

P.E.R.C. NO. 2019-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTHERN VALLEY REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2019-038

NORTHERN VALLEY EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Board's request for a restraint of binding arbitration of a grievance filed by the Association contesting the withholding of a teacher's salary increment. Finding that the reasons for the withholding concern an alleged violation of work rules pertaining to the supervision or safety of students, and therefore do not predominately relate to an evaluation of teaching performance, the Commission declines to restrain arbitration.

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 (Matthew J. Giacobbe, of counsel and on
the brief)

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

DECISION

On December 5, 2018, the Northern Valley Regional Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Northern Valley Education Association (Association). The grievance contests the withholding of a teacher's salary increment for the 2018-2019 school year.

The Board filed briefs, exhibits, and the certification of its Superintendent, James Santana. The Association filed a brief, exhibits, and the certification of the grievant. These facts appear.

The Association represents teachers and other employees of the Northern Valley Regional School District. The Board and Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2015 through June 30, 2018. The grievant is a tenured chemistry teacher at Northern Valley Regional High School in Demarest. The grievance procedure ends in binding arbitration.

Santana certifies that on March 27, 2018, the Board conducted a "lockdown" drill at its High School in Demarest. During a lockdown drill, it is the responsibility of faculty members to effectively manage their classrooms and to move all students into a secure location/safe zone within the room. According to Santana, during a lockdown drill, various Board administrators walk through the school to ensure compliance with the lockdown drill procedures enumerated in the Emergency Response Plan. During the March 27 lockdown drill, the District Supervisor of Mathematics observed that the grievant was not following proper protocol. Specifically, the grievant and a student were sitting on a table rather than on the floor with the other students. The District Supervisor further noted that there was sufficient room on the floor for the grievant and the student who was sitting on the table. The District Supervisor advised the grievant that the student should be seated on the floor and

she should be seated, at the very least, on a chair in order to protect their safety during a lockdown.

Santana certifies that on March 29, 2018, school administrators met with the grievant and her association representative to discuss the grievant's performance during the lockdown drill. The meeting was documented by letter dated April 5, which explained that the grievant's actions and poor judgment during the lockdown drill compromised the safety and security of students. When the grievant was provided with the April 5 letter, she was informed that the letter would be forwarded to Santana for review in consideration of disciplinary action due to her poor performance. The April 5 letter states:

Dear [Grievant],

The purpose of this letter is to review our meeting on March 29, 2018. Also present at this meeting were Luisella Marolda, assistant principal; Jennifer Cusmano, Supervisor of Science; and Kevin Walter, NVEA representative. We received feedback from a subject supervisor that during the lockdown drill you failed to follow proper protocol to ensure the safety and security of students. It was explained that all students were seated in the safety zone with the exception of one student who was found sitting on top of a desk and that you were also seated on top of a desk. At the meeting, you were provided with an opportunity to explain the circumstances behind your supervision of the students during the 3/27/18 lockdown.

You admit that you did not instruct the student that he must not sit on the desk and that he must sit on the floor in the safety zone. You further explained that you

yourself sat on the desk because to do otherwise you would have felt discomfort in your knees, which have been chronically painful. You responded that you ultimately did direct the student to move from the desk to the floor within the safety zone, but only after the observing supervisor directed you to do so. You responded that you understood the seriousness behind your inaction in asking the student to move to the floor within the safety zone.

We explained to you that your actions during the drill compromised the safety and security of our students, as you did not follow protocol. Your actions did not only affect the safety and security of the student who was sitting on the desk and your own personal safety, but also if you or that student became visible to a person looking to cause harm, that could invite danger to all students present in your room at the time of the lockdown. Furthermore, we do not announce whether the lockdowns are drills or a true event. Breaking from protocol may cause confusion for students regarding procedure and the degree of seriousness behind the lockdown.

On 3/28/17 almost exactly one year ago to the date of this drill, I explained to you in a meeting that we had, that you must bring all students to the back of the classroom during a lockdown and treat the response as a true emergency. Furthermore, during our 1/22/18 faculty meeting, I provided an updated detailed review of our emergency response procedures. Teachers were instructed that they must move to the back of the classroom into a safety zone and ensure that all students are seated on the floor and remain quiet.

As previously communicated to you, you were once again directed that during a lockdown you must move to the back of the classroom into a safety zone and ensure that all students are seated on the floor and remain

quiet. You should model the response of your students, unless you are needed to respond to emergent incidents that are occurring in the room.

Moving forward, any new incidents of you not following protocol during an emergency response drill or a true event may result in disciplinary action.

Please be guided accordingly.

Santana certifies that on May 1, 2018, he met with school administrators, the grievant and her Association representative to discuss concerns regarding the grievant's performance during the March 27 lockdown drill. By letter dated May 16, Santana advised the grievant that he would be recommending to the Board that it withhold her salary increment for the 2018-2019 school year based upon his assessment of her performance and prior related incidents involving poor performance. The May 16 letter^{1/} states, in pertinent part:

Dear [Grievant]:

This letter serves to advise you that I will recommend to the Board of Education at its meeting on May 21, 2018 that it withhold your employment and adjustment increments for the 2018-2019 school year. My recommendation is based upon an assessment of your performance, for the reasons explained to you by Dr. Timothy Gouraige on March 29, 2018 and reiterated in his April 5, 2018 letter.

