

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HAMBURG BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2021-018

HAMBURG EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Hamburg Board of Education for a restraint of binding arbitration of a grievance filed by the Hamburg Education Association, contesting the withholding of a certified Speech Language Specialist's salary increment for the 2020-2021 school year. The Commission finds the Board's concerns about the grievant's alleged failures to comply with post-meeting deadlines for the forwarding of individualized education program (IEP) plans to the Child Study Team Coordinator, and her alleged untimely completion of student testing, are performance-related because they implicate the Board's overriding interest in ensuring adherence to State regulations governing the delivery of important educational services to students with disabilities. The Commission finds that those concerns predominate over other reasons given for the increment withholding decision, including allegations of excessive tardiness and a failure to report to lunch duty.

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, Cleary Giacobbe Alfieri Jacobs,
LLC, attorneys (Matthew J. Giacobbe, of counsel and on
the brief)

For the Respondent, Oxfield Cohen, P.C., attorneys
(Samuel Wenocur, of counsel and on the brief)

DECISION

On October 21, 2020, the Hamburg Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Hamburg Education Association (Association). The grievance contests the withholding of the salary increment of a certified Speech Language Specialist (SLS) for the 2020-2021 school year. Because the increment withholding was predominately related to teaching performance, we grant the Board's request to restrain binding arbitration.

The Board filed briefs, exhibits and the certification of its Chief School Administrator, Kimberly Sigman. The Association

filed a brief, exhibits and the certification of the grievant. These facts appear.

The Association represents all certificated full or part-time 10 month teaching staff members and the Child Study Team (CST) members, excluding supervisors, administrators, confidential employees, classroom aides and custodians. 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.

Sigman certifies that the grievant is employed by the Board as an SLS. The grievant's duties include administering student evaluations meant to identify children with disabilities and developing individualized education programs (IEPs) in conjunction with the CST. On February 26, 2020, she received a handwritten letter from the grievant wherein she admitted to missing a student evaluation deadline, requiring her to re-schedule the evaluation and causing her to miss lunch duty that day. Later that day, Sigman held a conference with the grievant where they discussed the letter as well as the grievant's excessive tardiness, including 23 days of tardiness as of February 26, 2020. Sigman memorialized the meeting in a March 3, 2020 letter of reprimand. From February 26 through the end of the 2019-2020 school year, there were no further documented issues concerning the grievant's tardiness.

Sigman certifies that on May 20, 2020, she was copied on a correspondence from the Vice Principal to the grievant wherein the Vice Principal informed the grievant that she had been deficient in timely forwarding IEPs to the CST Coordinator throughout the 2019-2020 school year. Within that letter, the Vice Principal noted that he had previously discussed related deficiencies with the grievant, once during a March 12, 2020 in-person meeting and again during a May 6, 2020 email correspondence.

In his May 20 letter to the grievant, the subject of which was "Individual Education Plan Timeliness," the Vice Principal also stressed that N.J.A.C. 6A:14-2.3(h) requires that IEPs must be shared with and approved by parents within 15 days, leaving less than ten days following an IEP meeting with parents for school districts to edit and review the IEP before a final copy can be provided for a parent's review and signature. The Vice Principal identified seven separate instances during December, January and April of the 2019-2020 school year, when the grievant forwarded IEPs for his review in "well beyond a reasonable timeframe." The alleged delays ranged from 42 to 95 days after each respective IEP meeting. The Vice Principal's letter also warned that failure to comply with IEP deadlines "could result in an errored [sic] IEP being provided to parents, or more damaging actions taken against the district."

The Board's exhibits also include the Vice Principal's March 12, 2020 email to the grievant in which he cited three IEPs that the grievant handed in on February 26, 2020 as being "well beyond" the window for review, the longest of these delays being "over two months"; as well as email correspondence initiated on May 6, 2020, between the Vice Principal and the grievant in which the grievant admitted to at least three further late IEP reports.

