

JENNIFER BARRETT, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE CITY : DECISION
 OF ELIZABETH, UNION COUNTY, :
 :
 RESPONDENT. :
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SYNOPSIS

Petitioner – a tenured assistant superintendent, employed in various capacities by respondent since 1967 – appealed the district’s withholding of her salary increment for the 2007-2008 school year. Petitioner contended that the Board’s withholding of her increment was arbitrary, capricious and unreasonable, based primarily on the fact that a February 2007 performance review – consisting of a checklist of seventeen “Performance Indicators” – rated her satisfactory in all areas. The Board contends that the increment withholding was justified, predicated upon petitioner’s unsatisfactory supervision of school administrators during the 2006-2007 school year.

The ALJ found, *inter alia*, that: an individual contesting a salary increment withholding has the burden of proof to demonstrate that the Board’s decision was unreasonable, arbitrary, without rational basis or induced by improper motives; petitioner’s supervisor – the superintendent of schools – had numerous conversations with her during the 2006-2007 school year, during which he emphasized that petitioner was not supervising the schools well enough and continued to need too much direction from him; petitioner was aware that the superintendent felt her performance was deficient with respect to supervision and evaluation of principals, and acknowledged having those conversations with him throughout the year; accordingly, petitioner has not met her burden of establishing that respondent’s action was arbitrary, capricious, or unreasonable; and respondent had a reasonable basis for its action. The ALJ concluded that the respondent appropriately withheld petitioner’s salary increment for the 2007-2008 school year.

Upon independent review and consideration, the Commissioner adopted the Initial Decision as the final decision in this matter, finding that multiple comprehensive discussions took place between petitioner and the superintendent of schools concerning his assessment of her work and his expectations for firmer leadership and improvement in the proactive management of her staff. Accordingly, respondent’s action in withholding petitioner’s salary increment for the 2007-2008 school year was upheld, and the petition dismissed.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 18, 2010

OAL DKT. NO. EDU 11723-07
AGENCY DKT. NO. 278-9/07

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Petitioner, an assistant superintendent in the Elizabeth school district, challenged respondent's action in determining not to award her a full salary increment for the 2007-2008 school year. The Administrative Law Judge (ALJ) before whom the hearing was held in the Office of Administrative Law (OAL) determined that respondent's action was not arbitrary, capricious or unreasonable and dismissed the petition. Upon consideration of both the record that was before the ALJ and the substance of petitioner's exceptions, the Acting Commissioner adopts the Initial Decision as the final decision in this matter.

At the outset, petitioner's exceptions to the Initial Decision must be evaluated in the context of her burden of proof, *i.e.* she must persuade the Acting Commissioner that respondent's actions were arbitrary, capricious, and/or unreasonable.

In the first of eight exceptions, petitioner appears to contend that an increment withholding was inconsistent with her performance report, and that the ALJ should therefore have found respondent's action in withholding her increment arbitrary, capricious and unreasonable. She focuses on the one-page performance report, dated February 23, 2007 (Petitioner's Exhibit P-10), consisting of a list of seventeen "Performance Indicators" which may be checked "Satisfactory" or "Needs Improvement." The "Satisfactory" boxes for all seventeen items were

checked. However, the record indicates that petitioner's supervisor, District Superintendent Pablo Munoz, had: 1) discussed with petitioner areas in which she needed improvement; 2) given her goals; 3) explained the rationale of the goals; and 4) provided feedback.

For example, an area of concern memorialized in petitioner's May 2006 Performance Improvement Plan (PIP), Petitioner's Exhibit P-9, was "Thorough & Efficient Management." The designated course of improvement was petitioner's creation and implementation – during the 2006-2007 school year – of accountability tools to ensure that her staff would work toward the strategic plan goals of promoting excellence and closing the achievement gap in the district schools. The PIP was signed by petitioner. (*Ibid.*)

Nine months later, in a March 15, 2007 follow-up memorandum to petitioner's February 23, 2007 performance report conference (Petitioner's Exhibit P-11), Munoz reiterated his concern with petitioner's management performance. In the section entitled "Areas of Future Focus," Munoz identified the need for petitioner to make decisions, accept responsibility and be firm. (*Ibid.*) In the section entitled "Areas of self-reflection," Munoz urged petitioner to regard student achievement as the rationale behind professional (staff) development. And in the section entitled "General Comments and Questions," he articulated the need for petitioner to "create a more proactive agenda with principals" and indicated that her principal evaluations were too soft in light of the student test scores. He directed her to update him more frequently; expressed his desire that she be more commanding; and asked her to reflect on what she was doing to institutionalize excellence and eliminate the achievement gap.¹

Petitioner's April 30, 2007 PIP for action in the 2007-2008 school year (Petitioner's Exhibit P-12) also reflected Munoz's continuing concern with "Thorough and Efficient Management," and an additional concern with petitioner's "Leadership Characteristics." The goals

¹ At the OAL hearing, petitioner acknowledged that the foregoing was discussed at her February 23, 2007 conference with Munoz. (1T124)

in the PIP, which was signed by petitioner, all related to petitioner's responsibility to make sure the principals knew their roles in monitoring and improving teaching and learning.

