
Increment Withholding: Forum For Review

Public Employment Relations Commission
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The Commission has jurisdiction under *N.J.S.A.* 34:13A-22 to -29 (the "1990 amendments") to resolve disputes as to whether the withholding of a teaching staff member's increment is predominately disciplinary or predominately related to the evaluation of teaching performance. *N.J.S.A.* 34:13A-27. The significance of that determination is that challenges to disciplinary withholdings must be submitted to binding arbitration, while challenges to withholdings predominately related to the evaluation of teaching performance must be reviewed by the Commissioner of Education. This paper (1) examines the legislative history to the 1990 amendments; (2) reviews court decisions on increment withholdings; and (3) analyzes Commission decisions deciding whether particular withholdings were predominately related to the evaluation of teaching performance or were effected for predominately disciplinary reasons.¹

¹The Commission gratefully acknowledges the work of Frank Kanther, an intern extraordinaire, in updating this paper.

While there are some ambiguities in the legislation, the Commission's use of a case-by-case balancing test to distinguish between teaching performance and non-performance cases is probably the only option it had and seems to have been what was intended by the sponsors of the 1990 legislation. While the Commission did not start out by establishing bright-line standards for what is and is not teaching performance, its case-by-case approach has yielded a consistent body of case law. In general, it has found that withholdings based on poor instructional skills or disciplinary techniques, inability to maintain classroom control, and inappropriate in-class remarks or conduct are predominately related to the evaluation of teaching performance. Withholdings based on excessive absenteeism, violation of administrative procedures, or some out-of-class interactions with students have been found to be disciplinary.

One general -- but not original -- point which stands out is that the Commission's decisions under *N.J.S.A.* 34:13A-27 have not focused on whether an increment withholding

is "discipline." Commission decisions, along with the legislative history to the 1982 discipline amendments and the 1990 amendments, indicate that all increment withholdings are disciplinary actions. While *N.J.S.A.* 34:13A-27 does require a focus on whether or not a withholding is "disciplinary," it appears that, reading the statute as a whole, the inquiry should be whether an indisputably disciplinary action was predominately related to the evaluation of teaching performance. The Appellate Division thus noted in *Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n*, 304 *N.J. Super.* 459 (App. Div. 1997), that Commission decisions should not turn on whether board action is disciplinary but whether it is predominately based on the evaluation of teaching performance. 304 *N.J. Super.* at 465.

Pre-1990 Statutory Framework on Salary Increments and Increment Withholdings

Increment withholding presupposes salary schedules that provide for periodic increments based on years of experience or cost of living adjustments. These salary schedules are traditional in the education field and were once statutorily required.

In 1954, prior to the enactment of the New Jersey Employer-Employee Relations Act, the Legislature required all boards to adopt minimum salary schedules which: (1) provided for higher rates of pay for advanced degrees and (2) included a minimum \$250 annual "employment increment" until the teacher reached the maximum statutory salary for his or her education and years of experience. See *N.J.S.A.* 18A:29-6 to -8 (repealed). Teachers who were below the minimum statutory salary for their education and years experience were also entitled to an annual adjustment increment of \$150 until they reached their appropriate place on the schedule. *N.J.S.A.* 18A:29-6; -10.² The minimum salary legislation applied to all full-time "teaching staff members" -- that is, all employees required to have a certificate from the State Board of Examiners (basically all professional employees). *N.J.S.A.* 18A:1-1; *N.J.S.A.* 18A:29-6.

The concept of increment withholding was introduced with this legislation. *N.J.S.A.* 18A:29-14 set forth the process by which a board could withhold an increment to which a

² *N.J.S.A.* 18A:29-5 also required that all full-time teaching staff members be paid a minimum of \$2,500 per year.

teaching staff member was otherwise statutorily entitled. It read (and still reads) in pertinent part:

Any Board of Education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all members of the Board of Education. It shall be the duty of the Board of Education, within ten days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such actions to the Commissioner under rules prescribed by him.

A practical reason why teachers press for arbitration of increment withholdings can be traced to a 1960 Appellate Division decision that still governs appeals of increment withholdings to the Commissioner. *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960), held that a teacher had the burden of proving that a board's decision to withhold an increment was arbitrary, capricious or unreasonable. In contrast, *N.J.S.A. 34:13A-29*, which applies to increment withholdings submitted to binding arbitration, states that the burden of proof is on the employer. *N.J.S.A. 34:13A-29* does not

specify the standard the board has the burden of meeting but, unless the parties agree otherwise, it must be more stringent than the "arbitrary and capricious" criterion under *N.J.S.A. 18A:29-14. Scotch Plains-Fanwood Bd. of Ed. v. Ed. Ass'n*, 139 *N.J.* 141, 156-58 (1995).

The Teachers' Quality Education and Improvement Act ("TQEA"), enacted in 1985, established a minimum salary of \$18,500 for all full-time teaching staff members but repealed the salary schedule provisions requiring higher rates of pay for advanced degrees, defining employment and adjustment increments, and providing minimum annual increments. *N.J.S.A. 18A:29-14* was not repealed, so a board retains its authority to withhold negotiated employment and adjustment increments. Prior to the repeal of the minimum salary schedules, court and Commissioner decisions had held that *N.J.S.A. 18A:29-14* gave a board authority to withhold discretionary or negotiated increments where the teacher was above the statutory minimum. They rejected arguments that boards needed to adopt specific policies in order to withhold increments not required by statute. See *Westwood Ed. Ass'n v. Westwood Reg. School Dist. Bd. of Ed.*, App. Div. Dkt. No. A-261-73

(App. Div., 6/21/74) (Appellate Division reversed Commissioner's determination that *N.J.S.A.* 18A:29-14 had no application to salary schedules in excess of the statutory minimum); *see also Bellet v. Teaneck Bd. of Ed.* 1982 *S.L.D.* 970, 974.

N.J.S.A. 18A:29-14 also governs other aspects of increment withholdings -- even those withholdings that, under the 1990 legislation, may be submitted to binding arbitration. For example, *N.J.S.A.* 18A:29-14 states that "[i]t shall be the duty of the board of education, within 10 days, to give written notice of [the withholding], together with the reasons therefor, to the member concerned." There is no requirement for a hearing before the board and the statute does not require that deficiencies or misconduct be identified in an evaluation prior to a withholding. For these reasons, a letter from a board secretary or superintendent may be one of the primary documents the Commission must rely upon in assessing whether a withholding was predominately related to teaching performance -- and in some cases it may be the only document.

N.J.S.A. 18A:29-14 also states that "[i]t shall not be mandatory upon the board of education to pay such denied increment in any

future year as an adjustment increment." Thus, the actual amount withheld does not have to be restored if and when a teacher's performance improves. Further, teachers who have been subject to withholdings, and whose performance improves, do not have to be restored to the place on the salary guide they would otherwise have attained. They will always lag behind their colleagues unless the board acts affirmatively to restore them to the position on the salary guide appropriate to their years of experience. *Probst v. Haddonfield Bd. of Ed.*, 127 *N.J.* 518, 527 (1992); *Cordasco v. City of E. Orange Bd. of Ed.*, 205 *N.J. Super.* 407, 410 (App. Div. 1985). On the other hand, a board that withholds an increment cannot purport to do so "permanently." It cannot "bind future boards" and intrude on their discretion to restore a teacher to the place on the salary guide which he or she would have had absent the withholding. *Colavita v. Hillsborough Bd. of Ed.*, 1983 *S.L.D.* 1205, 1220, *aff'd St. Bd.* 1983 *S.L.D.* 1920, *rev'd on other grounds App. Div. Dkt. No. A-4342-83T6* (3/28/85).

Thus, one increment withholding can have a substantial financial impact on a teacher. This financial impact was presumably one of the reasons the proponents

of the 1990 legislation sought a review forum that would make it easier for teachers to challenge withholdings.³ However, if an arbitrator sustains a withholding, nothing in the 1990 legislation alters the education-law ramifications of that board action. Indeed, in *Cherry Hill Tp. Bd. of Ed.*, P.E.R.C. No. 97-139, 23 *NJPER* 346 (¶28160 1997), the Commission held that the 1990 amendments did not allow a teacher to arbitrate a board decision not to restore her to the place on the salary guide that she would have held absent the withholding. The Commission concluded that this decision was not a separate action that could be arbitrated under the 1990 amendments. See also *North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed.*, 96 *N.J.*

³ Increment withholding is one of the few options a board has for financially penalizing a teacher. A tenured teacher cannot be suspended without pay absent a criminal indictment or certification of tenure charges. *N.J.S.A.* 18A:6-8.3; *N.J.S.A.* 18:6-14; *Slater v. Ramapo-Indian Hills Reg. H. S. Dist. Bd. of Ed.*, 237 *N.J. Super.* 424, 426 (App. Div. 1989). Unless a board and a majority representative have negotiated a schedule of monetary penalties under the 1990 amendments, an attempt to fine a tenured teacher would be a prohibited reduction in compensation under *N.J.S.A.* 18A:6-10.

