

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2021-016

CHERRY HILL ASSOCIATION
OF SCHOOL ADMINISTRATORS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Cherry Hill Board of Education for a restraint of binding arbitration of a grievance filed by the Cherry Hill Association of School Administrators, contesting the withholding of a school principal's salary increment for the 2019-2020 school year. The Commission finds the reasons given by the Board for the increment withholding, centered in allegations that the grievant created a hostile working environment through his words, tone and demeanor when communicating with staff and the school community, relate predominately to an evaluation of the quality of the grievant's performance as an educational leader and manager. The parties may present to the Commissioner of Education their arguments about the merits of the withholding, including as to whether it was justified in light of the grievant's "effective" score on his annual performance evaluation.

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, Schenck, Price, Smith & King, LLP,
attorneys (Paul H. Green, of counsel and on the brief)

For the Respondent, Schwartz Law Group, LLC, attorneys
(Robert M. Schwartz, of counsel and on the brief)

DECISION

On November 9, 2020, the Cherry Hill Board of Education (Board) filed a scope of negotiations petition, seeking a restraint of binding arbitration of a grievance filed by the Cherry Hill Association of School Administrators. (Association). The grievance contests the withholding of a school principal's salary increment for the 2019-2020 school year.

The Board filed briefs, exhibits and the certification of its Superintendent of Schools, Dr. Joseph Meloche. The Association filed a brief.^{1/} These facts appear.

^{1/} The Association did not submit a certification. N.J.A.C.
19:13-3.6(f) requires that all briefs filed with the
(continued...)

The Board operates the schools of the Cherry Hill School District (District) pursuant to N.J.S.A. 18A:1-1, et seq. The Association is the duly-authorized majority representative for administrative employees in the District, including school principals. 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 advisory arbitration.

The District's job description for the position of Principal requires holders of that position, among other things, to possess the following qualifications: "Strong leadership with excellent verbal and written communication and interpersonal skills"; and "ability to establish and maintain successful relationships with the educational community"; and "ensure a school climate that fosters the educational development of each student." Principals also have a duty to establish and maintain "an effective learning climate in the school."

The grievant, a tenured principal employed by the Board, has served as Principal of a District school from July 1, 2016 through the present. Dr. Meloche certifies that the grievant is overall a capable administrator, but cites ongoing concerns about

1/ (...continued)
Commission shall recite all pertinent facts supported by certification(s) based upon personal knowledge.

the manner in which the grievant addresses students and staff, and his use of inappropriate workplace humor.

In 2017, a teaching staff member filed an affirmative action complaint against the grievant, alleging that he had engaged in behavior that created a hostile working environment. An investigation did not confirm the allegations, but in a June 9, 2017 letter to the grievant, the District's affirmative action officer wrote:

[I]t was perceived that your demeanor was condescending and disrespectful. Administrators and others in position of authority have the responsibility to ensure appropriate behaviors, including tone of voice, are being exhibited at all times. Should similar circumstances occur in the future, I would encourage you to be mindful of your tone and demeanor.

In March of 2018, Dr. Meloche placed the grievant on a performance improvement plan (PIP) to address the following areas of performance deficiency: "relationships with students"; "communication with students"; and "communication with the educational community." The PIP directed the grievant, among other things, to be "mindful at all times of your tone, word, choice, delivery of your message, and your facial expression" when meeting and communicating with students and when "corresponding with the educational community." The PIP further directed the grievant, "it is your responsibility to make the necessary adjustments to meet and sustain acceptable performance

standards."

In late 2018, another affirmative action complaint was filed against the grievant, alleging that his verbal treatment of a District employee created a hostile working environment. The District's affirmative action officer was again unable to determine that a hostile work environment had been created, but she wrote to the grievant on January 17, 2019 that his "tone and demeanor, during that meeting, were perceived as verbally aggressive and intimidating," and reminded the grievant:

This is the second documented incident in which an employee has filed a claim regarding your tone and demeanor. In 2017 you were reminded of your responsibility to ensure that behaviors, including tone of voice, were being exhibited at all times and asked to be mindful of your tone and demeanor in similar situations.

