

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-96-139

JERSEY CITY ADMINISTRATORS AND
SUPERVISORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the State-Operated School District of the City of Jersey City for a restraint of binding arbitration of a grievance filed by the Jersey City Administrators and Supervisors Association. The grievance contests the withholding of a school psychologist's salary increment for the 1995-1996 school year. The Commission finds that this increment withholding is not based predominantly on an evaluation of teaching performance but on the grievant's compliance with applicable policies and regulations concerning outside employment and does not involve any review of subjective performance assessments. Accordingly, it can be considered by an arbitrator.

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.

P.E.R.C. NO. 97-98

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Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys
(Robert E. Murray, of counsel; Samuel M. First, on the
brief; Linda Sabat, on the reply brief)

For the Respondent, Wayne J. Oppito, attorney

DECISION AND ORDER

On June 17, 1996, the State-Operated School District of the City of Jersey City petitioned for a scope of negotiations determination. The District seeks a restraint of binding arbitration of a grievance filed by the Jersey City Administrators and Supervisors Association. The grievance contests the withholding of a school psychologist's salary increment for the 1995-1996 school year.

The parties have filed briefs and exhibits. These facts appear.

The Association represents the district's administrators and supervisors. The parties' grievance procedure ends in binding

arbitration of disputes over increments withheld for predominately disciplinary reasons. N.J.S.A. 34:13A-26 and 29.

Jennifer Figurelli was hired in 1971 as a school psychologist. In April 1990, she became the Director of Special Services.

In June 1991, Dr. Silvia Elias became Executive Director of Pupil Services and became responsible for observing and evaluating Figurelli's job performance. Evaluations by Elias during the 1992-1993 and 1993-1994 school years rated Figurelli in seven categories. Her April 1993 evaluation lists unsatisfactory ratings in three categories, a needs improvement rating in one category, and satisfactory ratings in the remaining three categories. Her March 1994 evaluation lists unsatisfactory ratings in two categories, a needs improvement rating in one category, and satisfactory ratings in four categories.

On February 4, 1994, Elias issued a memorandum to Figurelli asserting that Figurelli had been seeing a student in her private psychological practice. The memorandum asserted that this activity violated N.J.A.C. 6:28-5.2(a)(2)(iv). It directed Figurelli to stop seeing the student. A copy of the memorandum was sent to the District's Human Resources Director. The March 1994 evaluation does not discuss this issue.

On May 11, 1994, Figurelli was advised that her position had been abolished and that her seniority and tenure status

entitled her to the position of Supervisor of Special Education/Student Services. Figurelli accepted the position, but on August 1, 1994 filed a petition with the Commissioner of Education claiming that her tenure and seniority entitled her to the position held Elias, her supervisor.

On January 9 and 12, and March 7 and 10, 1995, Elias sent memoranda to Figurelli seeking information and stating concerns about how special services were being delivered to certain students.

On February 15, 1995, Elias issued an evaluation of Figurelli. This evaluation differs in format from evaluations made when Figurelli held her previous position.

Elias rated Figurelli's performances as unsatisfactory in "Leadership" and wrote:

Dr. Figurelli does not always provide a good role model for the staff. As an example, at a staff meeting held at P.S. #22 with the CST and students whom she directly supervises, a parent brought up a situation where Dr. Figurelli had evaluated the student at her independent practice. Child Study Teams for the past four years had been told that this is a practice that is not condoned since it is against the requirements of the N.J.A.C. 6:28. It was difficult to explain to the CST how Dr. Figurelli could be evaluating students independently when they have been told they can not work for agencies nor independently to provide services to students who reside in Jersey City.

Elias included this directive in Figurelli's Professional Improvement Plan ("PIP") for the next school year:

Dr. Figurelli is to cease and desist immediately from providing services to Jersey City pupils.

She also rated Figurelli as unsatisfactory in "Professionalism" and wrote:

This is an area of serious concern. Dr. Figurelli was notified in 1991-1992 and in 1994 that she is not to deal with students who are residents of Jersey City in order to avoid a conflict of interest. At a staff meeting recently, the parent of S.G. stated that Dr. Figurelli had evaluated her child privately in 1994. At that time, the parent stated that Dr. Figurelli recommended a different classification than that which the CST had provided and questioned the mother as to why the CST had provided the student with the classification he held. This is a student that is now at a school serviced by Dr. Figurelli. This obviously creates a conflict of interest. It is against N.J.A.C. 6:28 and against professional practice for a psychologist to work with students for whom he/she is directly responsible in a district, or who reside in that district, in order to avoid the type of conflict of interest that occurred in this particular situation.

