

P.E.R.C. NO. 2020-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST WINDSOR REGIONAL BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2019-076

EAST WINDSOR EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the East Windsor Regional Board of Education for a restraint of binding arbitration of a grievance filed by the East Windsor Education Association contesting the withholding of a school nurse's salary increment for the 2019-2020 school year. Applying its standard for evaluating the withholdings of teaching staff members who do not have full-time teaching duties, the Commission finds that the withholding predominantly relates to an evaluation of the nurse's performance because at least two of the three reasons given by the Board are directly tied to the nurse's statutory or regulatory duties to (1) notify the parent, and (2) examine the student.

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, David B. Rubin, P.C., attorneys
(David R. Rubin, of counsel and on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Keith Waldman, on the brief; Hop Wechsler, on the
brief)

DECISION

On June 26, 2019, the East Windsor Regional Board of Education (Board) filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the East Windsor Education Association (Association). The grievance contests the withholding of a school nurse's salary increment for the 2019-2020 school year.

The Board filed briefs, exhibits and the certification of Assistant Superintendent of Curriculum and Assessment, Michael Dzwonar, who served as Acting Superintendent when the underlying

events unfolded. The Association filed a brief and exhibits.^{1/} These facts appear.

The Association represents a broad-based unit of educational professionals including school nurses. The Board and Association were parties to a collective negotiations agreement (CNA) in effect from January 1, 2015 through June 30, 2019. The grievance procedure ends in binding arbitration.

The grievant is employed by the Board as a school nurse at the Ethel McKnight Elementary School. On January 2, 2019, the Principal received an email from a student's mother stating she was "very upset because my daughter had a very bad accident in school she is bleeding from her head and nobody called me." The mother forwarded photographs showing a roughly one-inch wound on her daughter's scalp, and had to take her daughter to the hospital where staples were required to close the wound. Earlier in the school year, the mother had submitted a request to be notified whenever her daughter visited the nurse, but the nurse never contacted her.

An investigation was conducted, as detailed in a "written chronology" dated January 9, 2019 (included with the Board's exhibits), and in a memo to the grievant by the Director of Student Services dated January 10 (included with the

^{1/} The Association did not submit a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

Association's exhibits). Both the January 9 chronology and the January 10 memo contain identical information, as follows.

The student fell backward and struck her head on the blacktop during recess. A recess monitor who witnessed the incident did not notice any bleeding, but it was a hard fall so she sent the student to the nurse's office with a pass indicating that she needed ice.

According to the investigative documents, the grievant admitted being aware of the mother's request to be notified of any nursing visits, but failed to do so. She also admitted to not promptly notifying the student's teacher, electing instead to wait until the end of the school day to bring the teacher a head injury sheet for the student to take home. The teacher did not know the student had gone to the nurse until the grievant brought the head injury notice to her at the end of the day.

Both the January 9, 2019 chronology and the Director's January 10 memo concluded in pertinent part:

Based upon the findings of the report, it has been determined that [Grievant]:

- Did not promptly inform the parent of the visit to the nurse, despite verbally agreeing to do so at the beginning of the year. Additionally, there is an alert in the student management system that indicates the parent should be informed of all visits to the nurse.
- Did not properly examine the student. Based on the pictures provided by the parent, there was a clear indication of

blood. Also, the wound was significant as it required staples to close.

- Did not notify the teacher of the injury.
- Falsely claimed in the meeting that there have been no issues in the 10 years she has worked in the district. A file review indicated a memo was placed in her personnel file in 2014 for bringing files home, a violation of student confidentiality.

Both documents contained identical recommendations that the Superintendent place the grievant on a Professional Improvement Plan and that her increment be withheld for the 2019-2020 school year, "due to the severity of the situation, and the fact that [the grievant's] actions resulted in disciplinary consequences in the past."

Dwonzar certifies that he recommended that the Board withhold the grievant's increment "for the reasons explained in that report," meaning the January 9, 2019 document. However Dwonzar also certifies that in a letter dated January 18, advising the grievant of "the reasons for this action," he explained that his recommendation was "[b]ased on these findings": the grievant "did not promptly notify the parent, did not properly examine the student, and did not promptly notify the teacher of the injury." The Board acted on that recommendation at its meeting on January 28, voting to withhold the grievant's salary increment.

On May 31, 2019, the Board's Business Administrator/Board Secretary wrote to the Association's Grievance Chair following a hearing on May 20 before a Board committee that heard testimony from Association representatives seeking to convince the Board to overturn its increment withholding decision. The Board Secretary reiterated that the "rationale for the withholding is based on [the grievant] providing less than an adequate assessment of a student's injury, in addition to not communicating the concern to his parents." The Board Secretary advised that after hearing the testimony, the committee decided not to recommend that the full Board reverse the increment withholding.

The Association filed a grievance contesting the increment withholding which was denied by the Acting Superintendent, Superintendent and Board Secretary. On June 10, 2019, 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,^{2/} or related predominately to the evaluation of teaching performance, we must make that determination. See N.J.S.A. 34:13A-27(a). When doing so, we focus on "the statement of reasons issued to the teaching staff member at the time the increment was withheld." N.J.A.C. 19:13-2.2(a)(3). Where a

2/ N.J.S.A. 34:13A-22 defines "discipline" to include "all forms of discipline, except tenure charges [which are appealable to the courts] . . . or the withholding of increments pursuant to N.J.S. 18A:29-14 [which are appealable to the Commissioner of Education]."

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 gate keeping 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.