Between late 2018 and February 2019, five additional teaching staff members filed affirmative action complaints against the grievant. The District's affirmative action officer and human resources officer took initial statements from the complainants, and in March 2019 the District retained an independent consulting firm, Palestis Educational Consultants (PEC), to further investigate their allegations.

PEC's investigation culminated in a written report issued in June 2019, redacted excerpts of which are included in the Board's exhibits. The report substantiated various complainants' allegations, and concluded that the grievant had engaged in a

pattern of behavior that established an unhealthy and hostile working environment for pregnant and female staff, in violation of Board Policies 3351/4351, Healthy Workplace Environment, through his "comments to women, related to pregnancy and family planning, the perceived emotionality of women, and the implicit superiority of men, [which] indicate that the comments were specifically directed at women . . . [and] were gender specific. In addition, [his] questioning a new staff member's sexuality was also directed at a protected class." The report further concluded that the grievant's pattern of behavior had established an unhealthy and hostile working environment for staff "through his use of inappropriate, crude and unprofessional humor directed at protected classes," targeted at certain students, a job applicant, and an employee. PEC's report further concluded that while the grievant "claims that he is focused upon making the school better, his interactions with staff actually undermines his agenda."

Dr. Meloche certifies that he found PEC's findings "extremely concerning," and on June 21, 2019, he met with the grievant to share his concerns, and advised that he would recommend that the Board withhold the grievant's salary increments, and place the grievant on another PIP for the 2019-2020 school year to address the "very serious concerns" raised in PEC's report about the grievant's role as a Principal. Dr.

Meloche memorialized this meeting in a June 21 memo to the grievant, in pertinent part as follows:

The [PEC] investigation concluded that you have created a hostile work environment at [the school]. It was clear to the investigators that:

- "A pattern of behavior by [the grievant] has established an unhealthy and hostile workplace environment for pregnant staff."
- "A pattern of behavior by [the grievant] has established an unhealthy and hostile workplace environment for females."
- "A pattern of behavior by [the grievant] has established an unhealthy and hostile workplace environment for all staff, through his use of inappropriate, crude and unprofessional humor."
- "In addition, many . . . teaching staff members have expressed or referenced a strong fear of retribution by the Principal."

Your behavior is unprofessional, unacceptable and it will not be condoned. The report's findings make clear that you are not satisfactorily carrying out your responsibility to oversee the school's staff and to provide the judgment, leadership and healthy workplace environment expected of a District principal. These concerns, coupled with the directives included in your 2018 [PIP] . . . that required you to "be mindful at all times of your tone, word choice and delivery of your message when communicating," lead me to recommend, based upon your unsatisfactory performance, that the Cherry Hill Board of Education withhold your salary increment for the 2019-2020 school year.

In addition, you will be placed on a [PIP] for the 2019-2020 academic year.

The 2019-2020 PIP, the second in consecutive years, identified the following areas of performance deficiency: "Maintaining a Healthy Workplace Environment"; and "Communicating with staff members." It directed the grievant to "maintain respectful and professional interpersonal relationships with staff" in formal and informal interactions, and to "communicate with all staff in a non-threatening, non-sarcastic and respectful manner." It also advised the grievant that he would be assigned a professional mentor with whom to meet, correspond and discuss the grievant's interpersonal relationships with staff. The second PIP again directed the grievant to "be mindful at all times of your tone, word choice and delivery of your message when communicating with staff." The PIP further directed the grievant to "develop a formal plan for communication with staff, developing a targeted messaging approach on a weekly basis - communicating to them in your voice in a positive manner and documenting the communication."

