.

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

For the Respondent, Springstead & Maurice, Esqs.,
attorneys (Alfred F. Maurice, of counsel and on the
brief)

DECISION

On March 9, 2017, the Mahwah Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Mahwah Education Association. The Association asserts that the Board violated the parties' collective negotiations agreement, as well as N.J.S.A. 18A:29-14 and N.J.S.A. 34:13A-27, when after withholding a teaching staff member's salary increment for 2015-2016 it declined to place her on the step of the salary guide she would have occupied for the 2016-2017 school year if no withholding had occurred. The Association deliberately did not appeal the initial withholding of the increment.

The parties have filed certifications, exhibits, and briefs. These facts appear.

The Association represents the Board's teachers, and other certified and non-certified personnel. The parties entered into a collective negotiations agreement effective from July 1, 2015 until June 30, 2019. The grievance procedure ends in binding arbitration.

On July 15, 2015, the Board voted to withhold the salary increment of a teaching staff member that she would otherwise have been paid during the 2015-2016 school year. According to the Association, the basis for the withholding was disciplinary, a contention that the Board, for the purposes of this scope of negotiations proceeding, does not dispute.

On September 11, 2015 the Association filed a grievance asserting that the Board's action to permanently withhold the increment in future years violated N.J.S.A. 34:13A-22 through 29. The grievance sought restoration of the increment for the 2016-2017 school year. On September 15, the Superintendent denied the grievance as untimely.

On September 17, 2015, a Board attorney e-mailed NJEA Uniserv representative Joseph Tondi stating:

[T]his is to confirm that we agreed to hold the 9/15/15 grievance on behalf of [the teacher] in abeyance. This is with the understanding that the Association is not contesting the underlying increment withholding, but is reserving its rights to

contest the restoration of the grievance in the event that [the teacher] requests that the increment be restored in future years and said request is denied. Each party would reserve all rights and defenses.

On September 30, 2015, Tondi responded that the teacher concurred with holding the matter in abeyance and that after a successful 2015-2016 school year may request that her increment be restored.

On June 10, 2016, the Board notified the teacher that her increment would not be restored. On June 24, Tondi filed a grievance on behalf of the teacher seeking immediate restoration of the increment for the 2016-2017 school year. It reads:

The Association contends that the Board's continuous decision was disciplinary without just cause. The Association also contends the Board's disciplinary action is totally out of proportion.

The Superintendent and the Board denied the grievance. The Association filed a demand for arbitration, describing the grievance as "Withholding of increment/discipline without just cause." This petition ensued.

Initially we find that this dispute involves a decision to not restore a previously withheld teaching staff member's salary increment, as opposed to an appeal of the original withholding decision.

Boards of Education have the ability to withhold the salary increment of a teaching staff member, subject to review, and the

sole discretion to decide whether to restore the increment in subsequent school years.

N.J.S.A. 18A:29-14 provides:

Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education.... The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid.... It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

[emphasis supplied]

Prior to 1990, all increment withholdings were reviewable by the Commissioner of Education. See Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979). After L. 1989, c. 269, took effect on January 4, 1989, increment withholdings that were predominantly disciplinary in nature could be reviewed through binding grievance arbitration. N.J.S.A. 34:13A-26, N.J.S.A. 34:13A-29, Scotch Plains-Fanwood Bd. of Ed. and Scotch Plains-Fanwood Ed. Ass'n, 139 N.J. 141 (1995).

However, given the language of N.J.S.A. 18A:29-14 as construed by decisions issued by the Courts, the Commission, and the Commissioner of Education, there is a significant difference between a challenge to the initial withholding of a salary

increment and whether a decision by a Board of Education not to restore that lost compensation can be challenged through binding arbitration.

Teachers cannot recover previously withheld increments in future years absent a local board's affirmative action. Cordasco v. City of E. Orange Bd. of Ed., 205 N.J. Super. 407 (App. Div. 1985). A board has discretion to restore increments, but is not compelled to do so. Probst v. Haddonfield Bd. of Ed., 127 N.J. 518 (1992) observed:

[N.J.S.A. 18A:29-14], however, clearly was meant to vest local boards with the ability to withhold increments from teachers who had not performed well during the previous year. First, the language of Section 14 is clear with respect to the restoration of teachers to adopted salary guides. That statute states that "[i]t shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment." N.J.S.A. 18A:29-14. The provision prohibits mandatory reimbursement of previously-withheld increments.

While a teacher losing an employment increment will always lag one step behind other teachers with the same experience, that fact is simply the effect of an earlier employment decision. North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed., 96 N.J. 587 (1984).

The Board relies on Cordasco and Probst and administrative agency decisions.

The Association asserts that the authority cited by the Board regarding its discretion over increment restoration does not apply to "disciplinary grievances." It asserts that the denial of restoration triggers an agreement by the parties to present their claims regarding the increment withholding to an arbitrator. It cites Commission decisions addressing whether or not increments were withheld for disciplinary reasons.

The Commission, in Cherry Hill Bd. of Ed., P.E.R.C. No. 97-139, 23 NJPER 346 (¶28160 1997), ruled on a dispute analogous to this case. A school psychologist had an increment withheld for disciplinary reasons for the 1993-1994 school year. The Education Association did not seek to arbitrate the withholding but proposed that the increment be restored in the 1994-1995 school year. The Board did not accept that proposal during the 1994-1995 school year, and the Association sought to contest that action through binding arbitration. It argued that the 1990 amendments, allowing arbitration of salary increments withheld for disciplinary reasons, allowed arbitration of a grievance seeking restoration of the psychologist's increment. We held:

[N]othing in the text or legislative history of the 1990 amendments suggests that the Legislature meant to go beyond addressing the forum for reviewing initial increment withholdings, to repeal the part of N.J.S.A. 18A:29-14 prohibiting the mandatory restoration of adjustment increments, or to overrule the prior case law holding mandatory restoration clauses non-negotiable. See Fieseler v. South River Bd. of Ed., 93

N.J.A.R. (EDU) 415 (St. Bd. 1993). Nor do the facts of this case suggest that the refusal to restore the psychologist's "correct" place on the salary guide should be viewed as a new disciplinary action rather than the effect of the earlier, unchallenged employment decision. We accordingly restrain arbitration.

[23 NJPER at 347-348.]

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: October 25, 2018

Trenton, New Jersey