

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH HACKENSACK BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2023-034

SOUTH HACKENSACK EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Fogarty & Hara, Esqs., attorneys
(Vittorio S. LaPira, of counsel and on the brief; Tyler
M. Stewart, on the brief)

For the Respondent, Springstead & Maurice, Esqs.,
attorneys (Alfred F. Maurice, of counsel and on the
brief; Lauren E. McGovern, of counsel and on the brief)

DECISION

On March 10, 2023, the South Hackensack Board of Education
(Board) filed a scope of negotiations petition seeking a
restraint of binding arbitration of a grievance filed by the
South Hackensack Education Association (Association). The
grievance contests the withholding of a teacher's salary
increment for the 2022-2023 school year.

The Board filed briefs, exhibits and the certification of
its Superintendent, Jason Chirichella. The Association filed a
brief in response to the petition and requested an evidentiary
hearing. These facts appear.

The Association represents all full-time teachers, school nurses, part-time teachers, school psychologists, and social workers employed by the Board. The Board and Association are parties to a collective negotiations agreement (CNA) with a term of July 1, 2020 to June 30, 2024. The grievance procedure ends in binding arbitration.

On September 6, 2022, the Association filed a grievance contesting an August 30 letter (Statement of Reasons) noticing the salary increment withholding of Christopher Masullo (Grievant), a member of the Board's teaching staff. The Board alleges that the Grievant engaged in a series of problematic conduct from October 21, 2021 through April 8, 2022 that prompted the Board to take corrective action.

The Board relies on seven incidents occurring on four days to support its decision to withhold the Grievant's salary increment. The Statement of Reasons explaining the salary increment withholding states:

The first incident occurred on October 21, 2021, when you directed your students to clean/organize the materials and supplies in your back classroom closet, and made several disrespectful remarks to your students, including, "I assign you something to do, you need to do it," "Hurry up, I don't have all day," and "Shut up, you guys are so annoying." You also had not removed your personal tools that you kept in that closet, which included at least one sharp instrument and were hazardous and unsafe for children, despite my previous direction in August to

remove them from the school. Following our discussion, I directed you to use good judgment and professionalism in speaking with students, to close and lock the closet door and not allow students inside the closet, and, again, to remove your personal tools from the school. However, you continued to display poor judgment in interacting with your students. On March 9, 2022, you closed the lid of your classroom prize box on a student's hand because, in your words, it was the end of your five second countdown that you allotted to the student. This incident had a negative impact on the student involved, as well as his parents. When we met on March 14, 2022, I informed you that the countdown was counterproductive to the reward system, and directed you to reconsider the structure of the procedure in order to facilitate the full benefit of the reward system for your students.

Only two days after the prize box incident, on March 11, 2022, you engaged in two more inappropriate exchanges with your students. First, during a discussion with your class regarding their teacher who was injured earlier that week, you stated, "Someone go find me a lighter and light me up so I can leave here." Although you denied making that particular statement, several students confirmed they heard you state something to that effect. Such a statement is simply unprofessional to make in front of students, especially second graders. In addition, you had given candy from the prize box to a student whose parent does not permit the student to eat candy in school. As a result, I directed you to put only non-food items in the prize box, and informed you that I would be conducting a walkthrough of your classroom. Despite having advance notice of the walkthrough, your classroom was untidy and disarranged, with many of your personal belongings

still remaining (after being directed on two occasions to remove them), and pieces of furniture that were not part of the original room design being housed there. When we met on March 15, 2022 to discuss these incidents, I, again, directed you to remove all personal belongings and furniture that did not belong in your classroom, in order to provide your students with ample space to properly join their desks and work together.

Notwithstanding three meetings where we discussed your interactions with students and your classroom management skills, you engaged in further unprofessional conduct less than one month later. On April 8, 2022, Mrs. Stephanie Kropp asked you to visit the main office, where you would receive a Rice notice. Although it was implicit in Mrs. Kropp's email that you visit the main office at a time that you were not under a duty to supervise students, you left your classroom full of students for twenty-five minutes under the supervision of an aide, who was a contracted service provider of the South Bergen Jointure Commission, not a Board employee, and assigned to that classroom only for particular students. Had the aide needed to leave the classroom to attend to her duties to the assigned child, your remaining students would have been completely unsupervised.