Elias included this directive in Figuerilli's PIP:

Dr. Figurelli must immediately cease and desist from providing any type of private service to any student who is a resident of Jersey City, through her private practice or through an agency. This is a serious ethical concern and has been discussed with Dr. Figurelli previously.

In the remaining categories, Figurelli was issued four "Needs Improvement" and three "Satisfactory" ratings. Elias rated Figurelli "Needs Improvement" in "Expertise/competency in area of supervision" and wrote:

Dr. Figurelli is currently responsible for Lincoln High School as well as for a number of elementary schools within the district. This is a new position for Dr. Figurelli who handled

TEMP, CPHU, ADTP, Homeless, and Home Instruction in the past, although she held the title of Director of Special Education.

In that capacity, and particularly since she was directly responsible for CPHU, ADTP, and for some special education students at TEMP, she should have been knowledgeable about N.J.A.C. 6:28.

Dr. Figurelli has had difficulties in reviewing files, and files are frequently returned to her with basic information that needs to be corrected. These files usually have difficulties with the statement of eligibility and/or with the current educational status that do not follow or conform to either code or to the PPS manual. Although these files have been given back to her for correction, other files are frequently turned in with the same kind of problem.

Elias included this directive in Figurelli's PIP:

In order to correct these problems, Dr. Figurelli is to become familiar with the code immediately as well as with the PPS manual and forms. She is to thoroughly read every file before turning it in for my review and/or before approving the file for the CST to meet with the parent. This is to take place immediately.

Elias rated Figurelli "Needs Improvement" in "Communication Skills" and wrote:

Dr. Figurelli communicates with her staff on an ongoing basis. Communication, however, appears to be inconsistent since many files are returned with the same problems initially identified. Either she is not communicating the information appropriately to the CSTs or she is not reviewing the information when it is returned. In either case, this is an issue that needs to be corrected immediately.

Elias included this directive in Figurelli's PIP:

Dr. Figurelli is to read the files carefully before completion to make sure that they are in compliance with code and PPS mandates.

Elias rated Figurelli as "Needs Improvement" in "Supervisory Skills" and wrote:

Dr. Figurelli is supervising a doctoral intern part time and she attempts to use supervision as part of a learning activity for staff. This area, however, appears to be inconsistent in that many times materials are returned with the same difficulties as they had in the past and there doesn't seem to be demonstration that files are being carefully reviewed prior to being handed in. According to Dr. Figurelli she maintains technical assistance to CSTs pertaining to N.J.A.C. 6:28 and department regulations. These, however, continue to be inconsistently demonstrated.

Elias included this directive in Figurelli's PIP:

Dr. Figurelli is to become familiar with N.J.A.C. 6:28 and with the PPS manual. She is to follow directives consistently and to review files prior to the CST meeting with the parent and prior to turning the files in as completed. This is to begin immediately.

Elias rated Figurelli "Needs Improvement" in "Professional Growth" and wrote:

Dr. Figurelli attends professional conferences. She does not keep current with changes in special education rules and regulations in an effective manner. She also confers with her colleagues as another way to gain knowledge and skill.

Elias included this directive in Figurelli's PIP:

Knowledge of N.J.A.C. 6:28 and of PPS manual is to be demonstrated immediately.

Elias rated Figurelli "Satisfactory" in "Planning" and wrote:

Dr. Figurelli is planning for her CSTs appropriately and is keeping track of their workload.

Dr. Figurelli engages in annual planning regarding the mandated activities of the Child Study Teams. In addition, she makes sure that they keep her current on all their activities. She reviews all their reports to determine if they are performing within the required timelines. She participates with other supervisors in notifying the Executive Director regarding the need for additional classrooms and related service needs.

Elias rated Figurelli "Satisfactory" in "Curriculum (Development/Implementation)" and wrote:

Dr. Figurelli monitors the Individualized Education Plans for the students and compares with teachers to make sure that curriculum and goals and objectives are delivered.