On June 3, 2020, the Vice Principal informed the grievant of his recommendation to the Board to withhold her salary increments for the 2020-2021 school year. This correspondence simultaneously constituted the grievant's notice of the right to waive private consideration of the matter (Rice Notice). On June 23, the Board voted to withhold the grievant's salary and adjustment increments for the 2020-2021 school year. The following day, on June 24, a Statement of Reasons was sent to the grievant. The letter states in pertinent part:

Dear [Grievant]:

On June 23, 2020, the Hamburg Board of Education, by majority vote, determined to withhold your salary and adjustment increment for the 2020-2021 school year. The Board's determination was based upon the recommendation of the Chief School Administrator and the following referenced deficiencies in your teaching performance as a Speech Therapist:

- Failure to comply with post-IEP meeting deadlines for the forwarding of IEPs to the Child Study Team Coordinator;
- Untimely completion of student testing;

- Failure to report to lunch duty
- Excessive tardiness

The grievant certifies that her duties as an SLS include evaluating speech and language skills as well as developing and implementing IEPs for causes under the auspices of "Eligible for Speech Language Services" (ESLS). Her duties do not explicitly mention anything about lunch or recess duty. In addition to her responsibilities as an SLS, during the 2019-2020 school year, Sigman also assigned her to preschool and lunch recess duty. The 2019-2020 school year was the first time in her Board assignment that she was assigned to any lunch or recess duties.

The grievant certifies that the Administrator below the Superintendent is the Vice Principal, who also serves as the CST Coordinator. The grievant certifies that she did draft a handwritten note to Sigman dated February 26, 2020. The note concerned her efforts in scheduling a re-evaluation of a special education student. The re-evaluation was a state requirement for special education students. Under N.J.A.C. 6A:14-3.8, a school district needs to re-evaluate a special education student every three years to maintain eligibility for State benefits. The primary purpose of the re-evaluation was so the Board can continue receiving funding from the State for special education services, including speech therapy under N.J.A.C. 6A:14-3.9.

The grievant also certifies that the delays in the re-evaluation of this student did not impact this student's

education. As this student already had an IEP, an education plan was already in place and in use. According to the grievant, when creating an IEP plan, she is required to meet with a student's parents to determine whether to draft an IEP for the student. If the parents agree, they then draft and approve the IEP together. Typically, both of these "meetings" occur simultaneously. Thus, the parents approve the IEP at the meeting. Speech related IEPs are developed so that parents are able to review and sign the documents in a single meeting. When parents sign these IEPs, they are able to implement and utilize them together. However, the Board has a policy in which the signed IEPs are to be forwarded to the administration for record keeping. This step is unnecessary for any part of the implementation of the IEP. Rather, this is solely for the Board to maintain documentation of the IEPs in place.

The grievant further certifies that all of the IEPs were reviewed and approved by parents at the meetings identified in the May 20, 2020 letter. The alleged delays in forwarding the IEPs to the CST Coordinator or Secretary did not result in any delay in the implementation of the at-issue IEPs. Any changes that the CST Coordinator or Secretary would have made to a signed IEP would have only been for non-substantive reasons, such as spelling or grammatical issues. In her more than eight years

with the Board, the administration has not made substantive changes to already signed IEPs.

After the grievant received her Statement of Reasons for the withholding of her increment, on July 6, 2020 the Association served the Vice Principal with a Level One grievance. On July 13, the Association served Sigman with a Level Two grievance on behalf of the grievant which was denied noting that the withholding of grievant's salary increment for the 2020-2021 school year was solely for the purpose of addressing the grievant's poor teaching performance and were not in any way disciplinary in nature. On July 17, the Association filed a Request for Submission of a Panel of Arbitrators. 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. 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). 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. 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, 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 (¶131 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. 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.

The Board argues that arbitration must be restrained, because the withholding was predominately based on a critical

deficiency in the grievant's teaching performance as a Speech Language Specialist, her failure to complete reports and develop IEP's in a timely manner. The Board contends that the Commission should not give equal weight to the issues of the grievant's tardiness or insubordination, because the grievant's failure to timely provide IEP's for review was the clear and predominant focus of the Superintendent's recommendation.

The Association argues that the increment withholding is arbitrable. Because two of the four reasons given for the withholding in its statement of reasons were disciplinary, the alleged tardiness and the failure to perform lunch duty, it is impossible for the Board to demonstrate that a majority of the reasons for its determination were evaluative rather than disciplinary in nature. The Association further argues that the other two reasons given by the Board for the withholding, the grievant's alleged delays in submitting IEP reports and completing a student evaluation, were also predominantly disciplinary because they did not prevent her students from receiving her educational services, nor did they impact either the creation or implementation of her students' IEPs. The Association argues that the alleged delays in filing required paperwork is a disciplinary issue unrelated to teaching performance. The Association further argues that the number of alleged tardiness incidents at issue (23) proves that a majority

of the events leading up to the increment withholding were disciplinary in nature.

