

BRUNILDA BAUER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL : DECISION

DISTRICT OF THE CITY OF

JERSEY CITY, HUDSON COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner, tenured special education teacher, alleged the District improperly withheld her salary increment for the 1996-97 school year under *N.J.S.A. 18A:29-14*.

ALJ concluded that the action of the District withholding petitioner’s increment should be set aside as arbitrary, capricious and unreasonable, finding that the factual record failed to establish unsatisfactory performance of the degree sufficient to warrant withholding; that the District blurred the distinct roles of providing support to its staff and evaluating teacher performance rendering the process flawed and unfair; and that the District improperly failed to consider the building principal’s favorable recommendation to grant petitioner’s increment. ALJ ordered the District to restore petitioner’s salary increment.

Commissioner reversed the ALJ’s determination, finding that the ALJ utilized a “heightened” standard of review in examining the District’s action in this matter. Instead, he concluded that under the proper standard, the withholding must be upheld as a valid exercise of the District’s discretionary authority. Citing *Kopera*, the scope of the Commissioner’s review in increment withholding matters is “not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions.” Moreover, the burden of proving unreasonableness lies with petitioner. Commissioner determined that the record confirmed that the District had a “reasonable basis” for withholding petitioner’s increment and petitioner did not meet her burden of establishing that the District’s action was arbitrary, capricious or unreasonable. Commissioner reversed ALJ’s decision and upheld the withholding. Petition was dismissed.

APRIL 30, 1998

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent, State-operated School District of the City of Jersey City, and petitioner’s reply thereto were timely filed in accordance with *N.J.A.C. 1:1-18.4*.

The District’s exceptions charge that the Administrative Law Judge (ALJ) in his decision erred in applying the applicable standard of review for increment withholding matters, thereby effectively “treating this case as if it were an action to terminate employment rather than the withholding of an increment***.” (District’s Exceptions at p. 2) In this connection, it posits that the applicable standard under which a district’s decision to withhold the increment of a teaching staff member must be reviewed was established in *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960), wherein the Court stated that the district’s action in this regard

“lies within the area of its discretionary powers,” and “even though that discretion is not completely uninhibited[,] . . .the scope of the Commissioner’s review is, as respondents say, not to substitute his judgment for that of those who made the evaluation but to

determine whether they had a reasonable basis for their conclusions.” *Id.* at 294, 296. Accordingly, the appropriate issues for determination are “(1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts***. *Id.* at 296-297. (District’s Exceptions at pp. 2-3)

Here, the District advances, while correctly reciting the applicable standard of review in his initial decision, the ALJ proceeded to overlook key undisputed facts and “substitute[d] his judgment for that of the District as to the quality of instruction, methods of instructional delivery and the process for evaluating teaching performance[,]” (*id.* at p. 2), finding, for example, “that the supervisor’s comments ‘were not particularly insightful or constructive’ (Initial Decision, page 3), that the supervisor’s criticisms of the petitioner’s teaching appeared ‘trivial or hypertechnical’ (Initial Decision, page 5), and that the petitioner ‘is not the type of unfit or incompetent teacher deserving of condemnation’ (Initial Decision, page 8).” The District observes that “[t]he purpose of an increment withholding is not to ‘condemn’ a teacher as ‘unfit’ or ‘incompetent’” but, rather, increments are intended to reward those who have contributed to the educational process, in the expectation this will contribute to “encouraging *high* standards of performance.” (emphasis in text) (*Id.* at p. 4) Moreover, the District asserts that it is well-settled that

“[t]o withhold an increment***, it is not necessary to show shortcomings on the part of a teacher sufficient to justify dismissal under the Teachers’ Tenure Act,” and “it is not necessary for the Board to have a quantum of proof...sufficient to justify dismissal,” *Hillman v. Caldwell-West Caldwell Bd. of Ed.*, 1977 S.L.D. 218, 224, 226 (Comm’r of Ed.). 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, and which was less than the minimum quality of teaching which the District had every right to expect.