Dr. Meloche further certifies that the grievant received an overall "effective" score of 3.34 on his performance evaluation for the 2018-2019 school year.^{2/} But as a result of the PEC report, he received a reduced numerical score of 2.8 in the

^{2/} Dr. Meloche certifies that this rating was adjusted downward from an initial "highly effective" score of 3.57, after the evaluator discovered he had mistakenly applied the weighting for 2017-2018 in calculating the summative score.

seventh domain of the administrator evaluation rubric, "Operations and Management." Dr. Meloche stresses that this was "a significant impact from the [grievant's] conduct . . . [and that] the unacceptable performance . . . was addressed rapidly and directly as a separate matter, as it needed to be dealt with and corrected immediately." Dr. Meloche certifies that his "reason for recommending the increment withholding was not punitive, but rather was to reflect [the grievant's] performance shortcomings as an educational leader and to motivate him to correct his behavior."

At its June 25, 2019 meeting, the Board approved Dr. Meloche's recommendation to withhold the grievant's salary increments. Written notice of the withholding, provided to the grievant on June 26, stated, in pertinent part:

The reason for the increment withholding is based upon the investigation report of Palestis Educational Consultants as summarized in Dr. Meloche's memo to you dated June 21, 2019.

The Association filed a grievance on July 16, 2019, contesting the increment withholding, which Dr. Meloche denied. On September 10, 2019, the Association filed a Request for Submission of a Panel of Arbitrators. This petition ensued.

On January 19, 2021, the Commission Case Administrator wrote to the Association, noting that the parties' grievance procedure ends in advisory arbitration, requesting clarification as to

whether the Association seeks advisory or binding arbitration, and requesting additional legal argument if the latter. The Board was given an opportunity to respond thereto. On January 26, the Association advised that it seeks binding arbitration, and provided additional argument on the issue. On February 5, the Board responded with opposing argument.

The Board contends that arbitration should be restrained because the underlying dispute concerns evaluative criticisms related to the grievant's performance of his professional responsibilities, thus the grievance is not arbitrable.

The Association argues that binding arbitration should not be restrained because the withholding was predominantly disciplinary. N.J.S.A. 34:13A-29(a) requires binding arbitration as the terminal step of grievance procedures that public employers are required to negotiate pursuant to N.J.S.A. 34:13A-5.3, with respect to disputes concerning imposition of reprimands and discipline. Further, N.J.S.A. 34:13A-26 requires that disputes concerning the withholding of an increment for predominantly disciplinary reasons shall be subject to such grievance procedures, which may not be replaced by the contract through negotiations.

With respect to the grievance at issue, the Association insists, in sum, that for an increment withholding to be predominantly evaluative of teaching performance, it must be

accompanied by a formal evaluation of less than "effective."

Here, the grievant received an "effective" score on his annual performance evaluation, which was issued after the Board determined to withhold the grievant's increment, and the Superintendent acknowledged that the grievant is otherwise a capable principal.

In reply, the Board concedes that the increment withholding decision preceded the issuance of the performance evaluation, but argues that the Association incorrectly contends that a teaching staff member's performance evaluation solely determines whether an action is disciplinary or performance-based. In any case, the Board argues, the reasons given for the grievant's increment withholding reflect the evaluative nature of the decision and had an impact on his performance evaluation. Whether the relative score on that evaluation supports the decision to withhold the increment must be determined by the Commissioner of Education or, if the parties prefer, submission to advisory arbitration. The Board agrees that the Association would be statutorily entitled to demand binding arbitration of a predominantly disciplinary withholding, notwithstanding the parties' contractual provision limiting grievances to advisory arbitration.

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., 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).^{3/} Pursuant to N.J.S.A. 34:13A-27(d), if the reason for a withholding is

^{3/} The final step of the grievance procedure in the CNA is advisory arbitration. However, the Association contends it is statutorily entitled, pursuant to N.J.S.A. 34:13A-26, to binding arbitration of the increment withholding since it was predominately disciplinary, despite that the CNA provides for advisory arbitration only. It appears that the Board does not dispute the Association's claim that if the withholding were predominately disciplinary, it would be statutorily entitled to binding arbitration. However, the Board does dispute that the withholding was predominately disciplinary. We do not reach the issue of whether a teaching staff member is statutorily entitled to binding arbitration of a predominantly disciplinary increment withholding despite that the applicable CNA ends in advisory arbitration since we find the increment withholding was not predominantly disciplinary.