587 (1984) (where increment withholdings were not challenged within 90 days of the board action, the fact that the teachers were one step behind on the salary guide in subsequent years was not a new, challengeable action but the effect of an earlier employment decision).

Court Decisions Concerning Increment Withholdings

The leading pre-1990 decision on increment withholdings is *Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n*, 79 *N.J.* 311 (1979), where the Supreme Court held that an increment withholding could not be submitted to binding arbitration. *Bernards Tp.* was decided before the 1982 "discipline amendments" allowing employers and employees to agree to submit disciplinary disputes to binding arbitration. Thus, it did not focus on whether an increment withholding was discipline, but on whether it was a negotiable and arbitrable term and condition of employment or a managerial prerogative. While the Court recognized that a withholding directly affected the work and welfare of the teacher, it emphasized that because the decision to withhold had to be based on inefficiency or other good cause, a

board's decision to that effect was dependent upon an evaluation of the quality of the services that the teacher had rendered. *Id.* at 321. The Court reasoned that in withholding a salary increment, a board was making a judgment concerning the quality of the educational system. It therefore found that the decision to withhold an increment was an essential managerial prerogative that could not be negotiated away. *Id.* at 322.

The Court held that these same considerations prevented the parties from agreeing to allow someone other than the Commissioner to review a board's decision to withhold an increment. The Court wrote that the Commissioner's review authority under *N.J.S.A.* 18A:29-14 was a means of fulfilling his statutory responsibility to oversee the State's educational system, including the maintenance of a competent and efficient teaching staff. As discussed below, this concern that the Commissioner's expertise be applied to some increment withholdings was carried over into the 1990 legislation.

Two other Supreme Court decisions concerning increment withholdings decided various education-law questions arising under *N.J.S.A.* 18A:29-14 and refer generally to the fact that an annual increment "is in the nature

of a reward for meritorious service in the school district." *North Plainfield*, 96 *N.J.* at 523; *Probst*, 127 *N.J.* at 527. That language could be used to argue that, because an increment is in the nature of a merit raise rather than an entitlement, the withholding of an increment is not a disciplinary action. However, neither *Probst* nor *North Plainfield* had to decide whether an increment withholding was discipline, and the 1990 amendments indicate that all withholdings are discipline in the generic sense.

1982 Discipline Amendment

The 1982 "discipline amendment" was enacted by the Legislature to overturn a court decision holding that a public employer could not negotiate binding arbitration procedures for disputes concerning disciplinary determinations affecting employees. *See* Assembly Member Paterno, Statement to Assembly Bill 706 (February 1, 1982). Assembly Bill 706 would have overruled *Bernards Tp.* and, as explained in the bill statement, would have allowed boards and majority representatives to negotiate review procedures by which employees could appeal disciplinary actions, including the denial of increments. (It would have prevented an

employee from proceeding to binding arbitration if the employee elected to use an alternative statutory appeal procedure, such as *N.J.S.A.* 18A:29-14).

The Legislature passed this bill, but the Governor vetoed it and suggested that it be amended to, among other things, preclude binding arbitration of disputes concerning disciplinary actions when an alternate statutory appeal procedure existed. The Legislature reenacted the bill to incorporate the recommendation in the Governor's veto message. *L.* 1982, *c.* 103.

In its decisions interpreting the 1982 amendments, the Commission has emphasized that, in adopting those amendments, the Legislature considered increment withholdings to be a form of discipline. The Commission noted that the Governor had never made any statements to the contrary, and that the interchange between the Governor and the Legislature focused instead on the existence, and significance of, alternate statutory appeal procedures for disciplinary determinations. *East Brunswick Bd. of Ed.*, P.E.R.C. No. 84-149, 10 *NJPER* 426 (¶15192 1984), *aff'd* 11 *NJPER* 334 (¶16120 App. Div. 1985), *certif. den.* 101 *N.J.* 280 (1985). While viewing an increment withholding as

discipline, the Commission nevertheless held that since *N.J.S.A.* 18A:29-14 provided an alternate statutory procedure for teaching staff members to appeal withheld increments, those withholdings could not be submitted to binding arbitration. On the other hand, since *N.J.S.A.* 18A:29-14 did not apply to school district employees who were not teaching staff members -- *e.g.*, secretaries and custodians -- the Commission concluded that increment withholdings involving these employees could be submitted to binding arbitration.

In sum, after 1982, the only reason that withheld increments of teaching staff members could not be submitted to binding arbitration was that *N.J.S.A.* 18A:29-14 provided an alternate statutory appeal procedure.

Overview of 1990 Amendments

As noted at the outset, several amendments to the Employer-Employee Relations Act took effect in 1990. *N.J.S.A.* 34:13A-22 through *N.J.S.A.* 34:13A-29. These amendments apply only to school district employees. *Bernards Tp.* was superseded to the extent it had prohibited binding arbitration of all withholdings involving teaching staff members and required

all such disputes to be submitted to Commissioner of Education pursuant to *N.J.S.A.* 18A:29-14. The 1990 amendments provided that withholdings for predominately disciplinary reasons must be submitted to binding arbitration, *N.J.S.A.* 34:13A-26; -29, and gave the Commission its current authority to resolve disputes as to whether a teaching staff member's increment was withheld for predominately disciplinary reasons or for reasons predominately related to the evaluation of teaching performance. *N.J.S.A.* 34:13A-26; -27.

While the increment withholding aspects of the legislation have generated the most litigation, the 1990 amendments also: (1) prohibited transfers between work sites for disciplinary reasons, *N.J.S.A.* 34:13A-25 and (2) provided that assignment to, retention in, and dismissal from extracurricular activities are mandatory subjects of negotiations. *N.J.S.A.* 34:13A-23. A seldom-mentioned and seldom-used portion of the 1990 amendments allows employers and majority representatives to negotiate over giving an employer authority to impose minor discipline and over a schedule of penalties to be imposed for particular infractions, and specifies that fines or suspensions for minor discipline shall not

constitute a prohibited reduction in compensation under the tenure statute. *N.J.S.A.* 34:13A-24. However, the provision does address the fact, noted at legislative hearings on the amendments that, under Title 18A, there is no middle ground between a reprimand and an increment withholding.

While *N.J.S.A.* 34:13A-26 and -27 set up an opposition between increment withholdings for predominately disciplinary reasons and those for predominately teaching performance-related reasons, the definitional section of the act states that all increment withholdings are a form of discipline in the generic sense, although not necessarily discipline that may be submitted to binding arbitration. *N.J.S.A.* 34:13A-22 defines "discipline" to include "all forms of discipline, except tenure charges . . . or the withholding of increments pursuant to *N.J.S.A.* 18A:29-14." It would not have been necessary to exclude increment withholdings under *N.J.S.A.* 18A:29-14 from *N.J.S.A.* 34:13A-22 unless the Legislature considered that they were a form of discipline in the first place. Thus, in deciding whether an increment withholding may be submitted to binding arbitration, the focus has not been on whether the action is "discipline" but on whether the

basis for the discipline was predominately related to an evaluation of teaching performance.

In *Edison*, the Appellate Division approved this focus, albeit by a somewhat different line of reasoning than contained in Commission decisions. The court did not discuss the definitional section, *N.J.S.A.* 34:13A-22, and did not identify all withholdings as "discipline" in the broad sense. Instead, it stated that *N.J.S.A.* 34:13A-26 required that all withholdings be submitted to binding arbitration, except those based predominately on an evaluation of teaching performance. Thus, it reasoned that the Commission's decision should have, and implicitly did, turn on whether the withholding was based predominately on an evaluation of teaching performance. 304 *N.J. Super.* at 465.

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| <p style="text-align: center;">Legislative History to 1990 Amendments</p> |
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The legislative history to the 1990 amendments consists of a transcript of a public hearing and a statement by the sponsors. *See* Assemblymen Haytaian and Doyle, Statement to Assembly No. 4706 (June 19, 1989) ("bill statement").

The testimony at the hearing indicates that the legislation was the subject of discussions between Governor Kean and the New Jersey Education Association, and was triggered by the NJEA's concerns that teachers should have broader negotiating rights and greater recourse against unjust discipline. The NJEA supported bills -- also discussed at the hearing -- that would have significantly expanded the scope of negotiations and/or required arbitration of a broader range of disputes. In the latter vein, one bill would have required arbitration of all disciplinary disputes, regardless of whether there was an alternate statutory appeal procedure. Another would have allowed (but not required) parties to agree to disciplinary review procedures that could replace any statutory appeal procedure, except those pertaining to tenure dismissal and the termination of civil service employees.

