

P.E.R.C. NO. 2018-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONROE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2018-020

MONROE TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Monroe Township Board of Education's request for a restraint of binding arbitration of a grievance filed by the Monroe Township Education Association contesting the withholding of a teacher's salary increment. Finding that the alleged intentional alteration of a student's grade implicates misconduct that does not require educational expertise to review, the Commission holds that the reason for the withholding is predominantly disciplinary rather than 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, Monroe Township Schools (Mary H. Smith, General Counsel, on the brief)

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

DECISION

On November 21, 2017, the Monroe Township Board of Education filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Monroe Township Education Association. The grievance asserts that the Board disciplined a teacher without just cause and in violation of Articles 5.D.1. and 5.D.2. of the collective negotiations agreement (CNA) by withholding her salary increment for the 2017-2018 school year.

The Board filed briefs, exhibits, and the certification of Michael G. Kozak, Superintendent of Schools. The Association filed a brief, but no certification.^{1/2/} These facts appear.

The Association represents a broad-based negotiations unit that includes non-supervisory teachers and other certificated personnel, as well as non-supervisory support staff. The Board and Association are parties to a CNA effective from July 1, 2014 through June 30, 2017. The grievance procedure ends in binding arbitration.

Article 5.D. of the CNA provides:

Employee Discipline Process

1. No employee shall be disciplined or reprimanded without just cause.

The Board retains the right to discipline or discharge an employee during the term of his/her employment contract when the employee's performance and/or attendance negatively affect his/her ability to perform his/her assigned tasks.

Discipline may include oral and/or written reprimands, increment withholdings, fines or suspensions without pay if consistent with law, and mid-contract discharges consistent with individual contracts, but shall not include the non-renewal of a non-tenured

1/ N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

2/ The Association's brief states that it "submits no additional Certification" because "[t]he facts germane to this Petition - specifically, the factual bases given for the withholding of [Grievant]'s increment . . . are not in dispute."

teaching staff member for performance-related reasons, the withholding of increments of a teaching staff member for predominantly evaluative reasons and the certification of tenure charges against a teaching staff member.

All disciplinary acts shall be subject to the grievance procedure.

2. The specific grounds forming the basis for official disciplinary action shall be made available to the employee in writing. If an employee is requested to give information which may lead to disciplinary action against that employee, the Board shall advise the employee of their right to representation.

During the 2016-2017 school year, the Grievant was a Language Arts teacher at Monroe Township High School. Early in the school year, the Grievant and a Guidance Counselor, Diane Peterson, twice met with one of the Grievant's students in order to address concerns about the student's school attendance. Superintendent Kozak certifies that "the student was not the strongest student academically" but "Ms. Peterson's primary concern was the student's unsatisfactory attendance record."

During the second semester of the school year, the Board approved a leave of absence for the Grievant from January 17, 2017 to April 7, 2017, but the Grievant returned early from leave on March 13. While the Grievant was out on leave, a different teaching staff member covered her Language Arts class. Upon returning from leave, the Grievant complained to Eugene Snook, ELA Department Coordinator, about the grades of the student with

the attendance problems (hereinafter, "Student"). The Grievant told Mr. Snook that someone had changed the Student's grades while she was out on leave and that the Student had actually received grades of 55 for both the first and second marking periods. On March 30, 2017, Mr. Snook spoke to Ms. Peterson about the Grievant's complaint regarding the Student's grades. Ms. Peterson showed Mr. Snook the time stamp for the Grievant's input of the Student's grades into the Genesis database system, which reflected a final grade of 73 for the first marking period and 70 for the second marking period. Ms. Peterson confirmed with Mr. Snook that there were no records of any formal grade changes or marking period failures for the Student. The in-class resource teacher also verified to Mr. Snook that the Student did not fail the first or second marking period.

On April 7, 2017, Mr. Snook informed Ms. Peterson that the Grievant was still insisting that someone had changed the Student's grades. Later that day, Ms. Peterson reviewed the Student's grades again, and noticed that earlier in the day someone had altered many of the student's individual assignment grades in Language Arts for the first and second marking periods. Ms. Peterson reported her discovery to Robert Goodall, Principal, Monroe Township High School, who directed Reggie Washington, the District's Director of Information Systems, to run a report to determine who changed the Student's grades in the Genesis system.

