

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

SYNOPSIS

Petitioner, speech-language specialist, contended the District improperly withheld his salary increment for the 1996-97 school year. District was dissatisfied with petitioner’s performance based on his failure to complete paperwork (departmental forms, lesson plans, etc.).

ALJ concluded that the District’s action withholding petitioner’s increment should be set aside as arbitrary, capricious and unreasonable. ALJ found that petitioner took a while to conform to the new reporting system but by the end of the year he had corrected his behavior. ALJ also found that the allegations against petitioner “implicated relatively insignificant problems” in completing paperwork rather than his ability as a speech-language specialist, the quality of his services or his willingness to cooperate. ALJ ordered the District to restore petitioner’s 1996-97 salary increment.

Commissioner reversed the initial decision, finding that the ALJ, in reaching his determination, impermissibly applied a “heightened” standard of review when examining the District’s action and erroneously interjected his own policy and value judgments for those of the District. Commissioner found that when the District’s action of withholding was examined under the proper standard, it had to be upheld as a valid exercise of that body’s discretionary authority. 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*) The record established that the withholding was based on validly perceived deficiencies in petitioner’s performance during the 1995-96 school year. Petitioner was aware of the deficiencies and he was obligated to correct them as were all the speech therapists supervised by the same individual. Thus, the Commissioner concluded that Petitioner Zampella did not meet his burden of establishing that the District’s action in withholding his 1996-97 increment was arbitrary, capricious, unreasonable or an abuse of its discretion. Petition was dismissed.

JULY 14, 1998

OAL DKT. NO. EDU 5144-97
AGENCY DKT. NO. 414-9/96

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The District requested an extension of time within which to file exceptions in this matter as it was awaiting receipt of hearing transcripts. Such extension was granted and the District's exceptions were timely filed in accordance with the established timelines. Reply exceptions of petitioner were, likewise, timely filed.

The District's exceptions charge that the Administrative Law Judge (ALJ) herein erroneously applied the legal standard required in the examination of an increment withholding matter, effectively holding the District to an impermissible "heightened" standard. (District's Exceptions at p. 3) It additionally contends that he neglected to identify and address the proper issues, ignored or misstated essential facts, and erroneously substituted his judgment for that of the District when he determined that the District's withholding of petitioner's salary increment was unreasonable. (*Id.* at p. 2) The District posits that the standard of review applicable in increment withholding matters is clearly delineated in *Kopera v. West Orange Bd. of Ed.*, 60 N.J.

Super. 288 (App. Div. 1990), “...the scope of the Commissioner’s review 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. *Id.* at 294, 296” (District’s Exceptions at p. 4) Rather, it asserts that, pursuant to *Kopera, supra*, “***the only two 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, bearing in mind that they were experts, admittedly without bias or prejudice and closely familiar with the mise en scene...’ *Kopera, supra*, at 296-297.” (*Id.*) Furthermore, it urges, it is without question that “[a]t all times ‘the burden of proving unreasonableness is upon the [petitioner].’ [*Kopera*] at 297.” (*Id.*)

The District advances that the initial decision fully evidences that the ALJ was preoccupied with “pointing out how ‘fully qualified’ and ‘highly regarded’ Mr. Zampella was, as though Mr. Zampella’s reputation was hanging in the balance (Initial Decision, p. 3).” (District’s Exceptions at p. 5) It proffers that such consideration was irrelevant in that “***the 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 thereby encouraging high standards of performance***.” (citations omitted) (*Id.*) Moreover, the District advances that it is well-settled that to withhold an increment

“***it is not necessary to show shortcomings on the part of the 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 (Commissioner of Education). 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, 595. (District’s Exceptions at p. 4)