Additionally, as noted in the testimony of Munoz and Aida Garcia, Assistant Superintendent for Human Resources, Munoz's view that the principals were responsible for student achievement as measured by certain standardized tests – and that petitioner was responsible to evaluate whether the principals were properly executing that responsibility – was stressed in conversations between Munoz and petitioner, and was reinforced at the weekly “cabinet” meetings that Munoz held with the assistant superintendents. (2T15-17; 3T114-116)² In light of the foregoing, petitioner may not rely exclusively on the February 23, 2007, one-page performance report to show that her increment withholding was inconsistent with Munoz's verbal and written communications to her about her performance.

In her second exception, petitioner expresses her disagreement with Munoz's assessment of her performance and argues that – even if his assessment had merit – she was not given enough time to improve. More specifically, she contends that the period of time between Munoz' March 15, 2007 memorandum and the June 26, 2007 “Rice notice” alerting her that the Board of Education planned to discuss her employment (Petitioner's Exhibit P-14) was insufficient to allow her to correct deficiencies.

As to the first of petitioner's assertions, it is neither the ALJ's nor the Acting Commissioner's task – in the context of a controversy concerning the withholding of an increment – to second guess a superintendent's philosophy of educational management and his expectations for the management methods of his assistants. Rather, the question for the ALJ and

² 1T denotes the transcript of the September 11, 2008 hearing in the OAL.

2T denotes the transcript of the June 23, 2009 hearing in the OAL.

3T denotes the transcript of the October 1, 2009 hearing in the OAL.

4T denotes the transcript of the February 23, 2010 hearing in the OAL.

Acting Commissioner is whether Munoz's – and the respondent Board's – actions were arbitrary and capricious.

Munoz testified at length about his training for the superintendency of a large urban district, and his consequent belief that administrator accountability is the key to pulling up school districts that are not properly performing. Munoz saw the mission of the Assistant Superintendent of Schools – the position held by petitioner – as one of constant observation of what was actually occurring in the schools, and of how the administrators were dealing with same. Munoz communicated this to petitioner on multiple occasions. (*See, e.g.* 3T43; 3T103-104)

As to the second of petitioner's assertions in this exception, the record indicates that Munoz had had concerns with petitioner's management skills since at least May of 2006. (Petitioner's Exhibit P-9) Those concerns were reiterated at petitioner's Performance Report conference on February 23, 2007, which was over four months prior to her June 26, 2007 "Rice notice." The Acting Commissioner cannot, under those circumstances, deem arbitrary and capricious either Munoz's conclusion that in four months petitioner had not made sufficient progress, or respondent's determination to accept Munoz's recommendation regarding the withholding of petitioner's increment.

In her third exception, petitioner contends that the ALJ should have found that it was arbitrary, capricious and unreasonable for Munoz to base his recommendation against her salary increment upon the results of annual student achievement testing, which testing determined how many of the Elizabeth Schools had achieved adequate yearly progress (AYP). However, while Munoz freely asserted that student achievement would be the yardstick against which administrative employee performance would be measured, the record reveals specific, independent grounds for his recommendation against an increment for petitioner.³

³ *See, e.g.* the above discussion of petitioner's first exception.

For example, as referenced above, there are multiple references in Munoz's testimony to his concerns about petitioner's supervision and evaluation of the principals and other administrative staff for whom she was responsible, *see, e.g.* 3T79-80; 3T98-99; 3T103. In that vein, both Munoz and Garcia testified that an investigation had revealed that at least one of the principals whom petitioner supervised had not evaluated staff. Nonetheless, petitioner had not recommended a withholding of the principal's increment. (2T31-34) Indeed, despite the fact that in the 2006-2007 school year many of the Elizabeth schools were in need of improvement, petitioner brought no staff deficiencies to Munoz's attention (3T77), and submitted first-rate evaluations of her staff's performance. (3T80-81) Ultimately, Munoz took the initiative to recommend that increments be withheld from both petitioner and certain principals, assistant principals, house directors and other staff, and respondent accepted the recommendation. (Petitioner's Exhibit P-15 [the Board resolution withholding increments for petitioner and several other certificated employees for the 2007-2008 school year]; 2T30-32)

Munoz also felt that petitioner was not sufficiently diligent about communicating significant issues to him. He was troubled when he heard from the community about problems of which petitioner should have apprised him. (3T101) In summary, the Acting Commissioner cannot conclude that petitioner's increment was withheld due simply to student test results. Ironically, it was the AYP results that restored to petitioner half of her increment.