A-3567 was a narrower, compromise bill, which the Governor had agreed in advance to sign. By allowing some withholdings to be submitted to arbitration, it partially addressed NJEA's concern, expressed at the hearing, that the Commissioner considered only whether a board acted arbitrarily and capriciously in withholding an

increment -- not whether it acted fairly or for good reasons.

The public testimony and the sponsor's statement to the bill provide some insight into what proponents of the bill considered to be a disciplinary reason for an increment withholding. One of the legislators described a situation where a teacher had written on the blackboard "you should hate men" and "you should hate the kids in parochial school." The NJEA representative indicated that that situation probably leaned toward teaching performance. On the other hand, where a board withheld an increment because a teacher was late for school or took a day off without a reason, the NJEA representative suggested that such withholdings would be disciplinary.

The bill statement did not include specific examples of disciplinary vs. teaching performance withholdings, but simply explained that withholdings for disciplinary reasons could be submitted to binding arbitration, while those based on "actual teaching performance" would still be appealable to the Commissioner. The "actual" language connotes a narrowing intent, but it is not clear what "actual teaching performance" is to be contrasted with. The phrase was probably intended to underscore, as did the

Commission's decision in *Holland Tp. Bd. of Ed.*, P.E.R.C. No. 87-43 12 *NJPER* 824 (¶17316 1986), cited later in the bill statement, that everything a teacher does touches on students and teaching, and that that fact should not be used to label all withholdings as related to teaching performance.

The legislative history also includes some discussion of the roles of the Commission and the Commissioner of Education under the 1990 amendments. Both the NJEA and the Department of Education supported the proposal that the Commission, as an independent third party, should decide whether a withholding or transfer between work sites was for disciplinary reasons. However, while noting that the Commission, as an independent third party, should make this determination, the Department of Education stated that it was crucial that the Commissioner of Education retain authority to review increment withholdings related to teaching performance.

The bill statement indicated that the Commission should make the determination whether a withholding or transfer was predominantly disciplinary "as it previously did in *Holland Tp. Bd. of Ed.*"

Unfortunately, the reference to *Holland* is somewhat inapt when considered in relation to the 1990 amendments. In *Holland*, the Commission announced a case-by-case balancing test to determine whether letters or memoranda issued to teachers were disciplinary reprimands that could be submitted to binding arbitration or, on the other hand, were non-disciplinary evaluative documents that could not. While *Holland* did not so state, the implication of finding that a document was evaluative was that it was not reviewable anywhere: it could not be submitted to binding arbitration because it was evaluative, and the Commissioner does not generally review evaluations. See *Victoria v. Woodbridge Tp. Bd. of Ed.*, 1982 S.L.D. 1. In contrast, all increment withholdings are disciplinary and under *N.J.S.A. 34:13A-26* and *27*: the Commission's role is to decide whether the *reasons* for the disciplinary action -- the increment withholding -- were predominately related to an evaluation of teaching performance. That determination controls the forum for review -- not, as in *Holland Tp.*, whether the action is discipline and therefore reviewable.

Nevertheless, *Holland* is relevant to the Commission's role under *N.J.S.A. 34:13A-*

27 in the sense that it recognized that "there may not always be a precise demarcation between that which predominately involves a reprimand and is therefore disciplinary within the amendments to *N.J.S.A. 34:13A-5.3* and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore non-negotiable." The Commission went on to state in *Holland* that it would review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve teaching performance. As discussed below, the Commission used *Holland Tp.* as the model for a case-by-case approach to its role under *N.J.S.A. 34:13A-27*.

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| <p style="text-align: center;">PERC Decisions Under <i>N.J.S.A.</i> 34:13A-27</p> |
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Over the last several years, the Commission has decided 129 cases under *N.J.S.A. 34:13A-27* and restrained arbitration in 101 cases. Arbitration was allowed to go forward in the remaining 28.

Its first decision, *Scotch Plains-Fanwood Bd. of Ed.*, P.E.R.C. No. 91-67, 17 *NJPER* 144 (¶22057 1991), announced its

approach to deciding whether an increment withholding is predominately related to the evaluation of teaching performance. *Scotch Plains* involved a teacher whose increment was withheld for excessive absenteeism, including over 300 absences for personal illness over a 12-year period, and 27 absences in the year in which the board took action. An interim evaluation had explained that the absences had "helped create a failure in providing good instructional leadership for your students." After tracing the legislative history to the 1982 and 1990 discipline amendments, the decision emphasized that the Commission's power was limited to determining the appropriate forum for resolving an increment withholding dispute -- not determining whether the withholding was with or without just cause. It then announced the approach it has followed and reiterated in all subsequent cases.

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]

In *Scotch Plains* itself, as discussed in more detail below, the Commission declined to restrain arbitration.

While the Commission has followed a case-by-case approach, its decisions can be roughly grouped into several categories: (1) cases involving allegedly poor teaching techniques, as detailed in observation reports and evaluations; (2) cases involving poor classroom management and student discipline, usually outlined in evaluations; (3) cases involving allegedly inappropriate in-class conduct or remarks; usually described in

evaluations or administrative memoranda; (4) absenteeism and corporal punishment cases; (5) cases involving inappropriate interactions with students, staff or supervisors outside the classroom or failure to follow administrative procedures; and (6) cases involving, on the one hand, a combination of teaching and/or classroom management problems and, on the other, alleged failures to follow administrative procedures or other outside-the-classroom problems. Another category is that involving professional staff members -- such as administrators or guidance counselors -- who are not classroom teachers.

The Commission has found that categories (1), (2) and (3) relate predominately to an evaluation of teaching performance, and categories (4) and (5) do not. It is difficult to draw generalizations about category (6) -- the stalemate or tiebreaker cases. The cases involving educational services and administrative personnel require separate discussion.

What follows is a discussion of each of the noted case categories, as well as a discussion of cases in which the Association alleged that the increment withholding was in retaliation for protected conduct.

Poor Teaching Techniques

The most straightforward type of withholding -- and the type of withholding related to teaching performance that was probably most in the Legislature's mind when it approved the 1990 amendments -- is one where the board decision is based on evaluations and observation reports detailing poor teaching techniques, poorly planned lessons or lack of mastery over subject matter. Very few of the Commission's increment withholding cases involve this type of straightforward fact pattern -- presumably because the parties usually agree that these withholdings should go to the Commissioner. The Commission has predictably restrained arbitration in these cases. *See Woodbury Bd. of Ed.*, P.E.R.C. No. 2006-81, 32 *NJPER* 128 (¶59 2006) (arbitration restrained where teacher allegedly failed to prepare, develop adequate assessment strategies, have learning activities involving teacher feedback or student/student interaction, and record student grades); *Englewood Bd. of Ed.*, P.E.R.C. No. 2006-33, 31 *NJPER* 353 (¶140 2005) (arbitration restrained where teacher allegedly lacked lesson plans and a class register book, and had poor instructional practices);

Washington Tp. Bd. of Ed., P.E.R.C. No. 2005-81, 31 *NJPER* 179 (¶73 2005) (arbitration restrained where teacher allegedly failed to communicate with parents about academic performance, timely return graded weekly homework, advise students of after-school help, handle disciplinary issues tactfully and keep communication lines open with students, and confront students about cheating on a test); *Paramus Bd. of Ed.*, P.E.R.C. No. 2004-30, 29 *NJPER* 508 (¶161 2003) (arbitration restrained where teacher allegedly failed to develop lesson plans with clear objectives, follow lesson plans based on approved curriculum, differentiate instruction to meet different needs, develop ways to assess knowledge and skills of students, plan units with other teachers to provide common learning experience, maintain a classroom free of clutter and hazards, and follow suggestions on improvement of instruction); *North Caldwell Bd. of Ed.*, P.E.R.C. No. 2001-76, 27 *NJPER* 290 (¶32105 2001) (arbitration restrained for allegedly unsatisfactory instructional planning, failure to communicate content appropriate to students, poor instructional methods and poor questioning, poor use of materials, inconsistency and inappropriateness in dealing with student

behavior, and failure to read and implement curriculum goals); *Salem City Bd. of Ed.*, P.E.R.C. No. 2001-3, 26 *NJPER* 357 (¶31142 2000) (arbitration restrained where teacher allegedly was inefficient in carrying out curriculum, unable to maintain classroom decorum and student control, failed to submit timely and relevant lesson plans, and failed to follow directive regarding sending students from the classroom; Commissioner can consider union's claim that the cited reasons were pretextual); *Greater Egg Harbor Reg. Bd. of Ed.*, P.E.R.C. No. 2000-85, 26 *NJPER* 214 (¶31088 2000) (arbitration restrained where last three annual evaluations alleged lack of professional communication with students, parents, and coworkers and most recent evaluation noted the need for teacher to better organize information presented to students, and structure his class with respect to pacing, timing, and constructive pupil involvement); *Parsippany-Troy Hills Bd. of Ed.*, P.E.R.C. No. 2000-28, 25 *NJPER* 442 (¶30194 1999) (arbitration restrained where withholding centered on classroom management, organization and preparation of lesson plans, instruction, and communication with students); *East Orange Bd. of Ed.*, P.E.R.C. No. 99-102, 25 *NJPER* 292 (¶30122

