

P.E.R.C. NO. 2020-31

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PINELANDS REGIONAL BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2019-047

PINELANDS REGIONAL EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Pinelands Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Pinelands Regional Education Association which asserts that the withholding of a Learning Disabilities Teacher-Consultant's salary increment constitutes discipline without just cause. The Commission finds that the reasons advanced by the Board for withholding the grievant's increment, including performance issues noted in observation documents and ratings covering the 2015-2016, 2016-2017 and 2017-2018 school years, are predominately related to her performance as a teaching staff member. Thus, pursuant to N.J.S.A. 34:13A-27a and -27d, the Commission determines that the Commissioner of Education is the appropriate forum for resolving this dispute.

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, Cooper Levenson, P.A., attorneys  
(Amy L. Houck Elco, of counsel; Kasi M. Gifford, on the  
brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum,  
& Friedman, P.C., attorneys (Colin M. Lynch, of  
counsel; Craig A. Long, on the brief)

DECISION

On February 15, 2019, the Pinelands Regional Board of Education (Board or Pinelands) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Pinelands Regional Education Association (Association). The grievance asserts that the withholding of a Learning Disabilities Teacher-Consultant's (LDTC) salary increment constitutes discipline without just cause.

The Board filed briefs, exhibits and the certification of its Superintendent of Schools, Melissa McCooley, Ed.D. The Association filed a brief.<sup>1/</sup> These facts appear.

The Association represents regularly employed teaching staff members, special services staff, and other staff. The Board and Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2018 through June 30, 2021. The grievance procedure ends in binding arbitration.

The grievant is a tenured LDTC employed in the District for 17 years. The grievant is responsible for observing students in the classroom, consulting with teachers and recommending instructional strategies. And, the grievant is responsible for scheduling, conducting, assessing and writing reports for learning evaluations both in Pinelands and the Bass River Township School District which has a shared services agreement with Pinelands. The Superintendent additionally asserts that the grievant's job requires her to collaborate and actively and positively participate as a member of the Pinelands Regional Junior High School and High School Child Study Team (CST).

The Superintendent certifies that in August 2018, after a review of the grievant's Observation/Evaluation Reports, Corrective Action Plan (CAP) Meeting Minutes, and Personnel File,

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

she recommended that the Board withhold the grievant's 2018-2019 increment. The Board approved the withholding at its August 14, 2018 meeting.

The Superintendent sent the grievant a Statement of Reasons on August 16, 2018 stating in pertinent part:

Dear [Grievant]:

The action was taken to withhold your increment due to your ineffective job performance and the concerns brought by numerous administrators. It is important for you to understand that we anticipate moving forward in a positive direction. Please be aware however, that any future discipline issues could result in the Board taking additional disciplinary measures, which may include tenure charges.

The Superintendent's certification cites performance issues and relies on observation documents and ratings covering the 2015-2016, 2016-2017 and 2017-2018 school years.

The Superintendent supports her assertions with a May 26, 2016 report of the Director of Special Services (Director) rating the grievant "Partially Ineffective - 1.9," across four (4) domains.<sup>2/</sup> The Director's report asserts that the grievant displays little effort to be available for staff and parents, did not conduct adequate classroom visitations, was continuously uncooperative, and did not work collaboratively with colleagues.

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<sup>2/</sup> The grievant attached a written objection to the 2015-2016 report.

The grievant's June 1, 2016 Annual Summary Conference for 2015-2016 discussed her performance and the contents of a CAP for the following school year.

The 2016-2017 CAP provides:

Areas Identified for Improvement: (1) Collaborating with other Child Study Team Members, (2) Demonstrating Knowledge of Role as a Consultant - Classroom Visitations and Observations, (3) Growing and Developing Professionally, (4) Scheduling Time Management, and (5) Development of the Individualized Education Plan. All areas contained sources of information and evidence listed as well as corresponding components of evaluation practice instrument.

II. Goals and Professional Responsibilities:  
(1) Works collaboratively and professionally with all colleagues and parents; (2) Conducts weekly classroom visitations and observations; (3) Participates in a Professional Community; (4) Submits monthly reports on time, Arrives to meetings and building responsibilities on time, Responds to meeting invitations; (5) Submits IEPs with few or no errors) all demonstrable goals contained Staff member responsibilities, supervisor responsibilities, completion dates and estimated hours.

The Superintendent also points to numerous documents prepared to memorialize meetings about achieving the goals of the CAP; observations of the grievant; and mid-year and year end evaluations conducted during the 2016-2017 school year asserting that the grievant was ineffective in four domains and did not improve in the areas listed in her CAP.

On May 22, 2017, the Director observed the grievant for a third time that year, and issued a signed report upon completion of the grievant's observation for the 2016-2017 school year. The report asserts that the grievant had made no improvement in the areas identified in her CAP and that her performance had declined.

Another CAP was implemented for the 2017-2018 school year. The CAP identifies the following areas for improvement and Goals and Professional Responsibilities:

1. Collaborating positively with other Child Study Team Members.
2. Demonstrating Knowledge of Role as a Consultant.
  - a) Classroom Visitations which Provide Instructional Support to Teaching Staff
  - b) Monthly "Hot Topics"
3. Growing and Developing Professionally
  - a) RISE
  - b) PLC
4. Scheduling Time and Management
  - a) CST Monthly Reports
  - b) Meetings
  - c) Meeting Invites
5. Development of the Individualized Education Plan
  - 1) Works collaboratively and professionally with collages
  - 2) Conducts twice a month classroom visitations and provides instruction support for teaching staff.
  - 3) Participation in
    - a) JHS RISE Committee
    - b) Professional Learning Community
  - 4) Scheduling & Time Management
    - a) Submits required Child Study Team Monthly Reports on time

- b) Arrives to all meetings on time
- c) Responds electronically to meeting invitations timely within (24 hours)
- 5) Submits IEPs with few or no errors and IEPs are compliant with code.