Elias rated Figurelli "Satisfactory" in "Staff Development" and wrote:

The staff development is part of every supervisor's responsibility and the supervisor is to inform the staff of various changes in code, etc. All staff participate in district wide programs for professional development. In addition, they are encouraged to attend workshops and read professional literature in order to broaden their knowledge.

Elias included this directive in Figurelli's PIP:

Ensure that the team files demonstrate that staff development has taken place by errors being corrected prior to submission.

On February 22, 1995, an attorney representing Figurelli wrote to a school district attorney. The letter stated:

It has been brought to my attention that Dr. Silvia Elias has threatened to bring disciplinary charges against Dr. Figurelli for violation of N.J.A.C. 6:28-5.2(a).

Dr. Figurelli does maintain a private psychologist's practice and does treat and evaluate individuals on her own time, outside of the school district. Dr. Figurelli's practice is not a "clinic or agency approved by the Department of Education." In her private practice, Dr. Figurelli does not provide special education services to any pupil of the Jersey City Public School District.

As you are aware Dr. Figurelli is the petitioner in litigation involving the Jersey City Public School District. In that petition, Dr. Figurelli seeks to be placed in the position of Executive Director Pupil Personnel Services, the position now held by Dr. Elias.

It is clear that Dr. Elias' threats to bring these frivolous disciplinary charges against Dr. Figurelli are motivated by malice, a desire to save her own job, and a desire to retaliate against Dr. Figurelli for bringing her petition. If Dr. Elias persists in this activity, Dr. Figurelli will have no choice but to bring charges against Dr. Elias and the district pursuant to the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to 9.

On May 10, 1995, the District's Human Resources department sent a letter to Figurelli stating that the interim superintendent was considering withholding her increment for the 1995-1996 school year for "less than satisfactory performance." By letter dated May 18, Figurelli was advised that the superintendent had decided to withhold her employment and adjustment increment for "less than satisfactory performance."

On May 25, 1995, the Association filed a grievance contesting the withholding. It appears that the grievance was orally denied. The Association demanded arbitration and this petition ensued.

Under N.J.S.A. 34:13A-26, increment withholdings of teaching staff members for predominately disciplinary reasons are to be reviewed through binding arbitration. But not all withholdings can go to arbitration. Under N.J.S.A. 34:13A-27(d), if the reason for a withholding is related predominately to an 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, we must make that determination. N.J.S.A. 34:13A-27(a). 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 (¶22057 1991), we articulated our approach to determining the appropriate forum. 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. [17 NJPER at 146]

The District asserts that in withholding Figurelli's increment, "of most concern" to Elias and the District was Figurelli's engaging in an outside practice which purportedly conflicts with District and state regulations limiting such activity. It further asserts that her evaluation shows problems in other areas as well. The District contends that all these reasons are directly related to her teaching performance and thus only the Commissioner of Education can review its decision to withhold a salary increment.

The Association asserts that since the only two areas in which Figurelli's performance was found to be unsatisfactory concern the outside practice issue, the District's action was unrelated to her performance as Supervisor of Special Education/Student Services. Additionally, it asserts that the withholding was taken in retaliation for Figurelli's having filed a petition with the Commissioner of Education claiming the position of her supervisor.

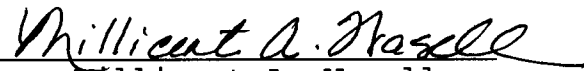
Based upon the record before us, we conclude that this increment withholding is not based predominately on an evaluation of Figurelli's teaching performance. The two areas in which Figurelli was rated unsatisfactory overlap and concern her "outside practice." The District contends that those activities violated District and state policies. We believe that this issue does not predominately involve teaching performance. Figurelli's compliance with applicable policies and regulations concerning

outside employment can be considered by an arbitrator and does not involve any review of subjective performance assessments. See Englewood Bd. of Ed., P.E.R.C. No. 91-118, 17 NJPER 341 (¶22153 1991), aff'd NJPER Supp.2d 269 (¶222 App. Div. 1992). The four areas in which Figurelli was rated "Needs Improvement" overlap and concern her knowledge of other policies and regulations. These areas involve issues of performance but were not the District's primary concern and do not outweigh the concerns that were not based on an evaluation of teaching performance. Under all these circumstances, we decline to restrain binding arbitration.

ORDER

The request of the State-Operated School District of the City of Jersey City is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: February 27, 1997
Trenton, New Jersey
ISSUED: February 28, 1997