1999) (arbitration restrained where evaluations alleged unsatisfactory lesson plans, spending too much time going over homework, assigning homework on untaught concepts, and failing to bring class to closure; teacher was rated "unsatisfactory" in majority of areas under "Teaching Strategies or Techniques," "Knowledge of Content," and "Planning and Preparation"); *Wood-Ridge Bd. of Ed.*, P.E.R.C. No. 98-41, 23 *NJPER* 564 (¶28281 1997) (arbitration restrained where withholding based on alleged deficiencies in preparing lessons and instructing students -- as well as difficulty in maintaining classroom discipline); *South Harrison Bd. of Ed.*, P.E.R.C. No. 96-36, 22 *NJPER* 20 (¶27007 1995) (arbitration restrained where withholding based on "ineffective instruction as observed in the classroom"; board submitted observation reports and evaluations detailing deficiencies); *Newark Bd. of Ed.*, P.E.R.C. No. 93-99, 19 *NJPER* 250 (¶24123 1993) (arbitration restrained where withholding was based on annual performance evaluation in which teacher was rated unsatisfactory in almost every element of teaching performance); *see also Bernardville Bd. of Ed.*, P.E.R.C. No. 94-83, 20 *NJPER* 82 (¶25037 1994) (arbitration restrained where

increment withholding based on evaluations describing poor lesson plans, lack of teaching objectives for each class period, and poor student supervision); *Passaic Cty. Reg. School Dist.*, P.E.R.C. No. 92-125, 18 *NJPER* 359 (¶23156 1992) (arbitration restrained where the board stated that three teachers failed to implement the board's curriculum, had inadequate lesson plans, and unilaterally instituted a rotating, student-elective, cross-grading schedule).

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| <p style="text-align: center;">Lack of Classroom Control/Inappropriate Disciplinary Techniques</p> |
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The Commission has decided numerous cases in which the primary basis for the withholding was lack of classroom management or control or poor disciplinary techniques -- problems that were sometimes accompanied by instructional difficulties. The Commission has consistently restrained arbitration in these cases on the theory, as articulated in two early decisions, that problems in these areas "were concerns within the Commissioner of Education's expertise and jurisdiction." *Upper Saddle River Bd. of Ed.*, P.E.R.C. No. 91-69, 17 *NJPER* 148 (¶22059 1991) (teacher's increment withheld

based on allegedly poor disciplinary techniques, including incident where he threatened to wrap trumpet around a student's neck; use of inappropriate language in classroom; and observation reports suggesting that teacher give clearer instructions, eliminate competition between children and provide positive comments); *Tenafly Bd. of Ed.*, P.E.R.C. No. 91-68, 17 *NJPER* 147 (¶22058 1991) (increment withheld based on allegations that a teacher had used corporal punishment on one student, had retaliated against that student by giving him a low grade when his parents complained, and had engaged in "excessive and consistent yelling" as a means of disciplining students). *See also Sterling H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 2007-58, 33 *NJPER* 112 (¶39 2007) (physical education teacher allegedly responded improperly to unruly students and lowered grades as a response to student discipline problems); *Dumont Bd. of Ed.*, P.E.R.C. No. 2007-17, 32 *NJPER* 323 (¶134 2007) (physical education teacher allegedly called children offensive names and put them in a closet to discipline them); *Englewood Bd. of Ed.*, P.E.R.C. No. 2006-35, 31 *NJPER* 356 (¶142 2005) (teacher allegedly failed to create and maintain a supportive learning

environment); *Englewood Bd. of Ed.*, P.E.R.C. No. 2006-34, 31 *NJPER* 355 (¶141 2005) (teacher allegedly used inappropriate classroom management techniques and demonstrated poor job performance detrimental to student learning); *Englewood Bd. of Ed.*, P.E.R.C. No. 2006-32, 31 *NJPER* 352 (¶139 2005) (teacher allegedly had inappropriate classroom management techniques and negative performance evaluations); *Readington Tp. Bd. of Ed.*, P.E.R.C. No. 2006-5, 31 *NJPER* 242 (¶93 2005) (special education teacher allegedly yelled and used inappropriate language towards students, used physical force or threat of it to ensure compliance, threw a pencil at a child, and was belligerent when an assistant principal intervened during one episode); *Middlesex Bd. of Ed.*, P.E.R.C. No. 2005-80, 31 *NJPER* 177 (¶72 2005) (media specialist allegedly had poor interaction with students due to little praise and too much criticism, and allegedly made inappropriate and unprofessional comments to students and fellow staff members in front of students); *Orange Tp. Bd. of Ed.*, P.E.R.C. No. 2005-65, 31 *NJPER* 118 (¶50 2005) (three observations of teacher alleged inability to manage class, problems with student altercations in class,

failure to improve classroom climate, and failure to set and carry out class expectations/rules; the weight of these evaluations led the Commission to conclude the withholding was predominately based on evaluation of teaching performance despite the teacher's alleged insubordination in failing to cover a duty assignment); *Matawan-Aberdeen Reg. Bd. of Ed.*, P.E.R.C. No. 2004-47, 30 *NJPER* 38 (¶11 2004) (computer science teacher's alleged improper monitoring of use of computers during class led to students hacking into district's computer network and changing data); *Hamilton Tp. Bd. of Ed.*, P.E.R.C. No. 2002-35, 28 *NJPER* 76 (¶33026 2001) (special education teacher allegedly exercised poor judgment in allowing assistant to leave early, thereby creating a classroom environment that led to inappropriate sexual contact between some of the students out of view); *Essex Cty. Voc. Sch. Bd. of Ed.*, P.E.R.C. No. 2000-23, 25 *NJPER* 427 (¶30188 1999) (special education teacher allegedly grabbed student's throat or shirt after student touched his arm leaving class, required another student to stand behind his desk for 30-40 minutes, and created classroom atmosphere not conducive to the instruction, growth, and development of special education students; teacher admitted a version of the

event involving an allegedly inappropriate disciplinary technique); *Randolph Tp. Bd. of Ed.*, P.E.R.C. No. 99-94, 25 *NJPER* 238 (¶30100 1999) (teacher allegedly allowed students to be disruptive and not to focus on lessons and tasks at hand; specifically, teacher's methods of starting class with homework collection and ending class by allowing them to start homework resulted in losing students' attention and socializing); *Morris Sch. Dist. Bd. of Ed.*, P.E.R.C. No. 99-85, 25 *NJPER* 164 (¶30075 1999) (physical education teacher allegedly failed to use systematic interventions related to motivating students, failed to behave professionally, and disciplined students by having them run laps outside and unsupervised for most of class period); *Morris Sch. Dist. Bd. of Ed.*, P.E.R.C. No. 99-84, 25 *NJPER* 162 (¶30074 1999) (teacher allegedly used a test prep program for 45 minutes per day rather than the recommended 20 minutes; walked in hall with coffee during class time while students acted inappropriately in hall; ate, drank, played solitaire, and read a magazine during class while students worked on computers unassisted; did not begin class on time and managed class poorly by allowing students to arrive ten minutes late; and lacked lesson plans and failed to teach based on student's

diagnosed instructional needs); *North Caldwell Bd. of Ed.*, P.E.R.C. No. 98-80, 24 *NJPER* 52 (¶29033 1997) (teacher allegedly disciplined a student inappropriately and teacher had been earlier reprimanded for an alleged act of inappropriate student discipline and had been directed to develop a professional plan to ensure, among other things, satisfactory performance in classroom management and student-teacher relationships); *Millville Bd. of Ed.*, P.E.R.C. No. 98-48, 32 *NJPER* 601 (¶28295 1997) (withholding based on teacher's in-class comments to a student - - comments which also triggered the teacher's suspension with pay - - plus alleged deficiencies in instruction, supervision and lesson planning); *Hillside Bd. of Ed.*, P.E.R.C. No. 97-39, 22 *NJPER* 389 (¶27210 1996) (librarian allegedly allowed students to leave classes before the closing bell, talk in class, and stick each other with pins); *Willingboro Bd. of Ed.*, P.E.R.C. No. 96-28, 21 *NJPER* 388 (¶26239 1995) (the board stated teacher inappropriately sent children to principal's office for disciplinary reasons, asked parents to take children home, altered student IEP and implemented his own disciplinary techniques); *Logan Tp. Bd. of Ed.*, P.E.R.C. No. 95-57, 21 *NJPER* 115 (¶26070

1995) (teacher allegedly yelled at students, demeaned them, let classroom problems get out of control and discouraged students from expressing their opinions or asking questions); *Somerset Cty. Vo-Tech Bd. of Ed.*, P.E.R.C. No. 95-55, 21 *NJPER* 112 (¶26068 1995) (teacher's increment withheld because of allegations that his students talked and ate in shop class and his classes had high incidence of property damage and student injury); *Wayne Tp. Bd. of Ed.*, P.E.R.C. No. 93-107, 19 *NJPER* 272 (¶24137 1993) (teacher allegedly used inappropriate disciplinary techniques such as kissing students and dumping out their desks).

