

NORTH BERGEN FEDERATION OF	:	
TEACHERS, LOCAL 1060, AMERICAN	:	
FEDERATION OF TEACHERS, AFL-CIO,;	:	COMMISSIONER OF EDUCATION
AND EILEEN WENDE,	:	
	:	DECISION
PETITIONERS,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF NORTH BERGEN,	:	
HUDSON COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioning clerk, along with her union, contested the withholding of her increment for the 1997-98 school year.

ALJ found Petitioner Wendé to be a credible witness and the Board's witness to be less credible. Moreover, based on the fact that Wendé's records do not show a record of excessive absenteeism and that her work that was criticized as poor was work she had been rarely required to do, the ALJ concluded that the Board's determination not to give Petitioner Wendé an increment in 1997-98 was patently arbitrary and capricious. ALJ concluded that the Board's determination was not for good cause and must not be upheld. ALJ ordered the Board's denial reversed and directed the Board to reinstate the increment retroactive to the proper date.

Commissioner set aside the Initial Decision since the gravamen of the challenge at the OAL ultimately concerned the Board's discretionary authority to withhold pursuant to *N.J.S.A. 18A:29-14*. Given the established case law in this area, and mindful of the amendments to *N.J.S.A. 34:13A-1 et seq.*, the New Jersey Employer-Employee Relations Act, which appear to provide for binding arbitration of disputes over withheld increments for noncertified employees within a bargaining unit, the Commissioner was not persuaded that he has the jurisdiction to hear and determine this matter. Therefore, the Commissioner remanded this matter to OAL for briefing and argument on the issue of jurisdiction, and for additional fact-finding, as may be necessary upon the exploration of such jurisdictional issues, in order to resolve this matter.

October 28, 1999

OAL DKT. NO. EDU 9838-97
AGENCY DKT. NO. 290-8/97

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner is compelled, for the reasons set forth below, to set aside the Initial Decision of the Administrative Law Judge (ALJ). The within matter concerns a tenured clerk whose increment was withheld by the Board for the 1997-98 school year upon the Board's determination that Petitioner Wende's absences were excessive and were negatively impacting the District, and because the Board found Petitioner Wende's job performance to be unsatisfactory. In this connection, although Wende, along with Petitioner North Bergen Federation of Teachers, her bargaining agent, initially asserted broad bases for their claim that

the Board's action was improper, the gravamen of the challenge at the OAL ultimately concerned the Board's discretionary authority pursuant to *N.J.S.A.* 18A:29-14.

Within the context of a statute addressing compensation issues pertaining to "teaching staff members," *N.J.S.A.* 18A:29-1 *et seq.*, local boards are authorized by *N.J.S.A.* 18A:29-14 to withhold, for inefficiency or other good cause, the employment or adjustment increment, or both, of any "member" in any year. That "member" may appeal from such action to the Commissioner of Education. Prior decisional law has established that *N.J.S.A.* 18A:29-4.1, the statute permitting local boards to adopt salary policies for one, two or three years and schedules for all full-time "teaching staff members" concerns only those persons required to be licensed to hold their positions. (*See Bd. of Ed. of Tp. of Neptune v. Neptune Tp. Ed.*, 144 *N.J.* 16, 34 (1996).) This statute is to be read *in pari materia* with *N.J.S.A.* 18A:29-14, the statute allowing school boards to withhold increments from members in a given school year because of inefficiency or other just cause; "they are part of a common statutory enactment and should be reconciled to the extent possible." *Probst v. Board of Educ. of the Borough of Haddonfield, Camden County*, 249 *N.J. Super.* 222, 228 (App. Div. 1991) (emphasis added).

Given the established case law in this area, and mindful of the amendments to *N.J.S.A.* 34:13A-1 *et seq.*, the New Jersey Employer-Employee Relations Act, which appear to provide for binding arbitration of disputes over withheld increments for noncertified employees within a bargaining unit, the Commissioner is not persuaded that he has the jurisdiction to hear and determine the within matter. However, since this threshold issue was not raised at the OAL and was not, therefore, briefed before the ALJ, the Commissioner finds it necessary to remand this matter for briefing and argument on the issue of jurisdiction, and for additional fact-finding,

as may be necessary upon the exploration of such jurisdictional issues, in order to resolve this matter.

Accordingly, the initial decision is set aside and this matter is remanded to the OAL consistent with the within parameters.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 28, 1999

* 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.