

P.E.R.C. NO. 2023-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2023-011

OLD BRIDGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Old Bridge Board of Education for a restraint of binding arbitration of a grievance filed by the Old Bridge Education Association, which contested the withholding of a teaching staff member's salary increment. The Commission finds that the withholding was based predominately on the evaluation of teaching performance for the teacher's allegedly inappropriate statements to students in class.

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, Kenney, Gross, Kovats & Parton,
attorneys (Christopher B. Parton, of counsel)

For the Respondent, Bergman & Barrett, attorneys
(Michael T. Barrett, of counsel)

DECISION

On September 29, 2022, the Old Bridge Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Old Bridge Education Association (Association). The grievance contests the withholding of a teaching staff member's salary increment for the 2022-2023 school year.

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

^{1/} Neither party filed a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certification(s) based upon personal knowledge.

The Association represents a broad-based unit of Board employees including all teaching staff. The Board and Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2019 through June 30, 2024. The grievance procedure ends in binding arbitration.

The Board and Association submitted various evaluations of and memoranda concerning the grievant from 2008 through 2022. We will summarize some of the documents from the most recent three school years submitted by the Board in support of its increment withholding. On September 24, 2019, the Board issued a counseling memo to the grievant following an investigatory hearing into "parent complaints in regards to comment and actions of teacher towards parents and students." Among the recommendations and conclusions was that the grievant be placed in a Corrective Action Plan (CAP) to address "working with others" and "communication skills." On October 23, 2019, the Board issued a counseling memo to the grievant following an investigatory hearing into "parent complaint regarding comments and actions of teacher towards student." The recommendations and conclusions for the grievant included the following:

- Be gracious and helpful to students, staff and parents;
- Be more compassionate and understanding towards the different needs of the students and when reprimands are actually necessary, keeping in mind that lunch time is down time for students;

- Display tact and understanding when resolving conflict situations with students and staff;
- Develop strategies to resolve student conflict; and
- Formulate strategies to enhance a positive relationship with the students.

On March 3, 2020, the Board issued a counseling memo to the grievant following an investigatory hearing into "parent complaint regarding comments and actions of teacher towards student." The recommendations and conclusions for the grievant included "Always be mindful of language and tone used with students, staff and parents, as things can be taken out of context." On March 11, 2022, the Board issued a counseling memo to the grievant following an investigatory meeting into a student's accusation that the grievant "physically remov[ed] a lollipop from his mouth." The recommendations and conclusions for the grievant included "[Grievant] is not to touch students, students' clothing, or students' possessions, especially items physically on a child, unless a child is in immediate danger to themselves or others."

On April 7, 2022, the Board issued a counseling memo and a request for additional action following an investigatory meeting into the complaints of five students who accused the grievant of making inappropriate comments towards them and other students in class regarding insinuations about being overweight, weak, shy, or how they dress. One student also claimed the grievant

referred to him as a monkey, specifically a Monchhichi Doll, due to his appearance and hair. The Board's administrative findings of fact were:

- [Grievant] did refer to a child as a Monchhichi monkey in reference to his appearance;
- There is a pattern of students making claims regarding how they are spoken to and treated in her class that students find demeaning, rude, and/or inappropriate.

The recommendations and conclusions for the grievant were:

- [Grievant] must not make statements that are demeaning, rude, or inappropriate;
- [Grievant] must think about how her statements can be interpreted by students. For example, referring to a child with a dark complexion as a monkey may be viewed as racist and hurt the feelings of not only the child but others that heard her say it;
- Due to the pattern of similar claims by students over the course of [Grievant]'s career I request that [Grievant]'s actions be reviewed for additional administrative action by central administration.

On June 28, 2022, the Board voted to withhold the grievant's salary increment for the 2022-2023 school year. By letter of June 28, the Board's Assistant Superintendent of Schools notified the grievant of the Board's action and provided the following statement of reasons for the increment withholding:

The Board's action is a result of your failure to appropriately manage and interact with students, despite many prior warnings and discussions.

The Association filed a grievance contesting the increment withholding as "discipline without just cause." On July 19, the

Superintendent of Schools denied the grievance. On July 26, the Association demanded binding arbitration. 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., 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-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. See N.J.S.A.

34:13A-27a. In doing so, we focus on the specific reasons cited by a school board in the statement of reasons it is required to provide the staff member 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). Where a 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 gatekeeping 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. Our jurisdiction 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.

The Board asserts that the increment withholding is not arbitrable because it is based predominately on deficiencies in the grievant's teaching performance, specifically her alleged inappropriate interactions with students. It argues that the record shows the grievant's history of unprofessional interactions with students, staff, and parents going back many years. The Board contends that the grievant's personnel documents from the 2021-2022 school year pertain entirely to insensitive and confrontational interactions with students.

