
Increment Withholding: Forum For Review

Public Employment Relations Commission April 3, 1998

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 withholding 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.

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. Only two Appellate Division decisions, *Mansfield Tp. Bd. of Ed. and Mansfield Ed. Ass'n*, 23 NJPER 209 (¶28101 App. Div. 1997) and *Edison Tp. Bd. of Ed. v. Edison Tp. Principals and*

Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), have reviewed Commission rulings in this area. *Mansfield* reversed the Commission's decision that a withholding was predominately related to the evaluation of teaching performance. However, *Mansfield* did not consider or call into question the Commission's case-by-case balancing test and because it involved an unusual fact situation, it does not undermine the Commission's analysis in the vast majority of those cases where the Commission has found that a withholding was related to an evaluation of teaching performance. *Edison* affirmed the Commission's decision that a withholding based on excessive, long-term absenteeism was not predominately related to an evaluation of teaching performance.

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. In the recent *Edison* decision, the Appellate Division also noted 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.

<p style="text-align: center;">Pre-1990 Statutory Framework on Salary Increments and Increment Withholdings</p>

Increment withholding presupposes salary schedules which 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 Public 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 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 and 29-10.¹ 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 teaching staff member was otherwise statutorily entitled. It read (and still reads) in pertinent part as follows:

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

¹ *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.

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 which 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. Bd. of Ed. of the Westwood Reg. School Dist.*, 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 which 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. Bd. of Ed.*, 127 N.J. 518, 527 (1992); *Cordasco v. 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 which would make it easier for teachers to challenge withholdings.² However, if an arbitrator

² 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. 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

sustains a withholding, nothing in the 1990 legislation alters the education-law ramifications of that board action. Indeed, in its recent decision, *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 which could be arbitrated under the 1990 amendments. *See also North Plainfield Ed. Ass'n v. Bd. of Ed.*, 96 N.J. 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).

<p style="text-align: center;">Court Decisions Concerning Increment Withholdings</p>

The leading pre-1990 decision on increment withholdings is *Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n*, 79 N.J. 311

amendments, an attempt to fine a tenured teacher would be a prohibited reduction in compensation under *N.J.S.A.* 18A:6-10.

(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 which 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 which 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 in order 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; -27.³

While the increment withholding aspects of the legislation have generated the most litigation, the 1990 amendments also: (1) prohibited transfers between work sites for

³ A December 1997 Appellate Division decision, *Randolph Tp. Bd. of Ed. v. Randolph Ed. Ass'n*, 306 *N.J. Super.* 207 (App. Div. 1997), pet. for certif. pending, Supreme Court Dkt. No. 45-367, provided a new gloss on the amendments and held that they also authorized the Commission to decide, under *N.J.S.A.* 34:13A-29, whether a non-teaching staff member's increment was withheld for disciplinary reasons. *Id.* at 213. In *Randolph*, the board withheld a secretary's increment for allegedly excessive absenteeism and the Association demanded arbitration pursuant to *N.J.S.A.* 34:13A-29. The Board sought to restrain arbitration in the Chancery Division, arguing that the parties' negotiated agreement precluded binding arbitration of increment withholdings. The Chancery Division dismissed the complaint for lack of jurisdiction. The Appellate Division affirmed the order dismissing the complaint and held that *N.J.S.A.* 34:13A-29 precluded the parties from contractually excluding disciplinary withholdings from binding arbitration. It also held that the Commission, not the Chancery Division, had jurisdiction to determine whether the increment withholding was legally arbitrable.

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 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. Few if any such schedules have been negotiated in school districts. 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 vs. those for predominately teaching-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.* 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 predominately based on an

evaluation of teaching performance. 304 *N.J. Super.* at 465.⁴

Legislative History to 1990 Amendments

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 NJEA, 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 -- which 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 which 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

⁴ *N.J.S.A.* 34:13A-26 states that the withholding of an employee's increment for predominately disciplinary reasons shall be submitted to binding arbitration. *N.J.S.A.* 34:13A-27d provides that, where the Commission determines that the withholding of a teaching staff member's increment is predominately related to an evaluation of teaching performance, the staff member may appeal the withholding to the Commissioner, pursuant to *N.J.S.A.* 18A:29-14.

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 *Holland Tp.* decision 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.*, P.E.R.C. No. 87-43, 12 *NJPER* 1736."