Mr. Washington discovered that the Grievant had made a series of entries in the Genesis system on April 7, including multiple changes to the Student's individual assignment grades in Language Arts for the first and second marking periods that resulted in lowering the Student's final grades for both marking periods.

The first marking period grade was reduced from 73 to 58.4.

Superintendent Kozak certifies that:

[B]oth Mr. Goodall and Ms. Peterson reported that the Grievant's actions in changing the student's grades were a deliberate attempt to sabotage the student's pathway to graduation.

Superintendent Kozak certifies that Ms. Peterson had previously shared her concerns with Mr. Goodall regarding the deteriorating relationship between the Grievant and the Student. Kozak certifies that Ms. Staub indicated to Mr. Goodall that the Student did much better with the other teacher while the Grievant was out on leave. Kozak certifies that Ms. Staub also reported to Mr. Goodall that the Grievant did not support the Student in class and did not have a good rapport with the Student.

On April 20, 2017, Superintendent Kozak and Principal Goodall met with the Grievant and her representative to discuss the Student's changed grades. In response, the Grievant denied making any changes to the Student's grades. During the meeting, Superintendent Kozak suspended the Grievant without pay pending a

full investigation into the grade change matter. The suspension was confirmed by letter of April 21, in which Superintendent Kozak stated, in pertinent part:

This letter confirms the substance of our discussion at the meeting in my office on Thursday, April 20, 2017. . . . During the meeting, we discussed serious concerns regarding the altercation [sic] of a particular student's grades in the Genesis system. During our April 20th meeting, I informed you that as a result of this issue, you were suspended with pay from your employment as a teacher in the Monroe Township School District, effective immediately, pending a full investigation into the matter.

Superintendent Kozak certifies that the investigation resulted in a determination that the Grievant engaged in unprofessional conduct by inappropriately lowering the Student's grades for the first and second marking periods. Regarding punishment for the alleged misconduct, Kozak certifies:

I seriously contemplated filing tenure charges against [Grievant] in view of the egregious nature of [Grievant]'s conduct. However, because of [Grievant]'s years of service in the District, I decided instead to make a recommendation to the Board to withhold [Grievant]'s employment and adjustment increments for the 2017-2018 school year.

By letter of August 10, 2017, Superintendent Kozak informed the Grievant that he would be recommending the withholding of her

2017-2018 employment and adjustment increments at the Board's August 23 meeting. The letter provided the following explanation for the increment withholding:

The reasons for the withholding of your increments have been explained to you through memoranda, in-person conferences, and the like. The area of significant concern identified in the aforementioned documents/conferences relates to your unprofessional conduct in connection with your attempt to fabricate a student's grades as well as your interactions with a particular student. Specifically, you purposefully and improperly lowered the student's grades in dereliction of your professional responsibilities and in violation of Board policies and regulations. As a result of your aforementioned actions, you have failed to meet the standards of professional performance as a teacher acceptable to the Monroe Township School District.

On August 23, 2017, the Board voted to withhold the Grievant's 2017-2018 employment and adjustment increments "due to the reason set forth in the Superintendent's letter dated August 10, 2017 to [Grievant] advising her of the Superintendent's recommendation to withhold her increments."

The Association filed a Level Two grievance on August 21, 2017 challenging the increment withholding as being made "without just cause" and violating "Article 5.D.1. and 5.D.2.; and any other articles, policies or laws that pertain to this matter."

The Board denied the grievance at every step. On November 16, the Association filed a request for binding arbitration. This petition ensued.

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. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), aff'g P.E.R.C. No. 97-40, 22 NJPER 390 (¶27211 1996). Under N.J.S.A. 34:13A-27d, if the reason for a withholding is related predominately to the evaluation of teaching performance, any appeal shall 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. N.J.S.A. 34:13A-27a. 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.

In Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144, 146 (¶22057 1991), 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.

