

#241-06

OAL DKT. NO. EDU 9909-00 (http://lawlibrary.rutgers.edu/oal/html/initial/edu09909-00_1.html)

AGENCY DKT. NO. 372-9/00

LORRAINE MOORE, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 STATE-OPERATED SCHOOL DISTRICT :
 OF THE CITY OF JERSEY CITY, :
 HUDSON COUNTY, :
 :
 RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the State-Operated School District (District) pursuant to *N.J.A.C.* 1:1-18.4. Petitioner did not reply to the District's exceptions.

On exception, the District contends that the Administrative Law Judge (ALJ) correctly recited the legal standard for adjudication of increment withholding matters, but then improperly applied it by placing the burden of proof on the District rather than on petitioner and by substituting her own judgment for that of petitioner's evaluators. (District's Exceptions at 2-3). The District further contends that the ALJ held the District's proofs to heightened standards, improperly gave the benefit of equipoise in evidence to the party (petitioner) bearing the burden of proof, and judged the qualifications of District evaluators by her own standards without regard to State certification rules. (*Id.* at 3-5) Finally, the District proffers that the ALJ ignored many of her own factual findings, overlooking demonstrated deficiencies in petitioner's

performance that fully warranted the withholding of her increment. (*Id.* at 5-13) The District concludes:

When the proper standard of review is properly applied to the significant undisputed facts in this case, it readily appears that the petitioner has not proven that there was anything unreasonable or arbitrary in the District's decision to withhold her salary increment for less than satisfactory performance. On the contrary, the evidence in the record provides more than adequate support for the District's conclusion that the petitioner's poor teaching performance did not merit the reward of a salary increment. (*Id.* at 13)

Upon careful and independent review, the Commissioner determines to reject the Initial Decision, substantially for the reasons stated by the District in its exceptions. The Commissioner is compelled to concur with the District that, despite the ALJ's recitation of the correct standard for reviewing the withholding of increments, Initial Decision at 30,¹ the standard was not appropriately applied to the facts at hand. Instead, the Commissioner finds, based on the record before her, that the District's decision to withhold petitioner's increment did not exceed the valid exercise of its discretionary authority and that petitioner has not met her burden of establishing otherwise.

It is by now settled law that actions concerning increment withholding may not be upset unless they can be demonstrated to be patently arbitrary, capricious, unlawful or induced by improper motive, and, further, that the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Educ.*, 60 N.J. Super. 288, 294, 297 (App. Div. 1960) As held by the State Board of Education in *Helen Yorke v. Board of Education of the Township of Piscataway, Middlesex County*:

¹ Although the ALJ inadvertently states that the burden of proving unreasonableness is on "the BOE member," it is clear from the context and subsequent discussion that she is referring to the petitioner.

It is well established that the only question open for review when a board withholds an increment is whether the board had a reasonable basis for its factual conclusion. *Kopera v. West Orange Bd. of Ed.*, 60 N.J. Super. 288, 295-96 (App. Div. 1960). The [adjudicating entity] therefore may not substitute its judgment for either the board or those who made the evaluation, but may only determine: (1) whether the underlying facts were as those who made the evaluation claimed and, (2) whether it was reasonable for them to conclude as they did based upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the *mise-en-scene*. *Id.* At 296-97. (1990 S.L.D. 1818, 1819; appeal A-6083-89T5 dismissed by Appellate Division on January 7, 1991 due to appellant's failure to prosecute)

In the present instance, ALJ held that “the underlying facts pertinent to the evaluations were [not] as referenced in the evaluations,” and that, “even in light of the deference to be given to the evaluators,” petitioner had proven by a preponderance of the credible evidence that the District’s action was arbitrary and unreasonable, thus meeting her burden under *Kopera, supra*. (Initial Decision at 32-33) However, the analysis on which this conclusion rests, set forth in full at 31-32, reveals that in reaching her conclusion, the ALJ effectively shifted the burden of proof from petitioner to the District. For example, the ALJ: 1) faulted District evaluators for failing to support their statements regarding Core Curriculum Content Standards and State mandates with documents at hearing, while making no comparable demand on petitioner; 2) required the District to present affirmative evidence that it had given individual teachers specific instruction as to what was expected of them by way of lesson plans, while ignoring undisputed evidence that general instructions and models were available to all teachers in the district; 3) sought proof from the District that, prior to the evaluations in question, petitioner had been specifically instructed to change her lesson plan format and had further been offered suggestions for improvement, ignoring the fact that the areas of need identified in petitioner’s January 2000 evaluation remained uncorrected at the time of her

subsequent evaluation in May; 4) expected the District to explicate precisely how and by whom the final decision to withhold petitioner's increment was made, notwithstanding the signatures of the Principal and Vice Principal – both of whom had evaluated petitioner – on the summative evaluation document recommending withholding (R-3) and the recognition that any withholding must ultimately be directed by the State District Superintendent, as it was in this instance (R-4); and 5) favored petitioner in matters where her testimony was deemed as credible as that of District's witnesses, rather than giving the benefit of equipoise to the District, as the burden of proof properly demanded. In short, the ALJ's analysis required the District to justify its action, rather than requiring petitioner to prove its arbitrariness.