^{1/} We consider the Board's May 16 letter, which incorporates by reference the April 5 letter, to be the Board's statement of reasons issued pursuant to N.J.S.A. 18A:29-14 and N.J.A.C. 19:13-2.2(a)(3).

Specifically, during a March 27, 2018 lockdown drill, you and another student were sitting on lab tables instead of sitting on the floor or in another concealed location. Your actions demonstrated to your students that the lockdown was simply a drill even though administration does not announce whether it is a drill or true event. As such, all lockdowns must be treated seriously and the protocol strictly followed to ensure everyone's safety.

As a reminder, the safety and security procedures were explained to you on January 22, 2018. Despite this, you did not properly follow protocol and put students at risk. Your attentiveness to these procedures is therefore lacking. This is especially evident since this is the second time that you misapplied safety protocols. Last school year, on March 28, 2017, you allowed students to remain at the front of the classroom where they would have been visible to intruders. Again, you have placed students at risk. As a teacher, it is your responsibility to ensure the safety and well-being of students while they are entrusted to your care. You are also expected to model appropriate behavior and response in times of crisis.

You are directed to review the High School's Emergency Response Plan and familiarize yourself with the safety protocols. If you have any questions or need additional guidance, do not hesitate to contact me.

Santana certifies that the grievant's poor teaching performance also includes her failure to properly apply the safety protocols during a previous mandatory lockdown drill in March 2017, which the Principal previously discussed with the grievant. Additionally, Santana certifies that the grievant also received written reprimands in May 2015, October 2015, and

February 2016 for poor performance and exhibiting poor judgment. Lastly, Santana certifies that the grievant has consistently received evaluations in which her professionalism and judgment have been identified as below proficient.

The grievant certifies that during the March 27 lockdown drill, she complied with the lockdown drill procedures by directing all of her students to the back-left section of the chemistry classroom. The grievant further certifies that this is the safest area of the classroom because it is blocked by a large exhaust hood and is unobservable from the hallway door, and thus, her students were out of sight lines from the hallway door.

The grievant certifies that she performed the drill correctly as all of her students were out of the line of sight and quiet during the drill. The grievant certifies that the Manual does not say the students must be seated on the floor. Rather, it only states that students should be seated. The grievant further certified that everyone in her classroom including herself was seated and out of the sight line of the hallway door in complete compliance with the lockdown drill procedures.

In response to the Board's reference in the April 5 letter to the March 28, 2017 lockdown drill, the grievant certifies that she was in her classroom at lunch during that lockdown drill. At that time, she did not have a classroom full of students. She

certifies that she had a student in the room with her who was recuperating from an injury and was on crutches. He had difficulty moving around and she allowed him to stay seated at the lab table and lowered the shades and lights in the room. Thus, the grievant certifies that she complied with the lockdown drill procedures in effect at the time.

The grievant denies the Board's assertions that lockdown procedures were explained to her at the January 22, 2018 faculty meeting. The grievant certifies that at the faculty meeting the Principal did not model sitting on the classroom floor and there was no discussion that students must sit on the floor during a lockdown. The grievant further certifies that it was not until on or about October 19, 2018 that she received an amendment to the Emergency Response Plan, which stated, "Students should be seated on the floor in the corner of the room farthest away from sight lines of the door." The grievant certifies that this was the first time that this requirement was included in writing.

Lastly, in response to the Board's assertions that her evaluations demonstrate poor teacher performance, the grievant certifies that her teaching evaluations show superlative performance which are all "Efficient" or "Highly Efficient."

On June 25, 2018, the Board approved the withholding of the grievant's salary increment for the 2018-2019 school year. By

letter dated June 27, 2018, the grievant was notified of the Board's decision to withhold her increment.

On July 3, 2018, the Association filed a Level One grievance challenging the Board's decision to withhold the grievant's salary increment for the 2018-2019 school year. On July 9, the Principal denied the Associations's grievance. On July 16, the Association filed a Level Two grievance, which the Superintendent denied by letter dated July 30. On August 1, the Association filed a Level Three grievance, which the Board denied by letter dated November 7.^{2/} The petition ensued.^{3/}

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.

^{2/} The Association certifies it filed a Level Four grievance on October 2, 2018. However, the Board's certification does not mention any Level Four grievance or its disposition.

^{3/} The arbitrator appointed to this matter granted the Board's request to hold the grievance arbitration in abeyance pending the outcome of the instant petition.

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.

