

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2019-030

ELIZABETH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Board's request for a restraint of binding arbitration of a grievance filed by the Association contending that the Board disciplined a teacher without just cause by withholding her salary increment for the 2018-19 school year. The Commission finds that the withholding was predominately based on an evaluation of teaching performance, as evidenced by numerous evaluative documents relied upon by the Board, and by the Association's failure to allege any arbitrable violations of work rules or misconduct by the grievant as the basis for the withholding. The Commission finds further indication that the withholding was based on an evaluation of teaching performance in the Association's contention that a lack of access to Board documents prevented the grievant from improving her teaching performance. The Commission further finds that any alleged inequities in the Board's evaluative process and decision making may be raised before the Commissioner of Education.

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.

P.E.R.C. NO. 2020-4

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Appearances:

For the Petitioner, DeCotiis, FitzPatrick, Cole & Giblin LLP, attorneys (Andres Acebo, of counsel and on the brief; Jason M. Hyndman, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Jesse Humphries, on the brief)

DECISION

On October 23, 2018, the Elizabeth Board of Education filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Elizabeth Education Association. The grievance asserts that the Board disciplined a teacher without just cause by withholding her salary increment for the 2018-19 school year.

The Board filed briefs, exhibits, and the certification of Frank Cuesta, Chief of Operations for the Elizabeth School District. The Association filed a brief and the certification of the Grievant. These facts appear.

The Association represents a broad-based negotiations unit of teachers and other certificated personnel, as well as non-certificated personnel. The Board and Association are parties to a collective negotiations agreement (CNA) effective from July 1, 2012 through June 30, 2015, followed by a memorandum of agreement (MOA) covering the period of July 1, 2015 through June 30, 2016, and an MOA effective from July 1, 2016 through June 30, 2019. The grievance procedure ends in binding arbitration.

During the 2017-18 school year, the Grievant was employed by the Board as a Kindergarten Physical Education and Health teacher at Jerome Dunn Academy of Mathematics, Technology and the Arts School No. 9. Cuesta certifies that the Grievant's 2018-2019 increment was withheld due to her poor teaching performance and that the Grievant received subpar teacher evaluations, multiple complaints from parents, was non-compliant with teacher action plans, and was ultimately stripped of her teaching duties in March 2018.^{1/} Cuesta further certifies that on December 5, 2018^{2/}, the Principal sent the Grievant an email reminding her that she should facilitate learning by sitting amongst her students rather than at her desk and that she had failed to

1/ The Grievant's current employment status is unclear from the certifications.

2/ Although Cuesta certified that this date and the subsequent date took place in 2018, for the time line of events to make sense, these events must have taken place in 2017.

timely submit her lesson plans. On December 8, 2018, the Principal sent the Grievant a memorandum wherein Torres noted her observation that the Grievant appeared cold and distant to parents and children.

On January 19, 2018, the Grievant received an in-class evaluation that ranged from "basic" to "unsatisfactory", citing the Grievant's failure to appropriately engage with students or employ an appropriate lesson plan, as well as her failure to assign her students reading material appropriate for their individual reading levels.^{3/} On February 12, a district social worker notified the Principal that two parents had requested that their children be transferred from the Grievant's classroom due to deteriorating classroom performance and frustration with the classroom environment.

On March 13, 2018, the in-class observer sent the Grievant a memorandum detailing her non-compliance with the 30-day Teacher Action Plan which was implemented after the Grievant's previous poor in-class observation. On March 14, the Vice Principal sent the Grievant a memorandum which documented an incident in which she had to intervene after observing the Grievant poorly managing an upset student. The memorandum also cited prior incidents of the Grievant's lack of attention to the class as whole and the

^{3/} The performance level ranges are Unsatisfactory, Basic, Proficient, and Distinguished.

needs of individual students (e.g. repeatedly ignoring a crying child in the Grievant's classroom and the Grievant being unaware if a child was present in her classroom).

The Grievant certifies that she was never informed of the reasons for the Board's withholding of her increment and the Board never provided her with any documentation supporting her increment withholding. She further certifies that she was "not given the opportunity to improve [her] teaching performance based upon the Board's evidence in support of [her] increment withholding."

On June 14, 2018, the Association filed a grievance contesting the increment withholding. On August 3, the Association demanded 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 because it withheld the Grievant's increment based primarily on her poor teaching performance. The Board argues that the Grievant's poor teaching performance is evidenced by multiple poor evaluations which ranged from basic to unsatisfactory;

multiple complaints from parents requesting their children be transferred from the Grievant's classroom; the Grievant's non-compliance with teacher action plans implemented to improve her performance; and ultimately her removal from teaching duties for poor classroom management and inattentiveness to the needs of her kindergarten students as detailed in the Vice Principal's March 14 memorandum. The Board argues that the Grievant's poor teaching performance is documented by multiple e-mails and memoranda issued to the Grievant concerning her alleged poor teaching performance and inability to manage her classroom effectively.^{4/}

The Association argues that arbitration should not be restrained because the increment withholding was predominately disciplinary. It argues that the timing and substantive content of the memoranda to the Grievant and the observations in her teaching evaluations were disciplinary reprimands and did not provide her an opportunity to improve her teaching performance. The Association further argues the Board's decision to withhold the Grievant's increment was flawed, as only two months separated

^{4/} The Board did not submit an official statement of reasons pursuant to N.J.S.A. 18A:29-14 and N.J.A.C. 19:13-2.2(a)(3). Absent an official statement of reasons, if the record contains documents from the Board 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, 42 NJPER 188 (¶50 2015).

the first incident from the last, her two evaluations were conducted within less than a month of each other, and the March 13 and 14 memoranda were disciplinary reprimands sent to the Grievant on consecutive days. The Association concludes that "the timing of these factors is not sufficient to withhold her salary increment."