We stress that our determination does not turn on the accuracy or merits of the reasons given for the increment withholding, but rather assessing whether the reasons predominately relate to professional performance or are more appropriately viewed as disciplinary. Pinelands Reg. Bd. of Ed., P.E.R.C. No. 2020-31, 46 NJPER 275 (¶67 2019), citing Monroe Township Board of Education, P.E.R.C. No. 2018-48, 44 NJPER 453, 456 (¶126 2018). The performance deficiencies alleged here are similar to those in cases where we restrained arbitration of increments withheld from child study team members. Pinelands, supra. In Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 98-153, 24 NJPER 339 (¶29160 1998), we restrained arbitration of the board's decision to withhold a school psychologist's salary increment, based on allegations that his habitual failure to meet deadlines for evaluation of students impacted the Child Study Team's effectiveness, notwithstanding his otherwise professional performance. We found that the board's concern with the psychologist's alleged "pattern of failure to submit reports on time, . . . [was] noted on observation reports and performance evaluations." Id. at 341. In Parsippany-Troy Hills Bd. of Ed., P.E.R.C. No. 96-52, 22 NJPER 65 (¶27029 1996), we restrained arbitration of the increment withholding of a learning

disabilities teacher consultant, based upon her alleged "extreme difficulties in complying with time lines for the completion of testing and the submission of reports and IEPs." We found that these teaching staff members:

must evaluate students, complete reports and develop IEPs. Meeting regulatory deadlines for these responsibilities is a critical part of the consultant's teaching job. So is overseeing testing for classified students.

[Ibid. at 67.]

The Board's statement of reasons lists four reasons for the withholding of the grievant's increment. The first and second concern the grievant's alleged failure to comply with post-IEP meeting deadlines for the forwarding of IEPs to the CST Coordinator, and her alleged untimely completion of student testing. We find that these reasons for the increment withholding relate squarely to teaching performance. While the grievant does not "teach" in the traditional sense, she provides speech and language services for students with various disabilities in accordance with students' IEPs. The first and second reasons concern an alleged breach of State regulations governing the delivery of those important educational services to students with disabilities. Montgomery Tp. Bd. of Ed., P.E.R.C. No. 2015-73, 41 NJPER 493 (¶152 2015)(restraining arbitration of SLS's salary increment withholding based in part on alleged failure to comply with State and federal special education

regulations and procedures). The grievant admits that the Board must comply with such regulations in order to continue to receive funding from the State for special education services, including speech therapy. The Board has an overriding interest in ensuring such compliance, even if the grievant's alleged delays did not actually prevent the creation or implementation of her own students' IEPs, as the grievant contends. We find that the Board repeatedly communicated its concerns to the grievant about the issue of the untimely IEP reports in meetings, letters and email correspondence during the 2019/2020 school year. We also find that, since the total number of days in which the grievant is alleged to have been late in filing IEP reports far surpasses the 23 days of alleged tardiness, the record does not establish a predominance of disciplinary concerns.

We further find that, standing alone, the third reason given in the Board's statement of reasons, the grievant's failure to report to lunch duty, counts as a disciplinary reason. However, in this instance, the grievant's absence from a non-teaching duty post was also a byproduct of her alleged mishandling of her special education duties. That is, the grievant was unable to report to lunch duty because she had to re-schedule a past-due student evaluation during that time. Under these circumstances, we find that its significance to the Board in its increment withholding decision had less to do with how well she performed

at lunch duty, as the Association argues, than with the Board's greater concerns over the grievant's late student evaluation.

We find the fourth reason given by the Board for the increment withholding, excessive tardiness, to be disciplinary. See, e.g., Atlantic City Bd. of Ed., P.E.R.C. No. 98-43, 23 NJPER 567 (¶28283 1997)(declining to restrain binding arbitration of increment withholding predominantly based on allegations of tardiness).

Thus, on this record, we find that the reasons given for the increment withholding are predominantly performance-related; the two Parsippany-Troy Hill cases, supra, are dispositive. We conclude that resolution of this dispute requires the expertise of the Commissioner of Education and cannot be submitted to binding arbitration.^{1/} The Association can pursue its arguments, including as to whether the alleged IEP-related delays impacted the Board's delivery of educational services, in an appeal of the increment withholding. We will restrain arbitration.

ORDER

The Hamburg Board of Education's request for a restraint of binding arbitration is granted.

^{1/} We note that because we find the increment withholding was not predominantly disciplinary, we do not reach the issue of whether a teaching staff member is statutorily entitled, under N.J.S.A. 34:13A-26, to binding arbitration of a predominantly disciplinary increment withholding despite that the parties' CNA ends in advisory arbitration.

BY ORDER OF THE COMMISSION

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

ISSUED: March 25, 2021

Trenton, NEW JERSEY