For purposes of determining which employees are covered by N.J.S.A. 34:13A-27 and its increment withholding provisions, we rely upon the definition of "teaching staff member" set forth in N.J.S.A. 34:13A-22, which specifically states that a school nurse is a teaching staff member. In Orange Tp. Bd. of Ed., P.E.R.C. No. 2006-14, 31 NJPER 291 (¶114 2005), the Commission established a performance standard for school nurses as follows:

We have recognized that the "teaching performance" standard used in N.J.S.A. 34:13A-27 cannot be applied literally when an increment withholding dispute involves a "teaching staff member" who does not teach. School nurses are - by statute - teaching staff members, but they do not have full-time teaching responsibilities. Thus, we have formulated a performance standard that is not limited to classroom teaching. See Franklin Bor. Bd. of Ed., P.E.R.C. No. 99-2, 24 NJPER 407 (¶29186 1998). This standard focuses on whether a nurse is performing nursing duties reserved by education law statutes to certificated nurses. . . .[W]e [have] held that the Commissioner of Education, not an arbitrator, must review disputes over the performance of nursing duties reserved by education law statutes to certificated nurses.

The Board argues that grievance arbitration must be restrained because the reasons given by the Acting Superintendent for his recommendation to withhold the grievant's increment, i.e. properly treating and examining students, and providing timely notification of an injury to the student's teacher and parent, all "fall within the purview" of the grievant's professional responsibilities as a school nurse. In support of this argument the Board relies on, among other things, the grievant's job description and a district policy on the care of injured and ill persons. The Association argues that binding arbitration is the appropriate forum because the withholding was predominantly disciplinary as it was based on a "single isolated incident" involving an alleged violation of "work rules," and the Board relied on a prior disciplinary incident as "additional justification" for the withholding.

We view the Acting Superintendent's January 18, 2019 letter to the grievant as "the statement of reasons issued to the teaching staff member at the time the increment was withheld." N.J.A.C. 19:13-2.2(a)(3). That letter, which the Board acted on at its January 28 meeting, specifically advised the grievant that the withholding recommendation was "[b]ased on these [three] findings": the grievant "[1] did not promptly notify the parent, [2] did not properly examine the student, and [3] did not promptly notify the teacher of the injury." We find that these

reasons are predominantly performance related because, at a minimum, two of the three determinations are directly tied to the grievant's responsibilities as a school nurse under education law or regulation- that she "did not promptly notify the parent," as required by N.J.A.C. 6A:16-2.1(a)(4)(iii) and (v), and "did not properly examine the student," as required by N.J.S.A. 18A:40-4. See also, Marlboro Tp. Bd. of Ed., P.E.R.C. No. 2016-84, 42 NJPER 570 (¶159 2016).

Marlboro Tp. Bd. of Ed. has similar facts to the facts herein. In Marlboro Tp. Bd. of Ed., the Board's withholding of a school nurses's increment stemmed from an incident of a student falling and losing consciousness. With regard to that incident, the Board raised concerns about the nurse's alleged failure to properly perform a medical examination and implement healthcare procedures as well as her making an unsound decision to send the student back to her classroom. The Commission found that the reasons provided by the Board were predominately performance-related because they were rooted in nursing responsibilities established by education statutes and regulations.

We find the allegation that during the Board's investigation the grievant falsely claimed to have had no prior disciplinary issues to be unrelated to an evaluation of the performance of her nursing duties. See, Atlantic City Bd. of Ed., P.E.R.C. No. 2014-35, 40 NJPER 263 (¶101 2013), aff'd, 41 NJPER 312 (¶101

2015); Clifton Bd. of Ed., P.E.R.C. No. 92-112, 18 NJPER 269 (¶23115 1992). However, this alleged false statement is discussed only in documents detailing the investigation, not in the statement of reasons.^{3/}

Further, even if the Board considered the prior discipline as an additional substantive reason for withholding the increment, it would not tip the balance toward predominantly disciplinary reasons. The underlying basis for that prior discipline related to the proper maintenance of student health records, a statutory duty directly allocated to the grievant's duties as a school nurse by N.J.S.A. 18A:40-4, N.J.A.C. 6A:16-2.3(b)(3)(iii) and N.J.A.C. 6A:16-2.4. As such, the Commissioner of Education may review whether that prior performance-related discipline from 2014 was or should have been considered by the Board along with the more recent predominantly performance-related issues when it withheld the grievant's 2019-2020 increment.

^{3/} Viewing the investigative documents as a statement of reasons does not produce a predominance of disciplinary reasons. Those documents cite a total of four determinations, including the three cited by the Acting Superintendent in his January 18, 2019 letter which are predominantly performance related, and the fourth being the grievant's alleged false statement about her disciplinary history. Since at least two of the four findings in the investigative material are performance-related, the reasons for the withholding, on that evenly split record, are not predominantly disciplinary.

Finally, the Association argues that the fact that the increment withholding was based on a single incident supports that it was predominately disciplinary. While personnel actions stemming from a single incident may at times support that the action was disciplinary, here the fact that the increment withholding stemmed from a single incident is not dispositive. Our determination focuses on the reasons provided by the Board, which, after applying the performance standard for school nurses to the facts of this case, we find to be predominately performance-related. We also note that Commission's finding of the performance-related increment withholding of a school nurse in Marlboro Tp. Bd. of Ed. was based on a single incident. However, the Association's argument may be raised to the Commissioner of Education in support of its disagreement with the propriety of the withholding.

ORDER

The request of the East Windsor Regional Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: February 20, 2020

Trenton, New Jersey