Here, we find that the increment withholding was predominately based on an evaluation of teaching performance. The March 29, 2018 Increment Withholding form relied on by the Board included the following: two in-class teaching evaluations conducted on January 10 and February 6, which rated the Grievant unsatisfactory or basic in all categories; the March 13 memorandum from the in-class observer to the Grievant notifying her of her non-compliance with a 30-day teaching action plan implemented as a result of her prior evaluations and requesting that the Grievant develop and implement her own action plan by a certain date; the March 14 memorandum from the Vice Principal to the Grievant detailing her ineffective classroom management; various emails from the school social worker detailing complaints from parents requesting their children be transferred from the Grievant's class; and documentation from Torres to the Grievant notifying that her performance needs improvement, specifically by sitting amongst her students and timely submitting her lesson plans. The documents relied on by the Board in support of the

increment withholding all primarily concern evaluations of the Grievant's teaching performance.

The Commission has regularly restrained arbitration in cases predominately involving allegations of problems with timely submission of lesson plans, engaging students, communicating content, or carrying out the curriculum. See, e.g., Elizabeth Bd. of Ed., P.E.R.C. No. 2015-66, 41 NJPER 452 (¶140 2015); East Orange Bd. of Ed., P.E.R.C. No. 2014-49, 40 NJPER 343 (¶125 2014); Englewood Bd. of Ed., P.E.R.C. No. 2006-33, 31 NJPER 353 (¶140 2005); North Caldwell Bd. of Ed., P.E.R.C. No. 2001-76, 27 NJPER 290 (¶32105 2001); and Randolph Tp. Bd. of Ed., P.E.R.C. No. 99-94, 25 NJPER 238 (¶30100 1999). We have also found that allegations of poor classroom management (e.g., control, discipline, or supervision of students) is a component of teaching performance. See, e.g., Elizabeth; Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 2000-28, 25 NJPER 442 (¶30194 1999); Morris Bd. of Ed., P.E.R.C. No. 99-84, 25 NJPER 162 (¶30074 1999); New Providence Bd. of Ed., P.E.R.C. No. 98-91, 24 NJPER 108 (¶29053 1998); Wood-Ridge Bd. of Ed., P.E.R.C. No. 98-41, 23 NJPER 564 (¶28281 1997); and Hillside Bd. of Ed., P.E.R.C. NO. 97-39, 22 NJPER 389 (¶27210 1996); Ridgewood Bd. of Ed., P.E.R.C. No. 2011-27, 36 NJPER 359 (¶140 2010).^{5/}

^{5/} As in Ridgewood, the Vice Principal's March 14 memorandum to the Grievant details her yelling at a student and being
(continued...)

The Commission cases relied upon by the Association are inapplicable to the instant matter. The Association cites cases where the teacher's increment was withheld due to violation of work rules or other misconduct, which the Commission found to be predominately disciplinary, and therefore, arbitrable. For example, the Association cites Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992) where the Commission declined to restrain arbitration because the increment withholding was based on allegations that the teacher left work early, falsified sign-out sheets, repeatedly missed back-to-school nights, and insubordination. The Association also cites Morris Hills Reg. Dist. Bd. of Ed., P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991) where the Commission declined to restrain arbitration because the increment withholding was based on allegations that a teacher struck a student. The Commission reasoned that no educational expertise was needed to decide that if a teacher hit a child, it would be improper conduct. Lastly, the Association cites Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986) and Manchester Tp. Bd. of Ed., I.R. No. 96-17, 22 NJPER 145 (¶27075 1996)^{6/} for the proposition that allegations contained in

5/ (...continued)
repeatedly inattentive to a crying student.

6/ It should be noted that this is a decision for interim relief to restrain binding arbitration of a grievance during the pendency of a scope of negotiations petition. It is not
(continued...)

documentation placed in personnel files, which are disciplinary rather than evaluative, can be challenged through arbitration.

However, here we find, for the reasons stated above, that the allegations contained in the documentation supporting the Board's decision to withhold the Grievant's increment were predominately related to teaching performance. Unlike Clifton and Morris Hills, the Association does not mention any alleged violation of work rules or misconduct by the Grievant as the basis for her increment withholding. Despite arguing that the Board's supporting documentation included disciplinary reprimands, the Association states that the documents pertain to the Grievant's "rapport with students and lack of an action plan" which indicates an evaluation of her teaching performance. The Association's arguments that the Grievant's lack of access to the Board's supporting documents prevented her from improving her teaching performance further indicate that the Board's increment withholding was based on an evaluation of her teaching performance. The Association's claims that the Board's decision to withhold the Grievant's increment was "flawed," and that "the timing of these factors is not sufficient to withhold her salary

6/ (...continued)
a final determination on the merits of the underlying scope petition. The standard for interim relief to restrain arbitration is different than that under a scope petition.

increment," are issues that may be raised before the Commissioner of Education.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: August 15, 2019

Trenton, New Jersey