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 which could be submitted to binding arbitration or, on the other hand, were non-disciplinary evaluative documents. While *Holland* did not so state, the implication of finding that a document was evaluative was that it was not reviewable: it

could not be submitted to binding arbitration because it was not discipline, and the Commissioner does not generally review evaluations. See *Victoria v. Woodbridge Tp. Bd. of Ed.*, 1982 S.L.D. 1. In contrast, *N.J.S.A. 34:13A-26* and *27* do not direct the Commission to decide whether or not an increment withholding is discipline: 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 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*.

<p style="text-align: center;">PERC Decisions Under N.J.S.A. 34:13A-27</p>

Over the last several years, the Commission has decided 62 cases under *N.J.S.A. 34:13A-27* and restrained arbitration in 50 cases. Arbitration was allowed to go forward in the remaining 12.

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 which 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) are predominately disciplinary. 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.

There have been two Appellate Division decisions reviewing Commission rulings in this area, *Mansfield Tp. Bd. of Ed.*, P.E.R.C. No. 96-65, 22 *NJPER* 134 (¶27065 1996), rev'd and rem'd 23 *NJPER* 209 (¶28101 App. Div. 1997) and *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). *Edison* is discussed at pages 20-21, along with other absenteeism cases. *Mansfield* is summarized at the conclusion of this paper.

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 teaching-performance related increment withholding -- and the type of withholding which 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.⁵ See *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

⁵ The case holding descriptions in this paper set forth the board's statement of reasons for withholding an increment. They should not be viewed as comments on the merits of the allegations. The staff member may have been successful in challenging the withholding before an arbitrator or the Commissioner.

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 Bernardsville 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 -- as well as failure to follow administrative procedures); *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).

<p style="text-align: center;">Lack of Classroom Control/Inappropriate Disciplinary Techniques</p>

While few cases come to the Commission involving the most straightforward type of teaching performance problem, 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 which 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 generally engaged in "excessive and consistent yelling" as a means of disciplining students). *See also Hillside Bd. of Ed.*, P.E.R.C. No. 97-39, 22 *NJPER* 389 (¶27210 1996)(increment withheld based on allegations that librarian allowed students to leave classes before the closing bell and without hallway supervision and that students talked in class and stuck each other with pins); *Willingboro Bd. of Ed.*, P.E.R.C. No. 96-28, 21 *NJPER* 388 (¶26239 1995)(teacher's increment withheld where the board stated he inappropriately sent children to principal's office for disciplinary reasons, asked parents to take children home, unilaterally altered student IEPs and implemented his own disciplinary techniques); *Somerset Cty. Vo-tech*, 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); *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); *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 require an objective determination 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 increment 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), appeal pending, App. Div. Dkt. No. A-3101-9T15, 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 which 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 particular 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 which 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 which 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. *See 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, made demeaning comments to and about students and was insensitive to the needs of lower ability 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 which 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 which call into question a teacher's judgment, as opposed to his 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 No. 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)(increment withheld because sixth-grade teacher sent allegedly inappropriate Christmas card to ninth-grader and former student); *Hunterdon Central Reg.*, 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); *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 Atlantic City Bd. of Ed.*, P.E.R.C. No. 98-43, 23 *NJPER* 567 (¶28283 1997)(increment withheld based on chronic

lateness which intruded on preparation time; no evidence that teaching assignments were affected or that teaching was unsatisfactory); *Willingboro Bd. of Ed.*, P.E.R.C. No. 98-51, 23 *NJPER* 607 (¶28298 1997)(increments withheld because teachers, acting as administrators and proctors, allegedly did not follow administrative directive concerning security procedures required in connection with administration of State-mandated test); *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).

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 *No. 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 was needed to review the board's subjective educational judgment, it cited the long-standing practice of arbitrators reviewing discipline imposed for absenteeism. The Commission also noted that because it viewed the increment 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* in subsequent cases. See *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 increment 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 teaching-performance reasons. See *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); *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).

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. One judge wrote a concurring opinion and joined in affirming the Commission's decision because he found that the record contained evidence of the board's punitive intent. 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'Annunizio 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'Annunizio stated that this "language of punishment and restitution" supported the Commission's determination and was evidence of the board's motive. 304 *N.J. Super.* at 468.⁶

⁶ L. 1997, c. 112, effective June 5, 1997, provides that sick leave taken as a result of a work-related accident constitutes satisfactory service and shall not constitute good cause for an increment withholding.