In the above cases, the withholdings were based on a series of incidents or observations and the staff member's problems were usually detailed in evaluations and observation reports. The Commission found that because the withholdings flowed from a board's subjective educational judgment about what type of interaction should take place in a classroom, they were predominately related to an evaluation of teaching performance. The Commission has distinguished these types of withholdings from those which, if contested, would simply require an objective

determination of whether a teacher engaged in certain indisputably improper conduct.

For example, in *Morris Hills Reg. Dist. Bd. of Ed.*, P.E.R.C. No. 92-69, 18 *NJPER* 59 (¶23025 1991), the Commission declined to restrain arbitration over an increment withholding based on allegations of corporal punishment, where the teacher denied that he had struck the students in question. The Commission reasoned that it took no educational expertise to know that hitting a student is wrong, and that an arbitrator could make an objective determination whether or not the teacher engaged in indisputably improper conduct. The Commission distinguished *Tenafly*, reasoning that in that case the review of the withholding required an assessment of both corporal punishment allegations *and* an evaluation of whether a teacher appropriately raised her voice or inappropriately yelled as a means of disciplining students -- an educational judgment that should not be reviewed by an arbitrator. Similarly, in *Upper Saddle River Bd. of Ed.*, P.E.R.C. No. 98-81, 24 *NJPER* 54 (¶29034 1997), the Commission restrained arbitration where, in response to the board's allegations of improper physical contact, the teacher asserted that the contact was necessary

to prevent injury to the student and damage to property. The Commission reasoned that while, as in *Morris Hills*, the trier of fact would have to determine what actually happened during the incident, he or she would also have to assess whether the physical contact was an appropriate classroom management technique that fell outside the statutory definition of corporal punishment. That judgment involved the appropriateness of student-teacher interaction in class and thus centered on an evaluation of teaching performance.

The above cases also illustrate that, in considering whether a withholding is teaching-performance related, the Commission has not developed an abstract definition of teaching performance and then assessed whether a particular set of deficiencies falls within that definition. Instead, it has focused on whether the board has made a subjective educational judgment that is best reviewed by the Commissioner. This focus is consistent with the statutory directive to decide whether a withholding is predominately related to an *evaluation* of teaching performance -- language that focuses on the nature of the board's judgment. It is also consistent with the legislative history,

which indicates that the Legislature made a distinction between disciplinary and teaching performance withholdings in order to preserve the Commissioner's authority, through *N.J.S.A.* 18A:29-14, to establish standards of teaching performance.

Inappropriate In-Class Conduct

Somewhat related to the above-described cases are those in which a teacher's increment was withheld for allegedly inappropriate conduct or remarks made in class. Arbitration will generally be restrained in such cases. *See Willingboro Bd. of Ed.*, P.E.R.C. No. 2007-29, 32 *NJPER* 361 (¶152 2006) (majority of cited reasons involved inappropriate interaction with students in class and refusals to meet with parents about the academic performance of their children); *Old Bridge Bd. of Ed.*, P.E.R.C. No. 2004-57, 30 *NJPER* 77 (¶28 2004) (teacher allegedly harassed and engaged in unwelcome touching of students during class and sometimes during lunch or in the hallways, and allegedly directed racist and sexual commentary towards students); *Northern Highlands Reg. Bd. of Ed.*, P.E.R.C. No. 2003-49, 29 *NJPER* 24 (¶7 2003) (teacher allegedly assisted female students at their computers in an

inappropriate manner, made inappropriate comments to female students, and had an improper decorum/demeanor towards the entire class); *Knowlton Tp. Bd. of Ed.*, P.E.R.C. No. 2003-47, 29 *NJPER* 19 (¶5 2003) (teacher allegedly had difficulty relating to second grade students and their parents and humiliated students in class); *Montclair Bd. of Ed.*, P.E.R.C. No. 2002-3, 27 *NJPER* 321 (¶32114 2001) (teacher allegedly had a negative attitude towards students and colleagues, made negative comments in front of students, inappropriately invaded a student's personal space and removed a hat from student's head, and made inappropriate statements regarding her personal issues and family relationships in class); *Willingboro Bd. of Ed.*, P.E.R.C. No. 2001-68, 27 *NJPER* 236 (¶32082 2001) (teacher allegedly made inappropriate sexual comments to girls in his class about their clothing and bodies, and told class about his sexual experiences; while some of the teacher's alleged inappropriate comments to students were made outside of class, these comments were not isolated or unrelated to the many statements he allegedly made in class); *Willingboro Bd. of Ed.*, P.E.R.C. No. 2000-68, 26 *NJPER* 117 (¶31050 2000) (teacher allegedly left students

without supervision, failed to implement preferential intervention plan to assist parent in monitoring student's progress, offered mediocre instruction plan, would not give students extra help, and used inappropriate language about a racial matter during class); *Ramsey Bd. of Ed.*, P.E.R.C. No. 2000-59, 26 *NJPER* 94 (¶31038 2000) (parents requested that their students be placed with a different Spanish teacher; and alleged inappropriate and demeaning behavior towards their children and rudeness or nastiness in dealing with parents and students); *Kinnelon Bd. of Ed.*, P.E.R.C. No. 99-64, 25 *NJPER* 90 (¶30039 1999) (arbitration restrained where health teacher allegedly used profanity in joking manner to students during class, discussed methods of committing suicide with students, told students how they could avoid being caught drinking their parents' alcohol, and joked about getting high on household toxic inhalants); *Bergenfield Bd. of Ed.*, P.E.R.C. No. 99-63, 25 *NJPER* 89 (¶30038 1999) (withholding was based primarily on teacher's alleged use of school computer for viewing and storing sexually explicit or obscene materials during instructional time; while an element of withholding was based on "misuse of school equipment," the allegations that the

inappropriate conduct occurred when he should have been instructing or supervising students, that he viewed the inappropriate material in a way that allowed students to view it, and that the obscene nature of the materials maintained an inappropriate teaching environment predominately related to an evaluation of teaching performance); *Greater Egg Harbor Reg. H.S. Bd. of Ed.*, P.E.R.C. No. 95-58, 21 *NJPER* 116 (¶26071 1995), recon. den., P.E.R.C. No. 95-84, 21 *NJPER* 175 (¶26110 1995) (teacher allegedly made repeated negative remarks about capabilities of blonde, female students); *Red Bank Reg. Bd. of Ed.*, P.E.R.C. No. 94-106, 20 *NJPER* 229 (¶25114 1994) (teacher allegedly told off-color jokes and made demeaning and insensitive comments to and about students); *Roxbury Bd. of Ed.*, P.E.R.C. No. 94-80, 20 *NJPER* 78 (¶25034 1994) (increment withheld because of allegedly improper remarks to female pupils and inappropriate physical contact with pupils); *Florham Park Bd. of Ed.*, P.E.R.C. No. 93-76, 19 *NJPER* 159 (¶24081 1993) (teacher had good evaluations but increment withheld because board maintained he criticized principal during class).

These cases are categorized separately from those discussed above because the

withholdings were based more on discrete incidents that have elements of misconduct with respect to particular students, as opposed to a general inability to maintain discipline. The withholdings also seemed to be based on allegations that call into question a teacher's judgment, as opposed to his or her ability to deliver instruction and manage a class. The Commission has restrained arbitration in these cases on the theory that they -- like classroom control or disciplinary technique cases -- involved a board's subjective educational judgment as to what is appropriate in a classroom environment.

