

P.E.R.C. NO. 2019-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX BOROUGH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2019-026

MIDDLESEX EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Middlesex Borough Board of Education for a restraint of binding arbitration of a grievance filed by the Middlesex Education Association. The grievance contests the withholding of a teacher's increments for the 2018-2019 school year. The Commission concludes that this withholding is not based predominately on an evaluation of teaching performance but is limited to a teacher's alleged violation of the Board's fire drill procedures.

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, Sciarrillo Cornell Merlino McKeever
& Osborne, LLC, attorneys (Dennis McKeever, on the
brief)

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

DECISION

On October 16, 2018, the Middlesex Borough Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Middlesex Education Association (Association). The grievance contests the withholding of a teacher's salary increment for the 2018-2019 school year as being without just cause.

The Board filed briefs, exhibits, and two certifications of the Principal of Parker School, Dr. Remi Christofferson. The Association filed a brief, exhibits, and the certification of the grievant. These facts appear.

The Association represents all full-time and part-time certified and all non-certified personnel, with certain exclusions as set forth in Article 1 of the collective negotiations agreement (CNA), employed by the Board. The Board and the Association are parties to a CNA in effect from July 1, 2014 through June 30, 2017. The grievance procedure ends in binding arbitration. The grievant is a tenured teaching staff member currently employed by the Board and assigned to Parker School. The Principal oversees and supervises all teachers who are assigned to and work at the school. During the 2017-2018 school year, the grievant taught second grade.

The Principal certifies that at the beginning of every school year, she meets with all teachers and provides them with a Crisis Plan Quick Reference Guide detailing procedures to follow for on-site and off-site evacuations, including fire drills. A fire drill is signaled by the ringing of bells, at which time all teachers and students are expected to vacate the building. When teachers and their students are outside of the building and attendance is taken, each teacher is expected to hold up, as appropriate, either a "red card," alerting that a student is missing, or a "green card," meaning all students have vacated the building and are present. In the 2017-2018 school year, this meeting occurred on September 5, 2017. The Principal further certifies that the grievant was present for the meeting.

The grievant certifies that an unannounced fire drill^{1/} was conducted at the school on April 24, 2018, prior to dismissal. The Principal certifies that while teachers and their students were outside the building during the fire drill, the grievant held up a red card. When questioned about it by the Principal, the grievant advised that a student was missing and was sleeping in the classroom. The grievant stated that she thought the bell would have woken the student up. The Principal further certifies that she directed the grievant to return to the building and bring the student outside, which she did.

The grievant contends that her ability to strictly comply with the fire drill procedure was compromised by the fact that the student fell asleep in class shortly before the fire alarm bell rang, and could not be woken despite the efforts of the grievant and the school nurse. The grievant also claims the student had a prior history of falling asleep or losing consciousness in class, which the grievant attributes to a "neurological disability" or "seizure disorder," and that she reported these prior incidents to the Principal and school nurse, but received no guidance on how to handle future incidents.^{2/}

1/ The Principal's certifications confirm that a fire drill occurred then, and do not dispute that it was unannounced.

2/ The Principal certifies that the student has no neurological disability, and that the grievant knows this and is just using the student as a "scapegoat" for her poor judgment and
(continued...)

The grievant also notes that for forty years she received consistently positive Instructional Observations and Year End Evaluations, and has never been the subject of any disciplinary action.

On April 25, 2018, the Principal sent a letter to the grievant regarding the incident, which stated:

Dear [Grievant]:

During our routine fire drill at 2:43 pm on Tuesday, April 24, 2018, I noticed that you were holding a *Red Card* in your hand. When I approached you, you notified me of a student that was inside the building sleeping as the fire drill was in progress.

Due to your lack of judgment and the safety implications that it posed on the safety and well-being of the student, you are being reprimanded for your neglect of duty and failure to uphold the Professional Standards for Teachers (NJAC 6A:9-3.3). This incident is very serious and will be discussed with the MBOE to determine what disciplinary steps will be taken as a result of your actions.

On May 15, 2018, the Superintendent informed the grievant that her increment would be withheld for the 2018-2019 school year. In pertinent part, the letter stated:

2/ (...continued)
supervision. However, records of the nurse's visits to the classroom, submitted by the Board with its reply brief, confirm the student often fell asleep in class, including on the day of the fire drill.

