

THOMAS MORRIS, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 STATE OPERATED DISTRICT OF THE CITY : DECISION
 OF NEWARK, ESSEX COUNTY, :
 :
 RESPONDENT. :
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SYNOPSIS

Petitioner – a tenured teaching staff member employed by the District since February 1995 – contended that the Board failed to properly adjust his salary following the withholding of his increment for the 2005-2006 school year. Petitioner argues that the District must properly adjust his salary in accordance with the school laws and commensurate with the step he attained by longevity, and that he is entitled to the salary for that step minus the increment withheld in 2005-2006.

The ALJ found, *inter alia*, that: the decision in *Probst v. Board of Education of the Borough of Haddonfield, Camden County*, 127 N.J. 518 (1992) is controlling in this matter; the withholding of an increment is a one-year penalty and if the teacher’s performance in subsequent years is satisfactory, the teacher earns the increment for the year in which performance is acceptable; and a teacher’s salary who has had an increment withheld is determined by taking the salary earned during the prior year and adding the increment for the current year. The ALJ concluded that an increment withholding does not equal the loss of a step on a teachers’ salary guide, and ordered that petitioner’s salary for the years subsequent to the withholding should be recalculated and the difference paid to petitioner.

The Commissioner adopted – with supplementation – the Initial Decision of the OAL as the final decision in this matter, and ordered that the petitioner’s salary be recalculated for the 2006-2007 and 2007-2008 school years in accordance with the method outlined in the Commissioner’s decision and any difference be paid to petitioner.

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.

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The record in this case, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions and reply exceptions have been thoroughly and independently reviewed. The Commissioner finds that *Probst v. Board of Education of the Borough of Haddonfield, Camden County*, 127 N.J. 518 (1992), controls the issues raised herein, and that the Administrative Law Judge (ALJ) correctly construed the *Probst* guidance concerning the salaries of employees who have had increments withheld for a given year, but whose job performances have become sufficient to warrant increments for subsequent years.

The case proceeded in the OAL by way of summary decision, as the facts are not in dispute. Petitioner is a tenured teacher in respondent's district, whose performance during the 2004-2005 school year (his eleventh year of service in the district) was considered deficient, and whose increment was consequently withheld for the 2005-2006 school year. In that year petitioner's performance was considered satisfactory, allowing him to receive an increment for the next school year – 2006-2007. The parties disagree on what petitioner's 2006-2007 salary should have been and how it should have been established.

Below is a chart reflecting respondent's salary guide covering the time period in question, and illustrating increments based on step level¹ and school year.

	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008
10	52,654	53,524	54,196	54,623	55,186
11	53,708	55,448	56,466	57,000	57,500
12	55,283	56,554	58,387	59,900	63,400
13	71,909	74,813	77,827	79,900	79,900*
14					82,200

As the ALJ explained, petitioner was on Step 11, *i.e.*, in his eleventh year, during the term 2004-2005 and earned \$55,448. For his twelfth year/step, petitioner would have earned \$58,387, had his increment not been withheld. However, since his increment for the term 2005-2006 was withheld, his salary for that school year remained at \$55,448. The amount of the withheld increment was \$2,939 (\$58,387 minus \$55,448).

Petitioner asserts in his reply exceptions that for the school year 2006-2007, his thirteenth year in the district, he was entitled to a salary of \$76,961 – arrived at by subtracting \$2,939 (the amount of the increment that was withheld from him for the 2005-2006 school year) from \$79,900, the Step 13 wage for the 2006-2007 school year. Respondent agrees that petitioner's salary for the 2005-2006 school year was \$55,448 but disagrees about how the compensation for petitioner's thirteenth year (the 2006-2007 school year) should be calculated. In its exceptions it urges that the increment-withholding after petitioner's eleventh year (2004-2005) required him to remain on Step 11 during the 2005-2006 school year. Petitioner could, in respondent's view, progress to Step 12 for the following school year (2006-2007), with the resulting salary of \$59,900 – as listed on the district salary guide. Thus, respondent contends

¹ The step level, in general, corresponds to the amount of years of service an employee has achieved in a district.

that the withholding of petitioner's employment and adjustment increments for the 2005-2006 school year barred him in that year from progressing to step 12 on the salary guide, and kept him on the salary grid a step lower than his years of service would otherwise dictate.²