Misconduct Cases

The Commission has declined to restrain arbitration in several cases where teaching staff members were accused of inappropriate conduct with students outside of the classroom. See *Bergen Cty. Voc. and Tech. Sch. Dist. Bd. of Ed.*, P.E.R.C. No. 2004-73, 30 *NJPER* 145 (¶58 2004) (culinary arts teacher was a stipended chaperone on a school-sponsored cruise during which he allegedly made a sexual gesture and consumed alcohol in the presence of students, engaged in inappropriate physical contact with male student by sitting on his shoulders, and

permitted female student in his presence to simulate a sex act; teacher's chaperoning of the cruise was extracurricular because it was not part of the teaching and duty assignments scheduled during the regular work day, week, or year); *Boonton Tp. Bd. of Ed.*, P.E.R.C. No. 99-101, 25 *NJPER* 288 (¶30121 1999) (softball coach allegedly berated and struck student with a closed fist in the helmet for not stealing a base; Legislature differentiated between extracurricular and teaching assignments and declined to equate a coaching incident with teaching performance concerns under *N.J.S.A.* 34:13A-27); *North Arlington Bd. of Ed.*, P.E.R.C. No. 97-28, 22 *NJPER* 366 (¶27192 1996) (single incident where teacher questioned and allegedly upset a special education pupil -- who was not assigned to any of his classes -- about an incident involving another teacher); *Morris Bd. of Ed.*, P.E.R.C. No. 93-50, 19 *NJPER* 50 (¶24023 1992) (sixth-grade teacher allegedly sent inappropriate Christmas card to ninth-grader and former student); *Hunterdon Central Reg. H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 92-72, 18 *NJPER* 64 (¶23028 1991) (although observation reports praised content and delivery of lessons, increment withheld based on allegations that teacher left class

unattended, let non-class members sit in on class, and kept gym clothes in class); *but cf. Dennis Tp. Bd. of Ed.*, P.E.R.C. No. 98-73, 24 *NJPER* 17 (¶29012 1997) (increment withheld because of allegedly inappropriate conversations with students about sex and dating as well as alleged deficiencies in instructional techniques, lesson planning, and classroom management; Commission held that even if the discussions with students occurred outside the classroom and did not involve teaching performance, the withholding predominately related to the evaluation of teaching performance).

The Commission has also declined to restrain arbitration in cases where teachers were charged with insubordination, a violation of administrative procedures, or chronic tardiness. *See Franklin Tp. Bd. of Ed.*, P.E.R.C. No. 2001-64, 27 *NJPER* 389 (¶32144 2001) (teacher allegedly violated the Teacher Handbook and a memo specifying that students should not be left unsupervised; the Board did not cite the teacher's teaching ability or even her ability to manage students in the classroom as reasons for the withholding); *Franklin Tp. Bd. of Ed.*, P.E.R.C. No. 2000-90, 26 *NJPER* 272 (¶31106 2000) (the only reason cited for

withholding was that teacher allegedly did not comply with a directive to contact a parent); *Montclair Bd. of Ed.*, P.E.R.C. No. 2000-1, 25 *NJPER* 361 (¶30155 1999) (allegation involved athletic director's compliance with administrative procedures governing gate receipts); *Willingboro Bd. of Ed.*, P.E.R.C. No. 98-51, 23 *NJPER* 607 (¶28298 1997) (teachers, acting as administrators and proctors, allegedly did not follow directive concerning security procedures required in administering State-mandated test); *Atlantic City Bd. of Ed.*, P.E.R.C. No. 98-43, 23 *NJPER* 567 (¶28283 1997) (board alleged chronic lateness that intruded on preparation time; no evidence that teaching assignments were affected or that teaching was unsatisfactory); *Clifton Bd. of Ed.*, P.E.R.C. No. 92-112, 18 *NJPER* 269 (¶23115 1992) (teacher allegedly left work early, falsified sign-out sheet, repeatedly missed back to school night, and was generally insubordinate); *Greater Egg Harbor Reg. Bd. of Ed.*, P.E.R.C. No. 92-9, 17 *NJPER* 384 (¶22181 1991) (alleged violation of telephone procedures and expense reporting requirements). In *Mansfield Tp. Bd. of Ed.*, 23 *NJPER* 209 (¶28101 App. Div. 2007), rev'g and rem'g P.E.R.C. No. 96-65, 22 *NJPER* 134

(¶27065 1996), an Appellate Division panel reversed the Commission and declined to restrain arbitration of a withholding based on a teacher's alleged evasion of a directive that all communications with a parent take place in front of a witness; while the board also cited the teacher's alleged failure to communicate with a resource room teacher about a special education student in her classroom, the Court noted that this reason was not cited in the annual evaluation.

These cases did not involve instruction, maintenance of an appropriate classroom environment, or in-class conduct. Given a statutory scheme that allows some withholdings to be submitted to binding arbitration, these cases fall readily into that category. It has been argued that, in cases like *North Arlington*, the Commissioner's educational expertise would be useful in evaluating what is or is not an appropriate interaction with a student. However, the Commission has not interpreted the phrase "evaluation of teaching performance" to include all of a teacher's interactions with a student. And the Legislature did not specify such a standard.

Absenteeism

As noted above, the first case to come before the Commission under *N.J.S.A.* 34:13-27, *Scotch Plains*, involved excessive absenteeism. The Commission reasoned that excessive absenteeism did not involve an evaluation of teaching performance, but rather flowed from the teacher's alleged failure to perform because of her absences. In contrast to the teaching performance and classroom management cases, where the Commission noted that the educational expertise of the Commissioner of Education was needed to review the board's subjective educational judgment, the Commission cited the long-standing practice of arbitrators reviewing discipline imposed for absenteeism. The Commission also noted that because it viewed the withholding as an attempt to penalize the teacher and induce her to improve her sporadic attendance, the withholding was disciplinary.

The Commission has followed *Scotch Plains*. See *Middlesex Bd. of Ed.*, P.E.R.C. No. 2000-86, 26 *NJPER* 217 (¶31089 2000) (arbitration not restrained where guidance counselor's excessive absenteeism related to bladder stone surgery and other health problems); *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); *Hillside Bd. of Ed.*, P.E.R.C. No. 92-124, 18 *NJPER* 358 (¶23155 1992). *Cf. Pollard v. Teaneck Tp. Bd. of Ed.*, 92 *N.J.A.R.2d* (EDU) 286, 287 (St. Bd), aff'd App. Div. Dkt. No. A-4109-91 (2/22/94) (State Board of Education noted that a withholding may be "an appropriate disciplinary action" where a teacher fails to fulfill professional responsibilities associated with an absence; decision also adverted to *Scotch Plains'* determination that such withholdings are disciplinary). In *Edison*, the Commission rejected an argument that *Scotch Plains* was inapplicable because, unlike the withholding in that case, the board had not intended to motivate the staff member to improve attendance because it did not dispute that the absences were legitimate. The Commission stated that this point was not dispositive and that the issue was whether the withholding was related to an evaluation of teaching performance.

The Commission has restrained arbitration where absenteeism was intertwined with predominate teaching-performance reasons. *See Rockaway Tp. Bd. of Ed.*, P.E.R.C. No. 97-88, 23 *NJPER* 129 (¶28062

1997) (increment withheld because of excessive absenteeism as well as poor performance; Commission found that teaching performance and the impact of absences on that performance were the board's dominant concerns); *Butler Bd. of Ed.*, P.E.R.C. No. 96-24, 21 *NJPER* 358 (¶26222 1995) (principal's increment withheld because of attendance record and several other reasons; sporadic, unexcused absences found to be part of larger issue of failure to communicate with superintendent).

In affirming *Edison*, a three-judge Appellate Division panel approved the Commission's determination that a withholding based on excessive absenteeism did not involve an evaluation of teaching performance. The majority in *Edison* stated that the board had made a policy decision that a staff member was not entitled to an increment where, because of valid health reasons, he had been unable to perform assigned duties. 304 *N.J. Super.* at 467. In upholding the Commission's conclusion that this decision was not predominately related to an evaluation of performance, the majority noted that the assistant principal had not been evaluated at all because his absences precluded such. It also wrote that the board

had submitted no actual reports of negative impact on the school or its students. *Ibid.* Finally, it agreed with the Commission that an arbitrator could determine whether the staff member's inability to work warranted withholding his increment. *Id.* at 467-68.

Judge D'Annunzio joined in affirming the Commission's decision because he found support for the conclusion that the withholding was "predominately disciplinary." He focused on the letter notifying the staff member that the board was considering withholding his increment because his absences had disrupted the school environment and required the expense of substitute personnel. Judge D'Annunzio stated that this "language of punishment and restitution" evidenced the board's motive. 304 *N.J. Super.* at 468.

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| Corporal Punishment |
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The Commission has held that certain corporal punishment cases will be considered disciplinary. In *Morris Hills Reg. Dist. Bd. of Ed.*, described on p. 19, the Commission held that where the board alleged that a teacher struck two students, and the teacher denied the charges, an arbitrator could objectively determine whether the teacher engaged in

indisputably improper conduct. *See also Vernon Tp. Bd. of Ed.*, P.E.R.C. No. 2002-36, 28 *NJPER* 78 (¶33027 2001) (arbitration not restrained where teacher allegedly initiated physical contact with a student between periods because he felt the boy should not have food in the hallway, the incident did not occur in the teacher's classroom and the student was not assigned to him, and the teacher denied that he improperly touched the student); *Pleasantville Bd. of Ed.*, P.E.R.C. No. 2002-21, 28 *NJPER* 17 (¶33004 2001) (arbitration not restrained where teacher allegedly struck a child and then had poor communications with child's parent who approached the teacher during school for an unscheduled meeting).