The Board asserts that arbitration must be restrained as the increment withholding was based predominantly on an evaluation of the Grievant's teaching performance. It argues that the Board withheld the increments "because of her unprofessional interactions with the student, resulting in [Grievant]'s attempt to fabricate the student's grades." The Board contends that the Grievant's "purposeful alteration of the student's grades is in direct contravention of Board policy and regulation" and that her "deliberate attempt to sabotage the student's pathway to graduation is directly at odds with [Grievant]'s professional responsibilities." The Board asserts that alleged violations of administrative procedures such as inadequate recording of grades and grade book deficiencies have been found by the Commission to

be sufficiently related to an evaluation of teaching performance and therefore not arbitrable.

The Association responds that the statement of reasons for the increment withholding shows that it was predominantly disciplinary and therefore arbitrable. It asserts that the Board's reasons specifically address the Grievant's alleged fabrication of the Student's grades, which is not predominantly related to an evaluation of teaching performance. The Association argues that, unlike the grade book deficiency concerns in the Commission cases cited by the Board, the alleged incident here does not concern a teacher's ability to evaluate students or properly maintain or record student grades. It contends that because this case concerns alleged deliberate falsification of records in order to sabotage a student, there is no education expertise required to determine whether or not the grievance should be sustained. The Association asserts that the Commission has found that alleged falsification of school records is predominantly disciplinary.

The Commission has held that alleged violations of administrative procedures or directives are arbitrable when they are remotely related to teaching performance or are based on more generally applicable Board policies. See, e.g., 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) (alleged falsification of home instruction forms); Montclair Bd. of Ed., P.E.R.C. No. 2000-1, 25 NJPER 361 (¶30155 1999) (athletic director allegedly violated administrative procedures regarding collection of gate receipts); and Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992) (alleged falsification of sign-out sheets); see also, Mansfield Tp. Ed. Ass'n, P.E.R.C. No. 96-65, 22 NJPER 134 (¶27065 1996), rev'd and rem'd, 23 NJPER 209 (¶28101 App. Div. 1997) (Appellate Division held that alleged failure to follow administrative directive to only communicate with parent of special education student in presence of other staff members was a single disciplinary incident "outside the parameter of the evaluation process").

The Commission has also held that, although administrative or procedural in nature, certain grade recording and reporting requirements are so intertwined with the performance of teaching duties that alleged deficiencies are appropriate for review before the Commissioner of Education rather than an arbitrator. See, e.g., Elizabeth Bd. of Ed., P.E.R.C. No. 2015-55, 41 NJPER 401 (¶125 2015) (untimely grade submission, deficient maintenance of grade book); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-48, 41 NJPER 344 (¶109 2015) (untimely grade submission, deficient maintenance of grade book); Woodbridge Bd. of Ed., P.E.R.C. No.

2009-53, 35 NJPER 78 (¶31 2009) (untimely grading; deficient maintenance of grade book); Mahwah Tp. Bd. of Ed., P.E.R.C. No. 2008-71, 34 NJPER 262 (¶93 2008) (incorrectly graded student exams); Mercer Cty V/T Schools Bd. of Ed., P.E.R.C. No. 2008-26, 33 NJPER 265 (¶101 2007) (unclear grading system; late and incomplete grade reporting); Willingboro Bd. of Ed., P.E.R.C. No. 2006-88, 32 NJPER 166 (¶75 2006) (unacceptable and incomplete grade book); and Woodbury Bd. of Ed., P.E.R.C. No. 2006-81, 32 NJPER 128 (¶59 2006) (failure to adequately record grades in grade book).

The alleged misconduct here, in the form of the Grievant allegedly intentionally fabricating a student's grades in the school's computerized grading system in order to cause the student to fail and be unable to graduate, is beyond the realm of regular teaching duties. Such a "deliberate attempt to sabotage" - as described by the Superintendent - is not a matter of teaching performance or educational judgment that requires the educational expertise of the Commissioner of Education. This is not a case of an alleged failure to abide by teaching-related administrative protocols concerning timely grade submissions or properly completed and timely entries into grade books. Rather, the Grievant allegedly attempted a fraudulent act that she denied doing. There is no question here regarding teaching performance

deficiencies, as the allegedly altered grades had previously been entered for the first and second marking periods. There is no allegation that the Grievant made untimely or incomplete submissions of any grades for her classes. Instead, she is accused of intentionally violating grade change protocols months after the grades had been reported in the normal course.