Both parties acknowledge that the Supreme Court's holding in *Probst* controls the present case. *Probst* clearly directs that an employee – who has been denied an increment but whose performance for the year during which the increment is withheld is satisfactory – should subsequently receive the increment shown on the salary guide for his or her next year of service. However, that increase is to be added to his or her actual current salary which – by virtue of the prior increment withholding – is lower than the figure set forth on the grid for the employee's current year of service. (*Probst, supra* at 528) *Probst* acknowledges and confirms that as a result of this procedure, the actual salary for a teacher after an increment withholding will not appear on the regular salary schedule/grid for the employee's year of service. (*Ibid*)

Application of the *Probst* holding to the present case results in the following calculations. First, going into the 2006-2007 school year, the district salary guide shows an increase of \$21,513 for district employees with petitioner's years of service. Adding this increment to the salary petitioner actually made in 2005-2006 (*i.e.*, \$55,448), as opposed to the salary guide figure for twelve-year employees in 2005-2006 (\$58,387), results in wages of \$76,961 for petitioner's 2006-2007 school year. That is clearly less than the \$79,900 that petitioner would have made in the 2006-2007 school year, had no increments been withheld from him.

² *Probst v. BOE Haddonfield, supra*, at 521-22 explains that employment increments are increases awarded after the successful completion of each year of service, while adjustment increments are instituted for such items as cost of living, achievement of advanced academic credentials, etc. The terms had been defined in *N.J.S.A. 18A:29-6*, but that statute was repealed in 1985.

Contrary to respondent's contentions, *Probst* does not hold that the penalty to an employee whose increment is withheld is relegation to a place in the salary guide that does not reflect his or her years of service. In arguing that *Probst* advocates such a methodology, respondent states – citing to page 523 of the *Probst* decision – that in the 1988-89 school year Probst “was given a raise consistent with the board’s salary schedule, but one step behind her peers.” (Respondent’s exceptions at 2) That is, however, incorrect. As the *Probst* Court stated:

Probst’s salary was established by the board at \$27,100 for the 1988-89 school year. That amount represented a \$2,100 increase from her previous salary and was based on an employment increment of \$800 and an adjustment increment of \$1,300. Although those increments were consistent with the compensation progression established in the Haddonfield salary schedule, \$27,100 does not appear on the guide for the 1988-89 school year.

Probst, supra, at 522. Emphasis added.

Had Probst been “given a raise consistent with the board’s salary schedule [for 1988-89], but one step behind her peers,” as respondent suggests, she would have received \$28,400. Ironically, this is what Probst had demanded, *see, e.g. Probst* at 523, and what the Court ultimately denied. (*Probst* at 528) Moreover, the *Probst* Court specifically found that “continued off-guide compensation does not amount to a continuing punishment,” clearly implying that there was no legal impediment to paying employees salaries that are not specifically set forth on the district’s compensation guide.

Respondent argues that there is nothing in *Probst* that would support the proposition that employees whose increments have been withheld can be automatically “returned” to their original steps. (Respondent’s Exceptions at 2) That argument must be rejected, since there is nothing in *Probst* that holds that an employee who loses an increment automatically forfeits his or her step progression – the element which reflects the number of

years he or she has served in the district. No restoration is necessary where there has been no forfeiture.

Additionally, the Commissioner concurs with the ALJ that respondent's position is not supported by dictum in *North Plainfield Educational Assoc. v. Board of Education of the Borough of North Plainfield*, 96 N.J. 587 (1984). Respondent places heavy reliance on the last sentence in *North Plainfield*, which was also mentioned in *Probst*:

Furthermore, the fact that teachers will always lag one step behind is not attributable to a new violation each year, but to the effect of an earlier employment decision, one that is protected by the regulatory period of limitations.

North Plainfield at 595.

As the ALJ explained, there is nothing in *North Plainfield* to suggest that the word "step" in the foregoing quote was intended as a term of art meaning a specific salary allotted to employees who successfully achieve a fixed number of years of service.

The sentence, to the contrary, was intended to reinforce the Supreme Court's prior sentence advising that the withholding of an increment – notwithstanding the fact that it results each year in a salary lower than the one listed on the district salary guide – cannot be characterized as a continuing violation for purposes of the application of a regulatory limitations period. Indeed, the gravamen of the controversy presented in *North Plainfield* was the question of whether the limitations period then set forth in *N.J.A.C. 6:24-1.2*, now *N.J.A.C. 6A:3-1.3(i)*, applied to the petitioner's appeal of the respondent's action of withholding an increment from her.

In summary, the Initial Decision is adopted as the final decision in this case, for the reasons expressed therein and supplemented herein. Petitioner's salary shall be recalculated for the 2006-2007 and the 2007-2008 school years in accordance with the method outlined

herein, and any difference between the result and that which petitioner has already received shall be paid to him.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: September 4, 2008

Date of Mailing: September 5, 2008

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.