The Association asserts that the increment withholding is arbitrable because it is predominately disciplinary. It argues that very few of the events documented in the grievant's

personnel files relate to interactions with students. The Association contends that the March 2022 complaints from students about disparaging remarks made by the grievant are disciplinary issues, that the October 2019 and March 2020 incidents involving students were denied by the grievant or are not classroom issues, and that earlier complaints concerning interactions with co-workers and parents did not relate to teaching performance.

Initially, we note that the Association's emphasis on whether some of the grievant's personnel records concern her allegedly inappropriate interactions with parents and staff, rather than just students, is misplaced.^{2/} In discharging our forum selection function under N.J.S.A. 34:13A-27, we accept the Board's statement of reasons and do not consider contentions that those reasons are pretextual or unsupported. See, e.g., Linden Bd. of Ed., P.E.R.C. No. 2014-42, 40 NJPER 291 (¶111 2013) (despite documented disciplinary issues, arbitration was restrained where statement of reasons addressed only teaching

^{2/} Although we are not required to and will not adjudge which of the many documents in the grievant's personnel records do or not pertain predominately to an evaluation of teaching performance, we note that the distinction the Association makes between the grievant's interactions with students versus with parents is not dispositive for purposes of our analysis. A teacher's inappropriate interactions with parents can be a matter of teaching performance depending on a variety of factors, such as "the location, content, subject, and overall nature of a parent-teacher interaction." Linden Bd. of Ed., P.E.R.C. No. 2010-27, 35 NJPER 386 (¶129 2009); see also Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 NJPER 179 (¶73 2005).

performance issues); Summit Bd. of Ed., P.E.R.C. No. 2013-57, 39 NJPER 311 (¶107 2013) (despite documented teaching performance issues, increment withholding was arbitrable where statement of reasons only addressed disciplinary issue).

Here, although the Board submitted documentation of the grievant's counseling notices and evaluations concerning many issues going back to 2008, the June 28, 2022 statement of reasons for the increment withholding specifically cites only her alleged "failure to appropriately manage and interact with students." (emphasis added). The Board's statement of reasons was supplemented by the grievant's personnel records, which indicate multiple student complaints about her allegedly inappropriate and insensitive comments and interactions with students.

The Commission has regularly found that withholdings based on a teacher's allegedly inappropriate conduct or remarks made in class predominately relates to teaching performance. Holland Tp. Bd. of Ed., P.E.R.C. No. 2022-48, 49 NJPER 27 (¶5 2022) (teacher's alleged inappropriate conversations with students were teaching performance); Red Bank Reg. H.S. Bd. of Ed., P.E.R.C. No. 2010-90, 36 NJPER 231 (¶82 2010) (teacher allegedly had humiliating "pet" names for students and made other inappropriate remarks); Montgomery Tp. Bd. of Ed., P.E.R.C. No. 2010-59, 36 NJPER 44 (¶20 2010) (teacher allegedly made derogatory comments to student during IEP conference); Robbinsville Bd. of Ed.

P.E.R.C. No. 2009-3, 34 NJPER 220 (¶75 2008) (teacher allegedly made insensitive comment to a student); Northern Highlands Reg. Bd. of Ed., P.E.R.C. No. 2003-49, 29 NJPER 24 (¶7 2003) (teacher allegedly made inappropriate comments to female students); Knowlton Tp. Bd. of Ed., P.E.R.C. No. 2003-47, 29 NJPER 19 (¶5 2003) (teacher allegedly humiliated students in class); Montclair Bd. of Ed., P.E.R.C. No. 2002-3, 27 NJPER 321 (¶32114 2001) (teacher allegedly made negative comments to students and inappropriate statements about personal issues); and Red Bank Reg. Bd. of Ed., P.E.R.C. No. 94-106, 20 NJPER 229 (¶25114 1994) (teacher allegedly made off-color jokes and demeaning and insensitive comments to students).

We have found these cases predominately relate to teaching performance as they involve a teacher's interactions with students and maintaining an appropriate educational environment. They implicate "educational judgments about where to draw the line between appropriate and inappropriate comments and conduct toward [the teacher's] students in the classroom." Old Bridge Bd. of Ed., P.E.R.C. No. 2004-57, 30 NJPER 77, 79 (¶28 2004). Accordingly, we find that the grievant's alleged inappropriate interactions with students predominately relate to her teaching performance and may be not be submitted to binding arbitration. Evaluation of the Board's allegations and the Association's defenses are appropriate for the Commissioner of Education.

ORDER

The request of the Old Bridge 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. None opposed.

ISSUED: March 30, 2023

Trenton, New Jersey