However, the Commission restrained arbitration where corporal punishment allegations were intertwined with allegations that the teacher used grades to retaliate against a student after he complained to his parents and consistently yelled at students to discipline them. *Tenaflly*. The Commission has also restrained arbitration where the physical force allegations were generally related to the overall classroom atmosphere. *See Readington Tp. Bd. of Ed.*, P.E.R.C. No. 2006-5, 31 *NJPER* 242 (¶93 2005); *Essex Cty.*

Voc. Sch. Bd. of Ed., P.E.R.C. No. 2000-23, 25 *NJPER* 427 (¶30188 1999). The Commission also restrained arbitration where an increment was withheld because of an alleged instance of improper physical contact and the teacher asserted that the contact was necessary to prevent injury to students or property. *Upper Saddle River*, P.E.R.C. No. 98-81. See *N.J.S.A.* 18A:6-1 (prohibiting corporal punishment unless necessary to prevent a disturbance, retrieve weapons, or protect persons or property).

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| <p>Staff Members Other Than Classroom Teachers</p> |
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N.J.S.A. 34:13A-22 provides that if the Commission determines that the withholding of a "teaching staff member's" increment relates predominately to the evaluation of that staff member's teaching performance, any appeal must be filed with the Commissioner. *N.J.S.A.* 34:13A-22 incorporates the Title 18A definition of "teaching staff member" as any member of a school district's professional staff who is required to hold a certificate issued by the State Board of Examiners.

Given this statutory framework, the Commission has concluded that a different definition of "teaching performance" must be

applied to administrators, educational services staff, and school nurses, as opposed to classroom teachers. *Middletown Tp. Bd. of Ed.*, P.E.R.C. No. 92-54, 18 *NJPER* 32 (¶23010 1991). In *Middletown*, where the withholding involved a principal, the Commission framed the inquiry as whether the withholding related predominately to the evaluation of the principal's performance as an educational leader and manager. It concluded that an alleged inappropriate handling of a student assault, a failure to lead assistant principals, and a failure to comply with budget procedures related predominately to the evaluation of teaching performance. In *Sterling Bd. of Ed.*, P.E.R.C. No. 2000-75, 26 *NJPER* 178 (¶31072 2000), the Commission restrained arbitration where a principal allegedly: sexually harassed a student when he took her out of class to tell her how nice she looked; tore up disciplinary slips and told her she looked nice and that "you owe me"; called her to the back room of library and asked her out to lunch on Saturday; called her at home; and caressed her arms, shoulders, and back. The Commission found that the in-school incidents where he took her out of class and tore up disciplinary slips issued to her

predominately related to the vice-principal's leadership and education judgment.

In other cases involving administrators, the Commission has restrained arbitration on the basis of statements of reasons that alleged a failure to provide leadership, or a failure to perform such job functions as overseeing buildings and grounds, overseeing student discipline or attendance, coordinating the co-curricular program, or evaluating professional staff. *See Bridgeton Bd. of Ed.*, P.E.R.C. No. 2006-100, 32 *NJPER* 197 (¶86 2006) (assistant principal allegedly did not observe due process or communicate appropriately in investigations of students); *Phillipsburg Bd. of Ed.*, P.E.R.C. No. 2003-8, 28 *NJPER* 340 (¶33119 2002) (assistant principal allegedly failed to maintain records or take action based on a parent's complaints about his child being harassed at school, and failed to coordinate and supervise duty assignments in the high school parking lot); *West Essex Reg. Bd. of Ed.*, P.E.R.C. No. 98-42, 23 *NJPER* 565 (¶28282 1997) (assistant principal allegedly did not evaluate teachers); *Butler Bd. of Ed.*, P.E.R.C. No. 96-24, 21 *NJPER* 358 (¶26222 1995) (assistant principal allegedly did not communicate with principal concerning school operations);

Paterson School Dist., P.E.R.C. No. 95-39, 21 *NJPER* 36 (¶26023 1994) (vice-principal allegedly did not provide positive leadership and initiative.

In cases involving Child Study Team (CST) members, the Commission has restrained arbitration where increments were withheld because the staff member missed regulatory deadlines for preparing individualized educational programs or failed to follow district procedures for scheduling parent conferences and consulting with teachers and parents about student services. *See Parsippany-Troy Hills Bd. of Ed.*, P.E.R.C. No. 98-153, 24 *NJPER* 339 (¶29160 1998) (annual evaluations noted school psychologist's untimely reports about his evaluations of students; poor time management in coordinating with CST members; poor adherence to policies in crisis situations; and problems with testing procedure, tardiness and absenteeism); *Parsippany-Troy Hills Bd. of Ed.*, P.E.R.C. No. 96-52, 22 *NJPER* 65 (¶27029 1996) (CST teacher allegedly did not properly evaluate students, complete reports on time, and develop IEPs); *Readington Tp. Bd. of Ed.*, P.E.R.C. No. 95-38, 21 *NJPER* 34 (¶26022 1994) (psychologist CST allegedly was

unorganized and thus hurt CST efforts). In *Vernon Bd. of Ed.*, P.E.R.C. No. 98-44, 23 *NJPER* 569 (¶28284 1997), a board withheld a librarian's increment because of the principal's continuing concerns about the library's cleanliness and organization; the Commission reasoned that the library was this staff member's classroom and that students may learn library and reading skills more readily in an organized and neat classroom.

In a case involving a guidance counselor, the Commission restrained arbitration where the counselor allegedly provided deficient counseling services to special needs students. *Wildwood Bd. of Ed.*, P.E.R.C. No. 2007-57, 33 *NJPER* 110 (¶38 2007). In another guidance counselor case, the Commission restrained arbitration where the withholding was predominately based on the counselor's alleged pattern of being disorganized and not responding promptly to the guidance-related concerns and questions of students and parents. *Freehold Reg. H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 2007-65, 33 *NJPER* 149 (¶53 2007).

The Commission has also restrained arbitration in cases involving school nurses who allegedly made poor nursing decisions and failed to follow recordkeeping,

notification, and authorization policies predominately related to their duties as certificated school nurses. *Wildwood Bd. of Ed.*, P.E.R.C. No. 2000-67, 26 *NJPER* 116 (¶31049 2000) (nurse allegedly overmedicated student and failed to notify child's mother, the administration, or the school physician; administering medication to students is a duty reserved by education law statutes to certificated nurses, and the performance of such duties must be reviewed by the Commissioner of Education); *Franklin Bd. of Ed.*, P.E.R.C. No. 99-2, 24 *NJPER* 407 (¶29186 1998) (annual evaluation cited alleged incident involving poor record maintenance and dispensing a medical product without the proper authority, and nurse allegedly erred in judging that a child was ill and needed to go home). Contrast *Orange Tp. Bd. of Ed.*, P.E.R.C. No. 2006-14, 31 *NJPER* 291 (¶114 2005), where a nurse allegedly called paramedics to school to care for an injured child when she should have referred the matter to the principal, then allegedly followed paramedics' advice to summon police to school without first consulting school administrators. In *Orange*, the Commission did not restrain arbitration because the school principal believed the

nurse's summoning of paramedics and police infringed on the principal's authority, and because the discipline was partly based on a history of reprimands about problems with her interactions with parents and staff that did not center on her primary nursing duties. *See also Hackettstown Bd. of Ed.*, P.E.R.C. No. 2003-48, 29 *NJPER* 22 (¶6 2003) (arbitration not restrained where nurse allegedly refused to accompany a class on a scheduled trip despite superintendent's warning of potential discipline).

School boards may agree to arbitrate all withholdings involving support staff rather than teaching staff. *Flemington-Raritan Bd. of Ed.*, P.E.R.C. No. 2003-64, 29 *NJPER* 113 (¶34 2003). The Commission thus will not restrain arbitration of a grievance contesting a support staff withholding. However, if negotiated grievance procedures do not end in binding arbitration, *N.J.S.A.* 34:13A-29 still entitles a support staff member to arbitrate a dispute if the withholding was predominately based on disciplinary reasons rather than evaluative reasons. In such rare cases, the Commission must determine the predominant basis for the withholding. *Randolph Tp. Bd. of Ed. and Randolph Tp. Ed. Ass'n*, 328 *N.J.*

Super. 540 (App. Div. 2000), certif. den. 165 *N.J.* 132 (2000).