Similarly, the ALJ made numerous substitutions of her own judgment for that of District evaluators and the State Superintendent. For example, she opined that, contrary to the opinion of evaluators, petitioner's lesson plans *were* sufficiently detailed, and that they comported with District requirements because the District offered no evidence of a specific written mandate for use of particular techniques on a daily or other time-specific basis. She further opined that because petitioner's ratings overall were generally satisfactory or "needing some improvement," withholding of increment was not warranted on balance, preferring petitioner's mechanistic approach to the District's individualized weighing of factors and contexts.² She called into question the judgment of District evaluators – all of them experienced and properly certified – by implying that they were not well-informed or sufficiently qualified, noting that District witnesses

² Petitioner's central argument on appeal is that she "received only one Unsatisfactory out of twelve possible scoring areas" – a reference to the fact that each of petitioner's three evaluations was scored in four overall areas – and that the District offered no evidence that "Needs Improvement" was considered less than satisfactory for purposes of withholding teacher increments. (Petitioner's Post-Hearing Brief at 8-10)

“exhibited a lack of information in certain respects, including familiarity with some of the materials considered, including the format of group presentations” (at 31), and that Vice Principal Pekarsky “did not evidence experience teaching any English courses nor substantial information regarding the English curriculum” (at 31). She suggested that the recommendation to withhold petitioner’s increment was suspect because Pekarsky’s role in the decision-making process was unclear and he was unaware of Principal Dabney’s positive evaluation of October 27, 1999 when he prepared his own negative assessment, overlooking the fact that Dabney concurred with Pekarsky’s summative year-end evaluation despite his own earlier opinion.

Lastly, the ALJ discounted substantial evidence on record supporting the District’s decision to withhold petitioner’s increment. Nothing in the documents presented by petitioner is sufficient to overcome the judgment of seasoned, certified evaluators that petitioner’s lesson plans were not sufficiently individualized for each day, that they were virtually identical for long periods of time, and that their teaching objectives were too broadly stated; it is not dispositive in this regard that the District does not expressly “prohibit” cookie-cutter lesson plans (at 28) or that it uses a plan book format that, in the opinion of petitioner and the ALJ, offers too small a space for the District’s stated requirements (at 30). Likewise, the record is clear that petitioner on the date of her third evaluation attempted to begin a lesson recognized by students as already taught, and was out of class for a significant period of time for an activity that was not reflected in her lesson plan while the balance of the class was left unattended. The record also shows that on two observations petitioner delayed instruction at the beginning of class, and that on the third she assigned lengthy individual projects while engaged at her

desk, then had students deliver oral reports without questions or feedback. Neither was anything presented that would counter the observation that petitioner made little or no attempt to have her students practice with rubrics so as to familiarize them with and prepare them for the types of activities included in State tests.

Under the circumstances, the District cannot be faulted for reasoning that:

[Petitioner] was an experienced teacher, yet she did not prepare adequate and specific lesson plans to indicate what she planned to teach and what the students would be able to learn. She made no effort to improve her lesson planning after receiving Ms. Ruane's evaluation in January 2000 but continued to cut and paste identical lesson plans in her book. She wasted time getting her class started when Ms. Ruane observed her class and was not even present at the start of the class observed by Mr. Pekarsky on May 2, 2000. When she was in the classroom, she did not ask her students questions which would challenge them toward critical thinking, did not conduct activities which would motivate them, did not engage the students in her class --- and did not even teach at all during the class observed by Mr. Pekarsky, but sat at her desk while students worked on projects for over 40 minutes and then let the students make oral presentations, giving them no feedback and asking them no questions.***The petitioner in this case did not merit a salary increment because her lesson planning and instructional techniques were well below the quality which the District had every right to expect from its teaching staff.***
(District's Exceptions at 11-12)

As the District rightly observes, a teacher's performance need not be egregiously deficient in order for an increment to be withheld:

The purpose of a salary increment, as stated in *Barnards Twp. Bd. of Educ. v. Barnards Twp. Ed. Assn*, 79 N.J. 311, 321 (1979), is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." Salary increments are a "reward for meritorious service" and a means for a school district "to ensure a high-quality teaching staff for its students," *Probst v. Haddonfield Bd. of Educ.*, 127 N.J. 518, 527 (1992). An increment can be withheld for performance which simply "did not meet the expectations or standards of excellence required by the Board," *Gnatt v. Manalapan-Englishtown Reg'l School Dist.*, 92 N.J.A.R.2d (EDU) 589, 594. (District's Exceptions at 12)

Here, while petitioner may well be a long-standing and generally capable educator who was clearly doing many things right in the judgment of all three of her evaluators – as evidenced by their positive ratings and comments in reference to those aspects of her teaching *not* judged as unsatisfactory or needing improvement – serious deficiencies in performance were nonetheless apparent during the year in question. Thus, while the District’s action may be viewed as harsh and reasonable minds might differ as to its appropriateness, in light of underlying facts which the record shows to have been as evaluators claimed, the Commissioner cannot find that the District abused its discretion in concluding that petitioner’s 1999-2000 performance overall was not sufficiently meritorious to warrant award of an increment for the subsequent school year.

Accordingly, the Initial Decision of the OAL, recommending that the District’s decision be reversed and that petitioner be awarded a salary increment for the 2000-2001 school year, is rejected for the reasons set forth herein. The District’s action is upheld and the Petition of Appeal is dismissed.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 12, 2006

Date of Mailing: July 12, 2006

³ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*