The Board argues that the grievant's increment was withheld due to her poor teaching performance based upon her prior two

violations of the "lockdown drill" procedures and her evaluations in which she has consistently been below proficient for professionalism and judgment. The Board argues that the grievant's failure to follow the lockdown drill procedures demonstrated poor class management and jeopardized the safety and security of her students, which directly relates to her teaching performance. Moreover, the Board contends that the grievant sitting on the lab table during the lockdown drill was a failure to model appropriate behavior in the classroom and diminished the seriousness of the lockdown drill.

The Association responds that the Board withheld the grievant's increment not because of her teaching performance, but rather, as discipline for her alleged isolated violations of workplace policy (i.e. the lockdown drill procedures). The Association argues that the grievant's teaching evaluations have consistently shown "Efficient" or "Highly Efficient" teaching performance.

Here, we find that the increment withholding was predominately disciplinary in nature, and not predominately based on an evaluation of teaching performance. Both the Board's April 5 and May 16 letters primarily focus on the grievant's alleged failure to adhere to the lockdown drill procedures, which is tantamount to an alleged violation of work rules affecting classroom supervision or student safety.

The Commission has previously found that misconduct centered around violations of rules pertaining to the supervision or safety of students is not primarily an issue of teaching performance. See, e.g., Middlesex Bd. of Ed., P.E.R.C. No. 2019-47, 45 NJPER __ (¶__ 2019) (declined to restrain arbitration for alleged violation of safety policy where teacher left sleeping student in classroom during a fire drill); Lodi Bd. of Ed. P.E.R.C. No. 2016-58, 42 NJPER 451 (¶123 2016) (declined to restrain arbitration involving allegation that teacher left students unattended in classroom while he left the school to get coffee); Elizabeth Bd. of Ed., P.E.R.C. No. 2016-19, 42 NJPER 188 (¶50 2015) (declined to restrain arbitration involving allegation that teacher jeopardized student's safety by directing student to retrieve coffee from her 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 is not an evaluation of teaching performance); Old Bridge Bd. of Ed., P.E.R.C. No. 2008-15, 33 NJPER 230 (¶88 2007) (declined to restrain arbitration involving allegation that 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) (declined to restrain arbitration involving allegation that teacher left students unattended and several students got into a fight).

We find this increment withholding was predominately based on isolated incidents of alleged violations of a workplace safety policy rather than an evaluation of teaching performance. We recognize the serious safety implications of the lockdown drill procedures and the important role of a teacher in effectuating such safety policies. But this dispute does not involve a subjective assessment of the nature of the grievant's student interactions, classroom management, or teaching performance requiring the expertise of the Commissioner of Education.

The Commission cases relied upon by the Board are inapplicable to the instant matter. The Board cites cases where the teacher's increment was withheld due to a messy classroom, poor classroom management, improper disciplining of a student, among other reasons. These cases cited by the Board involve an amalgam of reasons, such as failure to prepare lesson plans, which the Commission has found to predominately involve teaching performance. Notably, in the cases cited by the Board, poor classroom management or inadequate supervision are not the sole reasons for the increment withholding.

For example, the Board cites Florham Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 159 (¶24081 1993) for the proposition that a teacher's failure to model appropriate behavior constitutes poor teaching performance. This case is distinguishable from the instant matter. There, the increment was

withheld based on allegations of inappropriate classroom discussion; lack of control over classroom discussion; poor classroom management and climate; failure to implement appropriate classroom teaching skills; improper lesson presentation; and conduct unbecoming a teacher. Review of the withholding required educational judgments about how to respond to comments from students in class and about what subject matters should be discussed with students in class.

Here, the instant withholding does not involve the grievant's teaching or classroom discussions with students. Rather, the grievant's alleged inappropriate behavior comprised sitting on a lab table with another student during a lockdown drill, thereby violating the procedure, and seemingly not taking the drill seriously. Unlike the teacher's conduct addressed in Florham Park, the grievant's behavior did not predominately involve teaching performance but rather an alleged violation of a safety policy. Moreover, we are not persuaded by the Board's inclusion of the grievant's allegedly deficient evaluations to support that the increment withholding was due to her poor teaching performance. Neither the Board's April 5 nor May 16 letter makes any mention of the grievant's teaching performance, and only Santana's certification in support of the instant

petition cites the grievant's evaluations as a factor in the increment withholding.^{4/}

In sum, the record reflects more non-teaching allegations of violations or deficiencies than teaching performance concerns. In the Board's notices to the grievant regarding the increment withholding, particularly its June 27 letter, it emphasizes that the grievant "failed to properly implement student safety protocols." No educational expertise is needed to determine whether the alleged violations and misconduct occurred and justified the withholding. We therefore hold that the withholding is not predominately based on an evaluation of teaching performance and may be reviewed by an arbitrator.

ORDER

The request of the Northern Valley Regional Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: June 27, 2019

Trenton, New Jersey

^{4/} If the record contains documents from the board of education that explain the basis for withholding and are more contemporaneous with the increment withholding action, we will accept and place greater reliance on those reasons rather than certifications prepared for litigation. Elizabeth Bd. of Ed., P.E.R.C. No. 2016-19, supra.