

P.E.R.C. NO. 2020-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2020-009

MIDDLESEX EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Middlesex 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 salary increment. Finding that the Board's statement of reasons for the increment withholding was the grievant's alleged excessive absenteeism, the Commission holds that the withholding is not predominately related to an evaluation of teaching performance and is therefore legally arbitrable.

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^{1/}, The Busch Law Group, LLC,
attorneys (Ari D. Schneider, of counsel)

For the Respondent, New Jersey Education Association
(Brian R. Furry, UniServ Field Representative, on the
brief)

DECISION

On August 22, 2019, the Middlesex 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.

^{1/} On March 19, 2020, a Substitution of Counsel was filed by the Middlesex Board of Education. The Board was originally represented by attorneys Dennis McKeever and Kathleen Nestor of Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC at the time the briefs were filed.

The Board filed briefs and exhibits. The Association filed a brief and an exhibit.^{2/} These facts appear.

The Association represents all full-time and part-time certified personnel and all non-certified personnel (with certain exceptions enumerated in the CNA) employed by the Board. The Board and Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2014 through June 30, 2017. The grievance procedure ends in binding arbitration.

The grievant is a tenured teacher who was assigned to the Von E. Mauger Middle School during the 2018-2019 school year. On June 13, 2019, the Board sent the grievant a letter stating:

Please be advised that pursuant to N.J.S.A. 18A:29-14, the Middlesex Board of Education approved the withholding of your adjustment increment for the 2019-2020 school year at their June 10, 2019 meeting. Be further advised that the reason for withholding the increment was excessive absenteeism.

On June 17, 2019, the Association filed a grievance challenging the increment withholding. On July 23, the Board denied the grievance. On August 1, 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

^{2/} Neither party filed a certification(s). Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall...[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

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). Pursuant to 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 increment withholding was predominately based on the grievant's teaching performance, and is therefore not arbitrable. The Board argues that because an element of teaching performance is actually being physically present in the school building to deliver the lessons, the grievant's persistent absenteeism and failure to prepare lessons for her periods of absence directly relate to her teaching performance. It cites multiple cases in which increment withholdings were found to be predominately based on teaching performance where the teacher had allegedly left students unsupervised or had poor classroom management.

The Association asserts that the increment withholding was predominately disciplinary because it was based on the grievant's alleged excessive absenteeism, as stated in the Board's statement of reasons. The Association argues that the other reasons cited by the Board in its brief were not contained in its statement of reasons or its scope petition. It cites multiple cases in which increment withholdings based on excessive absenteeism claims were found to be predominately disciplinary and arbitrable.

In increment withholding cases, we focus on the specific reasons cited by a school board in the statement of reasons the board is required to provide to the teacher pursuant to N.J.S.A. 18A:29-14. See N.J.A.C. 19:13-2.2(a)(3) (statement of reasons required to be filed with scope petition). In selecting a forum under N.J.S.A. 34:13A-27, we accept that statement of reasons, determine whether the stated reasons are predominately based on the evaluation of teaching performance, and do not consider contentions that those reasons are pretextual or unsupported. See Linden Bd. of Ed., P.E.R.C. No. 2014-42, 40 NJPER 291 (¶111 2013); Paramus Bd. of Ed., P.E.R.C. No. 2004-30, 29 NJPER 508 (¶161 2003); see also North Caldwell Bd. of Ed., P.E.R.C. No. 2001-76, 27 NJPER 290 (¶32105 2001); Greater Egg Harbor Reg. Bd. of Ed., P.E.R.C. No. 2000-85, 26 NJPER 214 (¶31088 2000); Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1996).

Here, the Board's June 13, 2019 statement of reasons provides the following single reason for the grievant's increment withholding: "the reason for withholding the increment was excessive absenteeism." The Commission has regularly found that allegations of excessive absenteeism are disciplinary reasons for increment withholdings that do not predominately relate to evaluation of teaching performance. See, e.g., Edison, supra, aff'd, 304 N.J. Super. 459 (App. Div. 1997); Bergenfield Bd. of Ed. and Bergenfield Ed. Ass'n, P.E.R.C. No. 2006-69, 32 NJPER 82

(¶42 2006), aff'd, 33 NJPER 186 (¶65 App. Div. 2007); Scotch Plains-Fanwood, supra; Elizabeth Bd. of Ed., P.E.R.C. No. 2016-75, 42 NJPER 545 (¶150 2016); Elizabeth Bd. of Ed., P.E.R.C. No. 2015-48, 41 NJPER 344 (¶109 2015); Middlesex Bd. of Ed., P.E.R.C. No. 2000-86, 26 NJPER 217 (¶31089 2000); Hillside Bd. of Ed., P.E.R.C. No. 92-124, 18 NJPER 358 (¶23155 1992). As excessive absenteeism is the only reason cited by the Board in its statement of reasons for the increment withholding, we find that the increment withholding is not predominately related to evaluation of teaching performance and is therefore arbitrable.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: March 26, 2020

Trenton, New Jersey