Corporal Punishment

The Commission has held in one case that certain corporal punishment cases will be considered disciplinary. In *Morris Hills Reg. Dist. Bd. of Ed.*, described on page 16, 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. 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. *Tenafly*. 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).

Staff Members Other Than Classroom Teachers

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 and educational services staff, 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 provide leadership to

assistant principals, and a failure to comply with budget procedures related predominately to the evaluation of teaching performance.

In other cases involving administrators, the Commission has restrained arbitration on the basis of statements of reasons that alleged a general 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 West Essex Reg. Bd. of Ed.*, P.E.R.C. No. 98-42, 23 *NJPER* 565 (¶28282 1997); *Butler Bd. of Ed.*, P.E.R.C. No. 96-24, 21 *NJPER* 358 (¶26222 1995); *Paterson School Dist.*, P.E.R.C. No. 95-39, 21 *NJPER* 36 (¶26023 1994). In cases involving Child Study Team 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 appropriate services for students. *Readington Tp. Bd. of Ed.*, P.E.R.C. No. 95-38, 21 *NJPER* 34 (¶26022 1994); *Parsippany-Troy Hills Bd. of Ed.*, P.E.R.C. No. 96-52, 22 *NJPER* 65

(¶27029 1996). *Parsippany* in particular noted that meeting regulatory deadlines was a critical part of the CST member's job. 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 cleanliness and organization of the library, as well as for other reasons which the Association did not dispute were performance-related. The Commission held that the concerns about the poor condition of the library implicated an evaluation of teaching performance. It 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.

The Commission's decision to define "teaching performance" differently for administrators and educational services staff vs. classroom teachers is dictated by the legislation. Since *N.J.S.A.* 34:13A-27 specifically refers to the withholding of a "teaching staff member's" increment for teaching-performance related reasons, it is clear that the Legislature intended that the increment withholding provisions of the 1990 amendments apply to professional school

district employees other than classroom teachers. The dichotomy which the legislation establishes between disciplinary and teaching-performance related withholdings could only be maintained if the Commission recognized that administrative and organizational-type duties may sometimes constitute "teaching performance" for those employees.

Combination Cases

Probably the most difficult of the Commission's cases are those in which, applying the standards articulated in the other categories of cases, the Commission concludes that some of the stated reasons for a withholding are disciplinary and some are teaching-performance related. The Commission then has to decide which type of reason "predominates." The Commission has stated that there is no mechanical, uniform method for making this determination -- and it is difficult to envision a method which could be used in all such cases.

In some cases, the Commission has recognized that some of the stated reasons are teaching-related while others are not and, without analyzing every stated reason, has made a judgment based on which type of

allegations were more numerous or more important to the board's decision. *See 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-related and predominated; Commission stated that 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 a few cases, the Commission has cited the board's statement as to which reason was most important to it. *See 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; decision cites board's representation that classroom incident was relied upon most); *Southern Gloucester Cty. Reg. School Dist.*, P.E.R.C. No. 93-26, 18 *NJPER* 479 (¶23218 1992)(Commission

concluded that teaching-performance reasons "objectively appeared to have been more significant in substance and timing" in motivating the withholding). The decision also cited a principal's affidavit that the predominate and motivating reasons for the increment withholding were the teacher's repeated difficulties in interacting with students and parents, as opposed to her violation of various district regulations.

In *State-Operated School Dist. of Jersey City*, P.E.R.C. No. 97-98, 23 *NJPER* 165 (¶28083 1997), the Commission held that an increment 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. Finally, in *Mansfield*, where the Commission found that one reason was disciplinary and one predominately related to teaching performance, the Commission concluded that the balance tipped in favor of restraining

arbitration because the disciplinary reason "may also relate to or indirectly arise out of litigation touching upon Kolb's teaching responsibilities."⁷

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 of 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 (¶27065 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. These

⁷ The Appellate Division seemed to disapprove of this analysis and commented that it was expected that all of a school district's administrative directives related directly or indirectly to teaching responsibilities.

deficiencies were detailed in observation reports, but 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 which provided substantial financial support to the district. The staff member further pointed out that, after the incident, he was evaluated four times in nine weeks -- an unusual circumstance for a tenured teacher.

The Commission stated emphatically 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.