Dear [Grievant]:

On May 14, 2018 the Board of Education passed a Resolution to withhold your salary increment for the 2018-19 school year. Thus, your Guide Step for the 2018-19 school year shall remain the same as for the 2017-18 school year.

You were provided a Rice notice for the April 25, 2018 meeting. As you did not indicate that you wished to have the matter heard in open public session, the matter was discussed in executive session.

Pursuant to N.J.S.A. 18A:29-14, the Board is to give written notice "of such action, together with the reasons therefore..." Please accept this letter as notice of the Board's action to withhold your increment and a statement of reasons considered by the Board for that action.

STATEMENT OF REASONS:

Failure to ensure the safety of one of your students by leaving him in the classroom, sleeping and unattended, while executing the fire drill procedure with the rest of your class, outside of the building.

On July 12, 2018, the Association filed a Level 1 grievance stating that on or about June 25, the Board disciplined the grievant without just cause by withholding her increment for the 2018-2019 school year. On August 30, the Business Administrator/Board Secretary denied the grievance. On September 19, the Association filed a Request for Submission of a Panel of Arbitrators. This petition ensued.

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-27(d), 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. See N.J.S.A. 34:13A-27(a). 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.

Here, the grievant and the Principal both certify that during the unannounced fire drill at issue, all Parker School teachers and students "were expected to vacate the building," consistent with District policies. In other words, for all students and staff, normal school operations, including teaching activities, were suspended while the fire drill was underway. Thus we find that the grievant's conduct during the course of the fire drill could not have predominately concerned her teaching performance, as no teaching was being done (by the grievant or anyone else) at that time.

The cases relied upon by the Board wherein we restrained arbitration of grievances challenging increment withholdings for alleged failures of classroom supervision are distinguishable from the facts of this matter. Those cases involved incidents occurring in the classroom while learning was supposed to have been taking place, directly impacting upon the teacher's teaching performance. See, e.g., Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2002-35, 28 NJPER 76 (¶33026 2001) (withholding addressed teacher's judgment in allowing assistant to leave

classroom, and not reconfiguring class so she could see all her special education students, as documented by building principal during classroom observation); Somerset County Vocational and Technical Schools Bd. of Ed., P.E.R.C. No. 95-55, 21 NJPER 112 (¶26068 1995) (withholding addressed concerns about teacher's classroom management in allegedly failing to control students and ensure their safety during shop class in numerous incidents over several years, as documented in a memorandum, evaluations and classroom observations); Bergen County Vocational Schools Bd. of Ed., P.E.R.C. No. 91-70, 17 NJPER 150 (¶22060 1991) (withholding predominately addressed teaching performance, including allegedly leaving students in class unattended for 30 minutes without arranging for coverage by another teacher, failing to consistently discipline/supervise students, and failing to attend faculty meetings).

In contrast, here the grievant's increment was withheld for an act of alleged misconduct, not teaching performance. Her increment withholding was solely based upon her actions during a fire drill, when the primary focus of her job duties was not teaching her students, but seeing them safely out of the building. The Principal's letter of reprimand and the subsequent Superintendent's statement of reasons made no mention of the grievant's teaching performance or her ability to manage students during class as reasons for the reprimand.

The instant matter is analogous to Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-72, 18 NJPER 64 (¶23028 1992), wherein we declined to restrain arbitration of a grievance challenging an increment withholding for alleged failures to supervise students, the majority of which occurred while the grievant was not teaching, and none of which "related to the way she taught any of her classes." Id. See also, Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001) (declining to restrain arbitration where teaching performance or ability to manage students in classroom was "not mentioned as a consideration" in increment withholding decision based on teacher's alleged violation of directive not to leave students unattended).

Likewise here, we find that a determination of whose version is correct regarding the grievant's alleged neglect of duty during a fire drill, as well as the merits of her asserted defense regarding an alleged disability of the student, also have no relation to the way that she taught her classes, and therefore do not predominately involve an evaluation of her teaching performance. As such, an arbitrator may determine whether the Board had just cause to discipline the grievant by withholding her increment.

ORDER

The request of the Middlesex Borough Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: May 30, 2019

Trenton, New Jersey