The District asserts that the decision to withhold petitioner's increment was based on evaluations performed by his immediate supervisor which establish that "[d]uring the 1995-96 school year, Mr. Zampella failed to provide any evidence of adequate lesson planning, failed to complete his speech evaluations on time and failed to submit status reports and tracking logs to his supervisor on time." (District's Exceptions at p. 6) It proffers that, notwithstanding the ALJ's determination, the "reasonableness" of its action withholding petitioner's increment for "these significant deficiencies in performance" is fully supported by the within record. (*Id.*) The District urges that there are only three relevant issues which the ALJ should have examined when reviewing the reasonableness of its citing petitioner for his deficiencies with respect to lesson plans, "1) whether Mr. Zampella's supervisors had the authority to require lesson planning; 2) whether Mr. Zampella was informed of the requirement of lesson planning; and 3) whether Mr. Zampella provided to his supervisors any evidence of adequate compliance with that requirement." (District's Exceptions at pp. 7-8) The District makes extensive citation to hearing testimony, to a large extent that of petitioner, and record exhibits to substantiate its contention that this examination of the record vis-à-vis each of these relevant issues fully establishes the reasonableness of its action. It argues that it is particularly "disturbing" that, notwithstanding that petitioner was given "advance[d] notice of each evaluation that [was to be conducted,] ***[he] still did not make any effort to have an adequate lesson plan to present to either Mr. Podhoretz [his supervisor] or Principal Strynar." (*Id.* at p. 12)

The District advances that the ALJ's "preoccupation" with the fact that other supervisors may not have been as diligent as Mr. Podhoretz in enforcing the lesson plan requirement is of no moment in this matter. It argues that the only relevant fact, which it proffers is uncontroverted, is that "Mr. Podhoretz was consistent in his implementation and enforcement

of the lesson plan requirement among all of the speech therapists he supervised.***” (District’s Exceptions at pp. 12-13) It asserts that whether other supervisors enforced this requirement with their employees, or recommended withholding of an individual’s increment for deficiencies in this area is of no concern “to the independent decision making” which occurred here. (*Id.*)

The District strongly objects to the ALJ’s “personal judgment [call]” in his initial decision that lesson plans should not be required of speech therapists, and “that the use of so-called ‘clinical notes’ was a better method of planning.***” (*Id.* at pp. 14-15) This position, it argues, is diametrically opposed to the District’s judgment that lesson plans are at the core of delivering speech services to the students, (*id.* at p. 14) and is concrete evidence of the ALJ’s erroneous interjection of himself into the policy decision making of the District, specifically precluded by *Kopera, supra.* (*Id.* at p. 15) Moreover, the District advances, the ALJ’s apparent implication that “actual harm” must inure to a student before the District may address a teaching staff member’s deficiencies, as evidenced by his comment on page five of the initial decision where he stated, “[m]ore importantly, there is no evidence that any child suffered as a result of Zampella’s alleged failure to comply with District policy[,]” is abhorrent to the District which takes the “unwavering position” that it is essential to address performance deficiencies before any student is actually harmed. (District’s Exceptions at p. 16) The District advances that petitioner, in his own testimony, “admitted that he failed to provide any evidence of adequate lesson planning throughout the entire 1995-96 school year even though he was fully aware it was his responsibility to do so.” Citing *Caffrey v. New Providence Bd. of Ed.*, 1985 S.L.D. (Dec. 30) as its authority, the District argues that this deficiency of petitioner, standing alone, is sufficient to justify the withholding of his increment. (*Id.* at p. 17)

With respect to petitioner's failure to submit speech evaluations, the District strongly excepts to the ALJ's determination that its proofs in this area were based entirely on hearsay and that it had presented no legally competent evidence that petitioner failed to submit such speech evaluations on time. It posits that it is incomprehensible that the testimony of Principal Strynar, as well as his letter to Mr. Zampella, R-11 in evidence, can be considered hearsay. (District's Exceptions at p. 18) Further, it cites specific hearing testimony which, it alleges, confirms that "Mr. Zampella admitted that other Child Study Team members complained about his failure to complete his evaluations on time." (*Id.*) It asserts that the ALJ's findings in this area are simply inconsistent with the existing record. (*Id.* at p. 19)