In Atlantic City, supra, a home instruction teacher's increment was withheld for allegedly submitting falsified home instruction forms to get credit for teaching more than she did. Because no evaluation of her actual ability to teach or properly complete teaching-related paperwork was necessary, the Commission denied the Board's request to restrain arbitration, holding:

While these are allegations of serious misconduct, if true, they do not require educational expertise to determine it is wrong. See Clifton Bd. of Ed. [P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992)] (withholding predominantly disciplinary where based on allegations that teacher left work early, falsified sign-out sheet, repeatedly missed back-to-school night, and was insubordinate). Thus, a grievance arbitrator may review the increment withholding.

[Atlantic City, 40 NJPER at 265.]

The Appellate Division affirmed. 41 NJPER 312 (¶101 2015). Like Atlantic City, the instant case does not hinge on the Grievant's ability to teach, interact appropriately with students in the classroom, or even properly or diligently complete teaching-

related administrative functions. The alleged falsification of a student's grades is akin to the alleged falsification of home instruction forms because it involves a level of intentional misconduct that does not require educational expertise to review. See also Willingboro Bd. of Ed., P.E.R.C. No. 98-51, 23 NJPER 607 (¶28298 1997) (alleged violations of security procedures for state testing where copy of test booklet found at local church).

The Commission has applied a similar dichotomy to matters involving allegations of inappropriate classroom conduct. Where a teacher has been accused of inappropriate verbal interactions with students, inappropriate methods of disciplining students, or an inability to maintain control of the class, the Commission has found such cases to predominantly involve evaluations of teaching performance.^{3/} However, where a teacher's alleged conduct was so

3/ See, e.g., Dumont Bd. of Ed., P.E.R.C. No. 2007-17, 32 NJPER 323 (¶134 2007) (phys-ed teacher allegedly called children offensive names and put in closet to discipline); Orange Tp. Bd. of Ed., P.E.R.C. No. 2005-65, 31 NJPER 118 (¶50 2005) (alleged inability to manage class, problems with student altercations in class, failure to improve classroom climate and set and carry out class expectations/rules); Readington Tp. Bd. of Ed., P.E.R.C. No. 2006-5, 31 NJPER 242 (¶93 2005) (alleged yelling and inappropriate language; erratic and unstable demeanor); Knowlton Tp. Bd. of Ed., P.E.R.C. No. 2003-47, 29 NJPER 19 (¶5 2003) (alleged humiliation of students); Northern Highlands Reg. Bd. of Ed., P.E.R.C. No. 2003-49, 29 NJPER 24 (¶7 2003) (alleged difficulty relating to female students and inappropriate demeanor with the entire class); Montclair Bd. of Ed., P.E.R.C. No. 2002-3, 27 NJPER 321 (¶32114 2001) (alleged negative attitude and comments towards students, inappropriately invaded student's personal space, and

(continued...)

egregious that it involved physical violence or assault, or concerned a failure to supervise or a misjudgment concerning student safety, the Commission has found such cases predominantly disciplinary.^{4/} This analysis used to distinguish certain types of in-class performance and interactions as actually involving

3/ (...continued)
inappropriate statements about personal issues); Logan Tp. Bd. of Ed., P.E.R.C. No. 95-57, 21 NJPER 115 (¶26070 1995) (alleged yelling at and demeaning students, out of control classroom); Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) (teacher allegedly told off-color jokes and made demeaning and insensitive comments to and about students).

4/ See, e.g., Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991) (no educational expertise required to know that hitting a student is wrong); 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) (in contrast to a subjective assessment of a teacher's student interactions or classroom management, "no educational expertise is required to determine that a teacher should not sleep in class"); Elizabeth Bd. of Ed., P.E.R.C. No. 2016-19, 42 NJPER 188 (¶50 2015) (alleged sending students unattended on personal errand to retrieve teacher's coffee from car); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-69, 41 NJPER 474 (¶147 2015) (reprimand for leaving students unattended to heat up teacher's coffee in teachers' lounge and carry it back to the classroom); Old Bridge Bd. of Ed., P.E.R.C. No. 2008-15, 33 NJPER 230 (¶88 2007) (teacher used student to conduct personal union-related errand during class); Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001) (teacher left students unattended); Red Bank Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-23, 24 NJPER 474 (¶29221 1998) (alleged violations of student hall pass procedures); Burlington Tp. Bd. of Ed., P.E.R.C. No. 94-77, 20 NJPER 71 (¶25031 1994) (teacher used students to act as her "eyes and ears" to help her spouse); and Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-72, 18 NJPER 64 (¶23028 1991) (teacher accused of allowing students to leave study hall and sleep in unattended classroom).