As a result of the above conduct, the Board determined that the Grievant violated Board Policy No. 3211 "Code of Ethics," specifically citing the requirement that teachers "make reasonable effort to protect the pupil from conditions harmful to learning or to health and safety." Additionally, the Board found that the Grievant violated the Professional Standards for

Teachers No. 11(i)(5), found at N.J.A.C. 6A:9-3.3, which requires that educators "maintain professional relationships with students."

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. 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 board cites multiple reasons for the withholding, 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. In mixed-reasons cases, we look to those that predominate, paying particular attention to the ones most emphasized by the Board in its statement of reasons. Monroe Bd. of Ed., P.E.R.C. No. 2018-48, 44 NJPER 453 (¶126 2018), citing, inter alia, Bergenfield Bd. of Ed., P.E.R.C. No. 2006-69, 32 NJPER 82 (¶42 2006), aff'd, 33 NJPER 186 (¶65 App. Div. 2007); Camden Cty. V/T Bd. of Ed., P.E.R.C. No. 2007-47, 33 NJPER 24, 25 (¶9 2007). However, we will neither look behind the cited reasons nor consider their validity. See Saddle River Bd. of Ed., P.E.R.C. No. 96-61, 22 NJPER 105 (¶27054 1992). 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 argues that the listed reasons for withholding the Grievant's increment were entirely evaluative in nature and therefore arbitration should be restrained and any appeal of the disciplinary action should be addressed to the Commissioner of Education. The Board groups the Grievant's alleged misconduct into two main categories: improper interactions with students and poor classroom management, both of which are teaching performance issues. Specifically, the Board avers that the alleged improper comments on October 21, 2021 and March 11, 2022 along with the prize box incident consist of "inappropriate verbal and physical interactions with students." Further, the Board submits that the Grievant's storage of personal tools and furniture in the classroom, providing candy to a student who is not permitted to eat candy and leaving the classroom for 25 minutes in the care of a non-certificated aide all consist of poor classroom management.

In response, the Association contends that the "charges" against the Grievant are not related to teaching performance and

the increment withholding was effectuated by the Board predominantly for disciplinary reasons. The Association argues that the Board assembled a series of statements or actions made by the Grievant and simply labeled the issues "evaluative" so that the Board could avoid binding arbitration where the real issue is not teaching performance, but whether the Grievant followed instructions or protocols.

In reply, the Board refutes the Association's authority by citing to the Professional Standards of Teachers (N.J.A.C. 6A:9-3.3) and argues that the facts alleged by the Board involve the Grievant's inability to "manage the learning environment" including having unsatisfactory interactions with students and poor classroom management skills.

We find there are seven severable bases cited by the Board in support of its decision to withhold the Grievant's increment. Each will be analyzed and determined whether the issue is primarily disciplinary or evaluative of teaching performance.

(1) October 21, 2021 and (2) March 11, 2022 Inappropriate Comments and Directions to Students.

We find that the withholding partially based on the alleged comments and directions made to students on October 21, 2021 and March 11, 2022 is primarily related to teaching performance. This Commission has routinely determined that "withholdings based on a teacher's allegedly inappropriate conduct or remarks made in

class predominately relates to teaching performance.” Old Bridge Bd. of Ed., P.E.R.C. No. 2023-41, 49 NJPER 459 (¶112 2023) (citing Holland Tp. Bd. of Ed., P.E.R.C. No. 2022-48, 49 NJPER 27 (¶5 2022)). Because the alleged comments “involve a teacher’s interactions with students and maintaining an appropriate educational environment....[t]hey implicate ‘educational judgments about where to draw the line between appropriate and inappropriate comments and conduct toward students in the classroom.” Old Bridge Bd. Of Ed., supra (citing Old Bridge Bd. of Ed. P.E.R.C. No. 2004-57, 30 NJPER 229 (¶28 2004)).

(3) October 21, 2021 and (4) March 11, 2022 Storage of Personal Items in the Workplace.

We find that the Board’s allegations related to the storage of personal tools in a closet in the back of the classroom and personal furniture in the classroom are more of a reprimand for insubordination instead of an evaluation of teaching performance. In its Statement of Reasons, the Board notes that on October 21, 2021, the Grievant “had not removed your personal tools that you kept in the closet, which included at least one sharp instrument and were hazardous and unsafe for children, despite my previous direction in August to remove them.” The Statement of Reasons further notes that on March 11, 2022, the Grievant’s “classroom was untidy and disarranged, with many of your personal belongings still remaining (after being directed on two occasions to remove

them).” In both instances, the letter “strikes a disciplinary tone that indicates it is meant to maintain a record of [the Grievant’s] failure to comply with directions.” Middlesex Bd. of Ed., P.E.R.C. No. 2020-7, 46 NJPER 109 (¶23 2019). While the presence of a potentially harmful tool in a classroom closet could have some effect on learning, we find that the primary concern of the Board was the alleged failure of the Grievant to follow a directive of the superintendent, which, if true, amounts to a disciplinary issue not related to teaching performance.