Petitioner's fourth exception urges that the ALJ erred in finding that petitioner had responsibility for the performance of the high school "House Directors."⁴ She reasons that since § 14 of her job description (Petitioner's Exhibit P-5) directs only that she evaluate "principals," and since

⁴ It appears undisputed that Elizabeth High School was comprised of several buildings called "Houses," each of which had a House Director who was in charge of the house in the same way that the principals of the Elizabeth elementary schools were in charge of their school facilities, employees and students. The titular "Principal" of Elizabeth High School – to whom each house director reported – was located in a separate office and was not physically in charge of a school facility. Thus, the house directors were assistants to the principal but served as functional equivalents of building principals.

the principal of Elizabeth High School formally evaluated the house directors, she should not have been held accountable for any lapses by house directors.

However, § 17 of petitioner's job description indicates that one of petitioner's duties was to "[m]ake recommendations to the Superintendent relative to appointments, transfers, promotion, and discipline of certified employees." (Petitioners Exhibit P-5) Accordingly, Munoz testified that petitioner was supposed not only to evaluate principals, but also to make ongoing assessments of vice principals and instructional coaches – thereby monitoring the three levels of leadership and ensuring that the "right people" were leading the schools. (3T59)

If a principal was not properly evaluating his or her subordinates, it was not only the petitioner's responsibility to correct the principal, but also see to it that the principal's subordinates were properly performing their duties. (3T74) Thus, if a principal was not addressing a failure on the part of a vice principal or other subordinate to do evaluations, it was petitioner's responsibility to see that the subordinate was corrected by the principal or by petitioner herself. (3T77) Petitioner herself testified that she could "do evaluations of all administrators and teachers and any of the people working with our students." (1T87-88)

Further, the record reveals that Munoz periodically directed Garcia to run off reports identifying district staff whose evaluations had not been submitted and the principal, vice principal, director or supervisor who was responsible for the evaluation. (3T74) The reports were given to petitioner for follow-up, *i.e.* discussions with and/or discipline of the staff members who had failed to conduct the evaluations. (*Ibid.*) Where no improvement occurred, petitioner was supposed to recommend the withholding of the staff members' increments. (3T76) This was the system in 2006-2007. (3T75-76) The Acting Commissioner must conclude from this that the ALJ did not err in finding that petitioner was responsible for addressing lapses in the performances not only of

principals but also of house directors and other administrators, and was given the information she required to identify the staff who needed correction.⁵

Petitioner's contention in her sixth exception that she had not been apprised – prior to the withholding of her increment – of Munoz's concern about her supervisory performance, and that the ALJ therefore erred in so finding, has been addressed in the discussion of petitioner's first and second exceptions. The Acting Commissioner will not revisit the issue.

Petitioner's seventh exception quotes dictum from the Initial Decision – wherein the ALJ observes that contrary to the expectations of some employees, increments are not automatic – and characterizes the passage as error. The Acting Commissioner finds the passage unnecessary to the adjudication of the issues in the instant controversy, and does not assume that petitioner expected increments without meritorious performance.

However, petitioner also argues in this exception that she should have been evaluated pursuant to her own definition of student achievement, notwithstanding that her supervisor had made his standards clear to her and the other staff. The record shows that she knew or had reason to know that student test results – the measure used by the State to assess school and district performance and perhaps the only objective way of measuring both student achievement and the efforts of teachers and administrators – would be the polestar against which staff performance would be considered.

Further, as referenced above, multiple comprehensive discussions took place between Munoz and petitioner concerning his assessment of her work and his expectations for firmer leadership and improvement in the proactive management of her staff. Munoz's testimony made it clear that in the position of Assistant Superintendent for Schools, as opposed to Assistant Superintendents for Human Resources, Community Outreach or Instructional Divisions, staff management was central to the mission of improving student achievement – as reflected in

⁵ Petitioner argues in her fifth exception that she did participate in the process of withholding the increment of one principal. The record shows that this participation was not on her own initiative, but rather at the direction of Munoz. (1T156) Accordingly, the argument does not help petitioner.

testing scores. It is consequently unremarkable that it would be the most important component of her performance evaluation.

In summary, the Acting Commissioner concurs with the ALJ that petitioner failed to show that Munoz's recommendation against an increment for her – and respondent's action in withholding the increment – was arbitrary, capricious or unreasonable. Consequently, the action is upheld, and the petition is dismissed.⁶

IT IS SO ORDERED.⁷

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 18, 2010

Date of Mailing: October 19, 2010

⁶ As the validity of the entire increment withholding is upheld, there is no need to address the argument in petitioner's eighth exception that no authority exists to award partial increment withholdings. That issue, in any event does not appear to have been set forth in petitioner's pleadings.

⁷ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*)