(District’s Exceptions at p. 4)

The District urges that, in this matter, the ALJ's initial decision did not turn on any factual dispute with respect to deficiencies in petitioner's performance as reported on her formal observation reports but, rather, reflects, "the opinions to be drawn from the facts." (District's Exceptions at p. 5) It avers that the uncontested facts as concluded in the ratings of performance factors completed by the special education supervisor demonstrate that petitioner

was not proficient in addressing the individual needs of her special education students, that she was not properly assessing their needs or evaluating their progress, that she was not planning and organizing her lessons effectively to meet the individual needs of the students, and that she was not utilizing effective instructional techniques. (*Id.* at p. 7)

Notwithstanding this, it argues, the ALJ concluded that "the record failed to establish 'unsatisfactory performance of the degree sufficient to warrant the withholding of her increment' because the petitioner 'willingly sought help in refreshing some of her obsolete teaching techniques' and 'is not the type of unfit or incompetent teacher deserving of condemnation.' (Initial Decision, page 8)" (District's Exceptions at p. 7) The District, thus proffers, that such statements by the ALJ clearly evidence that he applied the rigorous standard of review necessitated in a tenure dismissal case rather than the limited standard applicable in an increment withholding matter.

The District next excepts to the ALJ's finding of procedural flaws in the process of evaluating petitioner, specifically, his conclusion that because the special education supervisor, who had provided assistance to petitioner, was the individual who formally evaluated her, "the combination of 'these conflicting functions in one supervisor...tainted the evaluation procedures' (Initial Decision, pages 8-9)" (District's Exceptions at p. 8) The District further advances that the ALJ's "new procedural rule" which, essentially calls for rigid separation of the functions of providing support and evaluating performance, finds no support in statute, regulation or case law.

(*Id.* at p. 11) Rather, it avers, *N.J.A.C.* 6:3-4.1(f) appears to contemplate that “the rendering of assistance is part of, and intertwined with, the process of evaluation.” (*Id.* at pp. 11-12) Moreover, it advances, the ALJ’s rigid separation of these duties can be, pragmatically, difficult to achieve, especially in districts lacking a sufficient number of supervisory or administrative staff. (*Id.*) Most importantly, the District advances, it must be recognized that the purpose of providing assistance to teachers is not, as espoused by the ALJ, to gather “information ‘to be used against her later in increment-withholding proceedings’ (Initial Decision, page 8)” but, rather, to ensure quality education for students, which objective is not advanced by prohibiting an administrator or a supervisor from performing both the assistive and evaluative functions. (District’s Exceptions at p. 12)

Even more disturbing, the District argues, is that in reaching his conclusion “that the District’s ‘blurring of the distinct roles of providing support to its staff and evaluating teacher performance rendered the whole process fundamentally flawed and unfair’ (Initial Decision, page 8)[,] [t]he [ALJ] cited to the case of *Rowley v. Manalapan-Englishtown Bd. of Ed.*, 205 *N.J. Super.* 65, 72 (App. Div. 1985) regarding ‘the administration’s important responsibility “to render positive assistance to the teacher in an effort to overcome his inefficiencies”’ (Initial Decision, page 8)” (District’s Exceptions at p. 9) The District points out that *Rowley, supra*, “was a case involving the DISMISSAL of a tenured teacher on the grounds of inefficiency,” wherein the Court held that “administrative/supervisory staff must make reasonable efforts to provide assistance to a teacher charged with inefficiency during the 90-day period which must be accorded before the tenure charges are determined by the district and filed with the Commissioner.” (*Id.* at p. 10) Again, it stresses, the within case is not a termination of employment matter but, rather, an increment withholding case, where the District is under no obligation to provide an individual assistance prior to acting to withhold her increment. (*Id.*)

The District urges that after providing assistance to petitioner, the supervisor conducted two formal evaluations of her performance, one on March 6, 1996 (Exhibit R-6), and the other on April 23, 1996 (Exhibit R-7), and, as even the ALJ concedes on page 4 of his initial decision, the District's determination to withhold petitioner's increment was based on the two formal evaluations and not on the prior visits. (*Id.* at p. 8) Despite this acknowledgment, the District asserts that "the ALJ characterized Mr. Van Note's action in preparing reports of his five visits as 'secretly reporting on Bauer's areas of weakness to be used against her later in increment-withholding proceedings' (Initial Decision, page 8)", *id.* at p. 9, a characterization which the District posits is blatantly incorrect. In this regard, it advances that, as the reports of Mr. Van Note's visits were never intended to be "formal evaluations," there was no necessity for him to share these with the petitioner. Additionally, it observes, the decision to withhold petitioner's increment was made by the State District Superintendent months after the two formal evaluations had been conducted. (*Id.*)