(5) Prize Box Incident.

The Grievant’s alleged closing of a prize box lid on a student’s hand is evaluative of teaching performance. There is no allegation that the student was physically harmed or that the Grievant intended to cause distress to the student. The Statement of Reasons focuses on the educational aspect of the prize box, noting that “the countdown was counterproductive to the reward system, and [Chirichella] directed you to reconsider the structure of the procedure in order to facilitate the full benefit of the reward system for your students.” Given that this interaction was part of the educational process (i.e. the reward system) during teaching time and directly involved an interaction with a student, we find this issue to be evaluative of teaching performance.

(6) Providing Candy to a Student.

The Statement of Reasons also documents allegations that the Grievant permitted a student to take candy from the prize box where that student's parents prohibited the consumption of candy while in school. While this does concern an interaction with the student, we find that the alleged infraction is of a disciplinary nature. The Statement of Reasons does not describe whether there was a Board policy, administrative directive, or some other rule that the Grievant allegedly violated. However, it is clear from the provided information that the Grievant was expected to know of and abide by this particular parent's wishes when it came to providing candy to the student. While this does involve an interaction with the student, the actual act of permitting a student to take candy from the prize box has not been alleged to be inappropriate. The failure to follow an administrative directive, without greater connection to teaching performance, is primarily disciplinary in nature. See infra, Madison Bd. of Ed.; see also Franklin Tp. Bd. of Ed., P.E.R.C. No. 2000-90, 26 NJPER 106 (¶31 2000) (failure to follow administrative directive to contact parents primarily disciplinary). From the Statement of Reasons, it is clear that the Board was most concerned by the Grievant's decision to deviate from the parent's wishes, which, we find is an issue not primarily related to teaching or instructional performance.

(7) Leaving Class Inadequately Supervised.

The Board also supported its decision to withhold the Grievant's increment by citing the alleged incident on April 8, 2022 where the Grievant left his classroom under the supervision of a non-certificated aide for 25 minutes in order to pick up his Rice notice from the main office. The Commission has frequently held that increment withholdings based upon the failure to supervise students, without more, are predominantly disciplinary. See e.g., Madison Bd. of Ed., P.E.R.C. No. 2020-58, 46 NJPER 596 (¶136 2020) (withholding primarily disciplinary where teacher left class unsupervised to wrestle student); Bergenfield Bd. of Ed., P.E.R.C. No. 2006-69, 32 NJPER 82 (¶42 2006) (withholding was predominantly disciplinary where teacher, among other things, was accused of poor classroom supervision by sleeping in class and repeatedly leaving building, resulting in students missing classes, finding "[s]uch allegations do not constitute an evaluation of teaching performance, because such performance did not occur"), aff'd, 33 NJPER 186 (¶65 App. Div. 2007); Franklin Tp. Bd. of Ed., P.E.R.C. No. 2001-64, 27 NJPER 389 (¶32144 2001) (withholding for failure to follow directive not to leave students unattended was not based on evaluation of teaching performance). Under the facts presented here, we find that the Grievant's alleged failure to supervise students was not related to an overall classroom management issue. Therefore, this issue

is primarily disciplinary and not evaluative of teaching performance.

We find that the instant increment withholding involves a mixture of both evaluative and disciplinary factors that gave rise to the Statement of Reasons, which we rely on to determine the predominate reasons for the withholding. Monroe Bd. of Ed., P.E.R.C. No. 2018-48, 44 NJPER 453 (¶126 2018). Here, the Board does not assign specific weight that it utilized for each issue underpinning the increment withholding. Because no incident or grouping of incidents is clearly the driving factor for the increment withholding, we accord each item similar weight. Balancing the seven incidents, we find that they are predominantly disciplinary in nature, rather than related to teaching performance. For this reason, we decline to restrain arbitration of the grievance contesting the Grievant's increment withholding.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: June 29, 2023

Trenton, New Jersey