Combination Cases

Probably the most difficult of the Commission's cases are those in which the Commission concludes that some of the stated reasons for a withholding are teaching-performance related and some are not. The Commission then has to decide which type of reason "predominates." There is no mechanical, uniform method for making this determination -- and it is difficult to envision a method that could be used in all such cases.

In *Demarest Bd. of Ed.*, P.E.R.C. No. 99-36, 24 *NJPER* 514 (¶29239 1998), aff'd 26 *NJPER* 113 (¶31046 App. Div. 2000), the Commission did not restrain arbitration after analyzing each of the three reasons for the withholding and determining that non-teaching performance reasons prevailed two to one. The music teacher's alleged inappropriate behavior in taking a musical part from a student during practice on the day of the concert involved teaching performance. But his allegedly inappropriate response when that student's parent approached him did not involve teaching performance (as contrasted with interacting with students or meeting with

the parent in a formal parent-teacher conference), and the teacher's alleged misinforming of students about why their class was moved involved a dispute between him and the administration about the allocation of resources.

In some cases, the Commission has recognized that some of the stated reasons are teaching performance-related while others are not and has made a judgment based on which type of allegations were more numerous or more important to the board's decision. *See Camden Cty. Voc. Tech. Bd. of Ed.*, P.E.R.C. No. 2007-47, 33 *NJPER* 24 (¶9 2007) (majority of 15 cited reasons did not involve the evaluation of teaching performance; among the non-evaluation reasons were parking in the wrong places, filing the wrong forms, violating a protocol for calling parents, and threatening another instructor); *Bergenfield Bd. of Ed.*, P.E.R.C. No. 2006-69, 32 *NJPER* 83 (¶42 2006), *aff'd* ___ *NJPER* ___ (¶_____ App. Div. 2007) (arbitration not restrained where basic skills teacher allegedly failed to report to her class, left school, did not sign out properly, did not follow her schedule, fell asleep during classes one day possibly as a result of an illness, and had instructional problems; misconduct and non-performance

reasons predominated over instructional concerns as basis for withholding); *Willingboro Bd. of Ed.*, P.E.R.C. No. 2006-88, 32 *NJPER* 166 (¶75 2006) (arbitration restrained where teacher allegedly had poor lesson plans and instruction, incomplete and improper grading, inadequate knowledge of subject and unsatisfactory performance ratings, and where teacher breached confidentiality of special education student names, and refused to meet with principal on any matter without union representation; while alleged refusal to meet with principal was not related to teaching performance, the cited reasons predominately involved poor teaching techniques and organization); *Willingboro Bd. of Ed.*, P.E.R.C. No. 2006-87, 32 *NJPER* 165 (¶74 2006) (arbitration restrained where teacher allegedly failed to communicate with parents concerning academic performance, failed to submit lesson plans or leave them for substitute teachers, failed to help students learn, and frequently was absent on Mondays and Fridays; while issue of frequent absences was not teaching-related, the other cited reasons predominantly involved teaching performance); *Maurice River Tp. Bd. of Ed.*, P.E.R.C. No. 99-52, 25 *NJPER* 35 (¶30014 1998) (arbitration restrained where librarian's

alleged performance deficiencies primarily involved lesson design and delivery, classroom management, student telecasts, regular course-related communications with parents, and student access to the library; although some of the alleged deficiencies may have involved failures to comply with directives - - not enrolling in courses for her Professional Development Plan - - the withholding was predominately based on an evaluation of teaching performance); *Red Bank Reg. H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 99-23, 24 *NJPER* 474 (¶29221 1998) (arbitration not restrained where teacher allegedly fell asleep at departmental meeting, left meeting early, did not attend a non-mandatory IEP meeting, failed to use proper hall pass forms, detained students after class, and scheduled students for extra help during other class periods; while alleged failures to fulfill Professional Improvement Plan goal and perform curricular work were “mixed” reasons, and the potentially offensive “Dog Den” sign in her classroom may be inappropriate in-class conduct, the six non-teaching related reasons cited for withholding outweighed the two mixed and one teaching performance reasons); *Red Bank Reg. H.S. Dist. Bd. of Ed.*, P.E.R.C. No. 97-72, 23

NJPER 45 (¶28031 1996) (while alleged failures to attend a faculty meeting and return a video were disciplinary, concerns about teaching of controversial material, content of final examination, and alleged improper remarks in classroom were teaching performance-related and predominated; teaching-related incidents were more numerous and weighed more heavily in the board's decision); *Hillside Bd. of Ed.*, P.E.R.C. No. 97-39, 22 *NJPER* 389 (¶27210 1996) (Commission need not decide whether every cited reason related to teaching performance given that most of the reasons do).

In several cases, the Commission has cited the board's statement as to which reason was most important to it. *See Bergenfield Bd. of Ed.*, P.E.R.C. No. 2006-80, 32 *NJPER* 126 (¶58 2006) (arbitration restrained where teacher allegedly failed to have enough student-centered learning opportunities, call on passive students or have students progress incrementally to higher levels of cognition, take summer courses, and stop a student from bringing a pillow and sleeping in class; while failure to take summer graduate classes may not have been a teaching performance-related reason, the Board did not give that reason significant weight, and its reasons and

supporting documents centered on engaging student interest during class and teaching techniques); *Elizabeth Bd. of Ed.*, P.E.R.C. No. 2003-86, 29 *NJPER* 247 (¶74 2003) (given the generally positive performance evaluation issued after the incidents cited in the Board's resolution and the primary weight due the Board's cited reasons, the withholding was based predominantly on issues of insubordination and poor attitude towards students and staff that did not directly affect students); *Trenton Bd. of Ed.*, P.E.R.C. No. 2002-67, 28 *NJPER* 239 (¶33089 2002) (arbitration restrained where the Board's stated reason for withholding was Resource Center teacher's failure to implement the Success For All program model); *Mahwah Bd. of Ed.*, P.E.R.C. No. 94-99, 20 *NJPER* 197 (¶25093 1994) (without stating which of eight cited reasons were disciplinary, Commission found that withholding was predominately based on evaluation of teaching performance; board represented that classroom incident was relied upon most); *Southern Gloucester Cty. Reg. School Dist. Bd. of Ed.*, P.E.R.C. No. 93-26, 18 *NJPER* 479 (¶23218 1992) (teaching performance reasons "objectively appeared to have been more significant in substance and timing" than alleged violations of regulations

in motivating the withholding; principal's affidavit stated that the predominate reasons for the withholding were the teacher's repeated difficulties in interacting with students and parents).

In *State-Operated School Dist. of Jersey City*, P.E.R.C. No. 97-98, 23 *NJPER* 165 (¶28083 1997), the Commission held that a withholding was triggered primarily by a school psychologist's alleged violation of State regulations concerning outside employment, a non-teaching performance related reason. It reached this conclusion because the alleged regulatory violation had generated two "unsatisfactory" ratings in overlapping evaluation categories, while teaching performance reasons had prompted only "needs improvement" ratings in four overlapping evaluation categories.

Retaliation Claims

In a few cases where the stated reasons for a withholding were related to teaching performance, the staff members have alleged that the board action was motivated by other, improper reasons. The Commission, consistent with the fact that its role is limited to determining the forum for review, has declined to question the board's stated reasons

for its actions. For example, in *Saddle River Bd. of Ed.*, P.E.R.C. No. 96-61, 22 *NJPER* 105 (¶27054 1996), the board stated that a teacher's increment was withheld because his relationships with pupils, administrators and parents all needed improvement, and because he lost student work, had not heeded observation reports, and failed to make plans for student-teacher contact time. The teacher alleged that the real reason for the withholding was that a parent had complained to the board that he had failed to select her daughter to attend a conference. The teacher emphasized that the parent was an influential board member of a tax-sheltered foundation that provided substantial financial support to the district, and that after the incident, he was evaluated four times in nine weeks.

The Commission stated that it would not look beyond the stated reasons for the withholding. It reasoned that that type of inquiry would take it beyond its gate-keeping function and require a full-scale hearing, "plunging us into judging the merits of the withholding." It added that the Commissioner has the authority to set aside a withholding induced by an improper motive -- although of course a different burden of proof would apply in proceedings before the Commissioner. *See*

also Trenton Bd. of Ed., P.E.R.C. No. 2002-67, 28 *NJPER* 239 (¶33089 2002) (whether teaching performance reasons are meritorious or pretextual must be considered by Commissioner).

Conclusion

In sum, while the Commission's decisions under *N.J.S.A.* 34:13A-27 have not established bright-line standards for what is and is not teaching performance, its case-by-case approach has yielded a consistent and stable body of case law. It is hoped that this paper will provide guidance to parties so that they can determine the proper forum for challenging increment withholdings of teaching staff members.