Regarding petitioner's failure to submit his tracking logs and statistics in a timely manner, the District cites to hearing testimony and exhibits to substantiate its contention that this documentation, necessary for submission to the State and Federal government in order to receive reimbursement for services provided, was required to be submitted to Mr. Podhoretz the first day of the month. (*Id.* at p. 20) It further cites numerous record exhibits representing communications to petitioner and other speech therapists reminding them of this requirement. (*Id.* at p. 21) The District alleges that "[i]n spite of these numerous warnings, Mr. Zampella failed to timely submit this documentation***." (*Id.* at p. 21) It strongly objects to the ALJ's finding herein that "since [petitioner] apparently corrected his lateness problems by May 3, 1996, the time of his second evaluation by Mr. Podhoretz, the District's concerns no longer had any merit.***" It advances that, based on the ALJ's skewed logic, "a District would now be obligated to award a staff member with an increment even though the staff member failed to perform sufficiently for up to 9 months of the school year." (*Id.*)

In summary, the District's exceptions urge that its actions in withholding petitioner's increment, when examined under the proper standard of review, were entirely reasonable and, therefore, a valid exercise of its discretionary authority. (District's Exceptions at p. 5) It advances that the ALJ's determinations to the contrary were based solely on his impermissibly imposing his own judgment in this matter, in violation of the well-established standard of review under *Kopera, supra*, and the District, therefore, seeks the Commissioner's reversal of the decision.

In response, petitioner argues that he clearly met his "heavy burden" of establishing that the District's action in this matter was unreasonable and the ALJ "did not overstep the circumscribed standard of review" applicable in increment withholding matters. (Petitioner's Reply Exceptions at p. 2) He avers that the ALJ, after considering the credibility of the witnesses and their testimony, rightly concluded "that the deficiencies complained of, and the basis of the denial of increment were not significant enough to warrant the denial of an increment." (*Id.*)

Upon a thorough and independent review of the record in this matter,¹ the Commissioner determines to reverse the initial decision in that he fully concurs with the District's exception argument that the ALJ, in reaching his determination herein, impermissibly applied a "heightened" standard of review when examining the District's action and erroneously interjected his own policy and value judgments for those of the District. The Commissioner finds 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.

¹ It is noted that the within record included a transcript of the hearing below conducted on February 18, 1998.

As recited in the initial decision and 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 294. 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. Additionally, the burden of proving unreasonableness lies with the petitioner. *Id.* at 296-297. As was recently noted by the Commissioner in a companion case to the instant matter, *Brunilda Bauer v. State-operated School District of the City of Jersey City, Hudson County*, decided by the Commissioner April 30, 1998, wherein the Commissioner in reversing the ALJ's decision finding the increment withholding in that matter unreasonable, 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." (*Bauer, Slip Opinion* at p. 19)

The Commissioner is in agreement with the exceptions advanced by the District that the record amply establishes that its action in withholding petitioner's increment was based on validly perceived deficiencies in petitioner's performance during the 1995-96 school year. Clearly, despite repeated directives and reminders to do so from his immediate supervisor and the school principal, (see Exhibits R-1, R-2, R-3, R-4, R-5, R-6, R-7, R-9, and R-11), petitioner failed to provide evidence of adequate lesson planning, failed to complete his speech evaluations on time and failed to submit timely status reports and tracking logs required by his supervisor.

Irrespective of whether petitioner, or the ALJ for that matter, consider the timely submission of reports to be a “relatively insignificant problem” (initial decision at p. 9), petitioner was aware that this activity was part of his job responsibilities and he was clearly placed on notice, and the record confirms that he understood, that his supervisor and the principal regarded his deficiencies in this area as shortcomings in his performance which he was, therefore, obligated to correct. The Commissioner also concurs with the District’s observation that the fact that other supervisors in the District may not have been as assiduous in their enforcement of the requirements of District policy is of no consequence in this matter. Petitioner has not alleged, nor does the record in any way indicate, that his supervisor did not uniformly enforce the District’s requirements among all of the speech therapists he supervised and, therefore, any declaration in the initial decision that the District engaged in disparate treatment of staff members in similar situations is without foundation.

Based on the above, the Commissioner concludes that the within petitioner has not, as required, met his burden of establishing that the District’s action in withholding his 1996-97 increment was arbitrary, capricious, unreasonable or an abuse of its discretion and, therefore, such action must be sustained.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 14, 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.