arbitrable misconduct rather than teaching performance is analogous to the distinction in the instant case. Here, the allegations concern whether an incident that is outside of the regular parameters of teaching duties occurred and whether the Board had just cause for the increment withholding. Like allegations of inappropriate physical conduct or lack of supervision or adherence to student safety protocols, the fact that the misconduct directly affected a student or students is not the determinative factor. The crucial element of our analysis is whether the incident is predominantly related to the evaluation of teaching performance. The allegation against the Grievant concerns unprofessional conduct that is so far outside of the scope of her regular teaching duties and grading responsibilities that it is predominantly a disciplinary matter, rather than an evaluation of teaching performance.

Finally, we disagree with the Board's contention that the increment withholding was more generally based on the Grievant's alleged unprofessional interactions with the Student. We cannot tell from this record whether the reference in the Board's statement of reasons to unprofessional interactions between the Grievant and the Student are related to teaching performance, as the Board has not submitted any background materials or documentation to support a finding either way. Superintendent

Kozak's certification likewise provides only broad, vague statements suggesting difficulty between the Grievant and the Student. Not only are Kozak's statements hearsay,^{5/} but no other evidence has been submitted to explain the nature or context of the alleged "deteriorating relationship" or lack of "good rapport." Even assuming, arguendo, that the stated concerns about the Grievant's interactions with the Student were predominantly related to an evaluation of teaching performance, the Board would have produced - at best - a mixed statement of both teaching performance and non-teaching performance reasons for the increment withholding. In such mixed reasons cases, the Commission looks to the reasons that predominate, paying particular attention to the reason or reasons most emphasized by the Board in its statement of reasons. See Bergenfield, supra; Camden Cty. V/T Bd. of Ed., P.E.R.C. No. 2007-47, 33 NJPER 24, 25 (¶9 2007); Orange Tp. Bd. of Ed., P.E.R.C. No. 2005-65, 31 NJPER 118 (¶50 2005); Elizabeth Bd. of Ed., P.E.R.C. No. 2003-86, 29 NJPER 247 (¶74 2003); Red Bank Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-23, 24 NJPER 474 (¶29221 1998); and Demarest Bd. of Ed. and Demarest Ed. Ass'n, P.E.R.C. No. 99-36, 24 NJPER 514 (¶29239 1998), aff'd, 26 NJPER 113 (¶31046 App. Div. 2000).

^{5/} Kozak's certification relays what Ms. Peterson and Ms. Staub said to Mr. Goodall about the relationship between the Student and Grievant, and what Ms. Staub said to Mr. Goodall about the student doing better with the substitute.

Here, it is apparent that the primary focus of the increment withholding was the specific April 7, 2017 alleged grade change incident. Superintendent Kozak's August 10 statement of reasons initially cites that alleged grade "fabrication" as the area of "significant concern," while only secondarily mentioning "as well as your interactions with a particular student." The statement then goes on to describe the alleged grade change incident in more detail, essentially designating it as the specific reason for the withholding.^{6/} Furthermore, the statement of reasons itself refers to a record, "memoranda, in-person conferences" through which "[t]he reasons for the withholding of [Grievant's] increments have been explained." That record includes the April 21 suspension letter and April 20 conference discussed therein. Superintendent Kozak's April 21 letter only addresses the alleged falsification of the Student's grades and is devoid of references to any other incidents, difficulties, or interactions between the Grievant and the Student.

For the foregoing reasons, we hold that the Board's stated reasons for the increment withholding do not predominantly relate to an evaluation of teaching performance and therefore may be

^{6/} "Specifically, you purposefully and improperly lowered the student's grades in dereliction of your professional responsibilities and in violation of Board policies and regulations."

reviewed in arbitration. The determination of whether the Grievant intentionally fabricated the Student's grades in an attempt to sabotage his graduation prospects, and the propriety of the increment withholding as punishment if the facts are as alleged by the Board, do not require special educational expertise.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: May 31, 2018

Trenton, New Jersey