Summary of Mansfield Decision

As noted at the outset of this paper, the Appellate Division decision in *Mansfield* reversed the Commission's decision that the withholding in that case was predominately related to an evaluation of teaching performance. In *Mansfield*, the board's stated reasons for withholding a teacher's increment were: (1) the teacher's failure to communicate with the resource room teacher about a special education student in her classroom and (2) the teacher's evasion of an administrative directive that all communications with a particular parent take place in front of a witness. These reasons arose out of a special education lawsuit brought against the district by the parents of one of the teacher's students. The teacher testified at the administrative hearing and related her experiences with and observations of the student. She acknowledged that she had not shared this information with the resource room teacher, although she knew that she was required to do so. Her hearing testimony was the basis for the board's conclusion that she failed to communicate with the resource room teacher.

The Commission ruled that the first reason was related to an evaluation of teaching

performance because a teacher has a responsibility to cooperate with a child study team and other educators to develop the best educational plan for a special education student in her classroom. It found that the second reason alleged insubordination and was therefore disciplinary. Faced with a tie, it concluded that the withholding was predominately related to an evaluation of teaching performance because the second reason "may also relate to or indirectly arise out of litigation touching upon [the teachers] teaching responsibilities."

The Appellate Division agreed with the Commission that the second reason was disciplinary, but concluded that there was no evidence to support its decision that the first reason was related to an evaluation of teaching performance. The Court observed that not only was the incident not described in the teacher's annual evaluation, but she was rated satisfactory in all areas, including effective student evaluation, where her involvement with the child study team was noted. The Court also reasoned that the teacher was disciplined for a single incident with a single student and that there was no indication that, in her twenty years of experience, she had generally failed to communicate with special

education personnel or violated administrative directives. It thus concluded that because the withholding was the result of something outside the parameters of the evaluation process, the board's action did not arise out of a problem with the staff member's teaching performance.

The Appellate Division did not consider the Commission's case-by-case balancing test and it did not call into question the Commission's view that classroom management and in-classroom conduct is teaching performance. It made the point, consistent with *Scotch Plains*, that all disciplinary actions relate in a sense to teaching, and that that fact does not mean that, under *N.J.S.A. 34:13A-27*, the withholding is predominately related to teaching performance.⁸

⁸ The Appellate Division remanded the case to the Commission so that it could consider the board's argument that arbitration should be restrained under the waiver provision of the Conscientious Employee Protection Act (CEPA), *N.J.S.A. 34:19-1 et seq.*, which provides, among other things, that an employee who files a CEPA action, as the teacher in *Mansfield* had, waives remedies available under a collective bargaining agreement or other State laws, rules or regulations. The Commission did not consider this argument in its first decision in view of its decision to restrain arbitration on

Given the intensely fact-specific nature of cases under *N.J.S.A.* 34:13A-27, it is difficult to state with specificity how much of an impact *Mansfield* will have on future cases. It is fair to state that *Mansfield* would not have required a different result in the vast majority of those cases where the Commission has found that a withholding was related to an evaluation of teaching performance. As discussed above, those cases involved a pattern or conduct or a series of incidents, usually documented in evaluations and/or memoranda by administrators. Two recent Commission decisions have considered claims that a withholding was not predominately related to an evaluation of teaching performance because it was based on a single incident.

In *North Caldwell Bd. of Ed.*, P.E.R.C. No. 98-80, 24 *NJPER* 52 (¶29033 1997) the Association argued that the withholding was not predominately related to an evaluation of teaching performance because it was based on one 1996 incident where a teacher allegedly disciplined a student inappropriately. The

other grounds. On remand, the Commission held that it did not have jurisdiction to construe and apply the CEPA waiver provision. *Mansfield Bd. of Ed.*, P.E.R.C. NO. 98-33, 23 *NJPER* 544 (¶28269 1997).

Commission noted that the teacher had been reprimanded for an alleged act of inappropriate student discipline in 1992 and had been directed to develop a professional plan to ensure, among other things, satisfactory performance in classroom management and student-teacher relationships. The Commission held that the case centered on "the appropriateness of a teacher's interactions with her students during class."

In *Millville Bd. of Ed.*, P.E.R.C. No. 98-48, the Association argued that the primary basis for a withholding was a single incident concerning a teacher's in-class comments to a student -- comments which also triggered the teacher's suspension with pay. The Commission found that the withholding was predominately related to an evaluation of teaching performance, noting that the letter recommending the withholding also listed deficiencies in classroom instruction, supervision, and lesson planning -- as well as the incident highlighted by the Association. The Commission held that it need not determine whether every reason cited related to teaching performance given that most of them did.

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 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.