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, 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).

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., supra. 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.

We have also recognized that while school principals are teaching staff members, they usually do not teach classes. Instead, they have "broader responsibilities for overseeing the educational system and ensuring that students are educated properly." Middletown Tp. Bd. of Ed., P.E.R.C. No. 92-54, 18 NJPER 32 (¶23010 1991). Thus, we have formulated a performance standard for principals that is not limited to classroom teaching, focusing on "whether the withholding relates predominately to an evaluation of the quality of the principal's performance as an educational leader and manager." Ibid. We restrained arbitration in Middletown based upon our conclusion that the reasons given for the withholding (inappropriate leadership and judgment in responding to a student-staff

altercation, failure to train the staff and oversee the building's budget, and ineffective leadership and training of assistant principals) predominately reflected an evaluation of the principal's performance as an educational leader and manager. Ibid.

We have since applied the Middletown test to restrain arbitration of increment withholdings of principals, assistant principals and vice principals (i.e. administrative teaching staff members who do not teach classes). In these cases, we found that the reasons given for the withholding predominately involved evaluation of the administrator's performance as an educational leader and manager. See, e.g., Paterson School Dist., P.E.R.C. No. 95-39, 21 NJPER 36 (¶26023 1994)(failure to show initiative, delegate authority, visit classrooms regularly, provide adequate instructional supervision); Butler Bd. of Ed., P.E.R.C. No. 96-24, 21 NJPER 358 (¶26222 1995)(assistant principal's lack of communication with principal concerning school operations); West Essex Reg. Bd. of Ed., P.E.R.C. No. 98-42, 23 NJPER 565 (¶28282 1997)(failure to evaluate professional staff and improve curriculum); Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 2018-34, 44 NJPER 327 (¶192 2018)(inappropriate handling of student-staff altercation, failure to comply with directives to establish building staff

development plan and sign purchase orders, failure to provide leadership and training to vice principals).

Finally, the Commission has "frequently recognized that deficient . . . performance does not necessarily have to appear on evaluation documents . . . and that even after all observations . . . have been completed, an increment may still be withheld for . . . performance reasons which must be reviewed by the Commissioner of Education." Marlboro Tp. Bd. of Ed., P.E.R.C. No. 2016-84, 42 NJPER 570 (¶159 2016), quoting Farmingdale Bd. of Ed., P.E.R.C. No. 2015-28, 41 NJPER 224 (¶74 2014); see also Old Bridge Bd. of Ed., P.E.R.C. No. 2004-57, 30 NJPER 77 (¶28 2004)(restraining arbitration of teaching staff member's increment withholding where annual evaluation did not describe conduct referred to in statement of reasons, and allegations came to board's attention through hostile work environment complaints, not regular evaluation process).

Based upon the undisputed facts presented, we conclude that the withholding relates predominately to an evaluation of the quality of the grievant's performance as an educational leader and manager, and we restrain binding arbitration. The reasons given by the Board for the increment withholding are centered in allegations that the grievant created a hostile working environment through his words, tone and demeanor when communicating with staff and the school community. We find that

those concerns relate directly and predominately to the grievant's qualifications, duties and responsibilities as a principal, specifically his leadership and his verbal and written communication and interpersonal skills, irrespective of whether those concerns arose outside of the regular evaluation process. See, e.g., Old Bridge Bd. of Ed., supra.

The grievant may appeal the withholding pursuant to N.J.S.A. 18A:6-9 and 18A:29-14. N.J.S.A. 34:13A-27d. The parties may present to the Commissioner of Education their arguments about the merits of the withholding, including as to whether it was justified in light of the grievant's performance evaluation.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: March 25, 2021

Trenton, New Jersey