Lastly, the District argues that the ALJ's reliance on its failure to consider the building principal's favorable recommendation with respect to the granting of petitioner's increment as further evidence of improper conduct on behalf of the District in this matter is misplaced. It points out that such recommendation of the principal was not signed off on by the principal and petitioner until June 19, 1996, after the decision to withhold petitioner's increment had been made by the superintendent and the day after this determination was communicated to petitioner by letter sent on June 18, 1996. (*Id.* at p. 13)

In conclusion, the District argues "[w]hen the proper standard of review is properly applied to the undisputed facts in this case, there is surely more than an adequate and reasonable basis to support the withholding of petitioner's increment for her lack of a consistent

level of teaching performance meeting minimal standards of quality.” (District’s Exceptions at pp. 7-8)

Petitioner’s reply exceptions support the ALJ’s “well thought and well written Initial Decision” (Petitioner’s Reply Exceptions at p. 1), which correctly concludes that petitioner “clearly met” her “heavy burden” of proving that the District’s action in withholding her increment was arbitrary, capricious and unreasonable. (*Id.* at p. 3)

Upon independent and comprehensive review of the within record, which it is noted did not include transcripts of the hearing below, the Commissioner is compelled to reverse the determination of the ALJ. The Commissioner fully concurs with the District’s advanced exception argument, that in reaching his determination herein, the ALJ, although recognizing the Commissioner’s circumscribed standard of review in increment withholding matters, erroneously proceeded to apply a heightened standard of review. The Commissioner finds, contrary to the conclusion of the ALJ, that when the District’s action of withholding petitioner’s increment for the 1996-97 school year is examined under the proper standard, it must be upheld as a valid exercise of that body’s discretionary authority.

As was correctly argued in the District’s exceptions, the scope of the Commissioner’s review in increment withholding matters is “not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions.” (*Kopera, supra*, at 296) As such, there are *only two* determinations to be made when reviewing a District’s decision to withhold a teaching staff member’s increment, *i.e.*, (1) whether the underlying facts were as those who made the evaluations claimed, and (2) whether it was unreasonable for them to conclude as they did based upon those facts. Moreover, the burden of proving unreasonableness lies with petitioner. (*Id.* at 296-297) Simply stated, under the applicable standard of review in increment withholding matters, neither the ALJ

nor the Commissioner is empowered to redetermine for himself whether the petitioner had, in fact, been unsatisfactory as a teacher, as this particular issue is irrelevant as a matter of law.

The Commissioner finds that the record in this matter evidences no factual dispute that petitioner's performance as a special education teacher was deficient to the extent determined by the District, and that petitioner recognized that assistive intervention was necessary.¹ Additionally, the record confirms that after receiving five assistive sessions with the special education supervisor, evaluations conducted by the supervisor on March 6, 1996 and April 23, 1996, establish that although petitioner's performance had improved somewhat between the first and second evaluations, her overall performance still fell short of the standards which the District finds "adequate" for one of its special education teachers. As such, it is fully evident that the District had a "reasonable basis" for determining to withhold petitioner's increment for the 1996-97 school year, and, consequently, pursuant to *Kopera, supra*, the Commissioner's review of this matter must conclude.

The Commissioner specifically disavows the ALJ's conclusion that there is an "inherent conflict" when assistive and evaluative functions are performed by a single individual. Rather, he agrees with the District's advanced observations in this regard that a rigid separation of these functions is not defensible legally or pragmatically nor does it serve to advance the paramount objective of providing a high quality of educational services for students.

Based on the above, the Commissioner concludes that the within petitioner has not met her burden of establishing that the District's determination to withhold her 1996-97 increment

¹ It is instructive to note that petitioner's perceived deficiencies were in areas of planning and organizing her lessons and utilizing effective instructional techniques to adequately address the particularized needs of her special education students. As noted in a footnote on page 4 of the ALJ's initial decision, delivering instruction which is tailored to address and meet the specific needs and abilities of children with learning disabilities is a particular obligation of a special education teacher.

was arbitrary, capricious or unreasonable, procedurally or substantively, and, therefore, the determination must be sustained.

Accordingly, the initial decision of the OAL is reversed for the reasons articulated above and the within Petition of Appeal is hereby dismissed.²

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 30, 1998

² This decision, as the Commissioner's final determination in the instant matter, 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. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.