As in 2016-2017, numerous regular observations and meetings, including discussions about the issues identified in the CAP, occurred throughout the 2017-2018 school year and were memorialized in documents submitted by the Board.

On March 29, 2018, another administrator issued an Observation/Evaluation Report for the grievant who was once again rated "Partially Effective" across four of the domains.<sup>3/</sup> The report stated that the grievant was putting forth some effort but was still rated only Partially Effective in most categories.

The Superintendent certifies that prior to making the recommendation to withhold the grievant's increment, she also reviewed the grievant's entire personnel file. The file contained numerous memos, e-mails and documents highlighting her alleged flawed job performance. According to the Superintendent, the grievant had two full school years to correct her performance through a CAP, but failed to do so.

On September 13, 2018, the Association filed a grievance with the Superintendent asserting that the increment withholding constituted discipline without just cause. The grievance was

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<sup>3/</sup> The grievant submitted written objections to the report.

denied at the initial and succeeding steps of the grievance procedure by administrators and the Board.

On December 5, 2018, the Association demanded 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 the circumstances surrounding its withholding of the LDTC's increment are analogous to those that were present in Montgomery Township Board of Education, P.E.R.C. No. 2015-73, 41 NJPER 493 (¶152 2015). There we found that two of the three reasons articulated for the withholding of the increment of a speech/language specialist related to job performance and the grievance challenging the withholding could not be reviewed through arbitration.

The Association argues that tardiness in filing paperwork is a disciplinary issue unrelated to teaching performance. The Association also questions the Board's reliance on lack of collaboration with CST members asserting that the issue is irrelevant because "each case manager works on his or her cases alone." It further maintains that the Board cannot point to any

one, of 21 alleged instances of the grievant's alleged failure to collaborate with her peers that "resulted in a single disruption in the delivery of CST services."

Our determination does not turn on the accuracy of the reasons given for the increment withholding, but rather assessing whether the reasons predominately relate to professional performance or are more appropriately viewed as disciplinary. In conducting that review we may consider whether the expertise of the Commissioner of Education is needed to evaluate the merits of the dispute. See Monroe Township Board of Education, P.E.R.C. No. 2018-48, 44 NJPER 453, 456 (¶126 2018).

The performance deficiencies alleged in the evaluative documents are analogous to those in cases where we restrained arbitration of increments withheld from child study team members. See Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 98-153, 24 NJPER 339 (¶29160 1998) (school psychologist's habitual failure to meet deadlines for evaluation of students impacted on effectiveness of Child Study Team even though psychologist had professional interactions with other CST members); Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 96-52, 22 NJPER 65 (¶27029 1996) (LDTC's extreme difficulties in complying with time lines for testing, submission of reports and IEP's; difficulty in effectively interacting with other professionals); Readington Tp. Bd. of Ed., P.E.R.C. No. 95-38, 21 NJPER 34 (¶26022 1994) (child

study team member's deficiencies in organizational skills "weakened morale on the child study team and jeopardized the district's compliance with administrative regulations and due process obligations").

The Association relies on Paterson School District, P.E.R.C. No. 94-115, 20 NJPER 258 (¶25129 1994). However, that decision restrained arbitration of grievances contesting the increment withholdings of seven teachers as there were multiple reasons cited as the basis for the withholdings. It is our task to view all the reasons and assess, for each withholding, whether the majority are disciplinary or performance based. As we noted in that case, 20 NJPER at 260:

While the Association asserts that the documents submitted do not support the reasons given, these reasons are educational in nature and it is therefore up to the Commissioner of Education to determine whether or not they have been substantiated.

We restrained arbitration of a challenge to an increment withholding of a learning disabilities teaching consultant in a more recent case between those same parties, Paterson State Operated School District, P.E.R.C. No. 2010-93, 36 NJPER 236 (¶85 2010). Among the performance areas cited by the Board were "Needs Improvement in Establishes and Maintains Harmonious Rapport with: A. Pupils, B. Staff, C. Parents, and Community," and deficiencies in preparation and timely submission of IEPs. (Emphasis added).

Our review of the record, including the documents submitted by the Board, persuades us that the reasons advanced for withholding the grievant's increment are predominately related to her performance as a teaching staff member. We conclude that resolution of this dispute requires the expertise of the Commissioner of Education and cannot be submitted to binding arbitration. The Association can pursue its arguments in an appeal of the increment withholding.<sup>4/</sup> We will restrain arbitration.

ORDER

The request of the Pinelands Regional Board of Education for a restraint of binding arbitration of the Learning Disabilities Teacher-Consultant's salary increment withholding is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: December 19, 2019

Trenton, New Jersey

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<sup>4/</sup> For example, the grievant's assertions that she was unfairly criticized about the content and quality of IEPs she prepared, which she contends the Board concedes are not part of her regular duties, can be made in the increment withholding appeal. Cf. Dumont Board of Education, P.E.R.C. No. 2018-27, 44 NJPER 294 (¶82 2018) (grievance could challenge negative comment on an evaluation form, where issue not part of announced evaluation criteria).