

DORIAN GIORGIO, :
 :
 PETITIONER, :
 : COMMISSIONER OF EDUCATION
 V. :
 : DECISION
 BOARD OF EDUCATION OF :
 THE CITY OF BRIDGETON, :
 CUMBERLAND COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioner – a tenured assistant principal employed by respondent in a twelve-month administrative position – appealed the district’s withholding of her salary increment for the 2005-2006 school year. Petitioner contended that the Board violated the provisions of *N.J.S.A. 18A:29-14* when it withheld her increment after the commencement of petitioner’s work year and without prior notice of intent to withhold the increment. Petitioner filed a request for arbitration alleging that the increment withholding was disciplinary and without cause; respondent filed a petition with the New Jersey Public Employment Relations Commission claiming that the increment withholding was evaluative and not disciplinary, and therefore not subject to arbitration; arbitration was consequently stayed. Respondent asserts that this dispute is strictly procedural, and the petition should have been filed within ninety days of the Board’s action denying petitioner her increment, but was not.

The ALJ found, *inter alia*, that: the petition was timely filed pursuant to *N.J.S.A. 34:13A-27d*; the petitioner’s school year coincides with the District’s fiscal year, which begins on July 1; collective bargaining incremental increases in District administrative salaries for the 2005-2006 school year commenced on July 1, 2005; petitioner’s salary increment had already vested by the time the respondent Board acted to withhold it; respondent’s action reduced petitioner’s compensation, which is not permitted absent the filing of tenure charges. The ALJ granted petitioner’s motion for summary decision in her favor.

The Commissioner adopted the Initial Decision as the final decision in this matter, amplifying the ALJ’s discussion of *N.J.S.A. 34:13A-27d* and additionally citing *Henry Pruitt et al. v. Board of Education of the City of Englewood, Bergen County* (<http://www.nj.gov/education/legal/sboe/1993/sb67-93.pdf>) with respect to withholding the increments of twelve-month employees.

<p>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.</p>

OAL DKT. NO. EDU 8136-06
AGENCY DKT. NO. 292-8/06

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions by the Board of Education (Board) were untimely filed and, consequently, are not considered herein.¹

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that: 1) the petitioner's appeal was timely filed, and 2) the Board of Education's (Board) action to withhold the petitioner's increment cannot be sustained.

With respect to the timeliness of the appeal, the Commissioner agrees with the ALJ that *N.J.S.A.* 34:13A-27d works to ensure that a teaching staff member who sought arbitration in the belief that the withholding of his or her increment constituted discipline – and then had such arbitration enjoined when a dispute arose as to the nature of the withholding – would not be precluded by operation of the 90-day rule (*N.J.A.C.* 6A:3-1.3(i)) from subsequent appeal to the Commissioner.

¹ Pursuant to *N.J.A.C.* 1:1-18.4, exceptions are due 13 days from the date the Initial Decision was mailed to the parties, on January 10, 2008 in the present instance. Although the Board's exceptions bear a face date of January 23, 2008, they were prepared for mailing on January 24, 2008, sent to the Commissioner by Federal Express Priority Overnight on Friday, January 25, 2008, and did not arrive at the Department until Monday, January 28, 2008. On February 1, 2008, the petitioner filed a timely reply to the Board's exceptions notwithstanding their late submission.

Viewing *N.J.S.A. 34:13A-27d* in its larger context, the statutory framework clearly envisions that this provision will be triggered any time a dispute arises as to whether a teaching staff member's increment withholding is disciplinary in nature. *N.J.S.A. 34:13A-26* establishes that:

Disputes involving the withholding of an employee's increment by an employer for predominately disciplinary reasons shall be subject to the grievance procedures established pursuant to law and shall be subject to the provisions of section 8 of this act [*N.J.S.A. 34:13A-29*, binding arbitration as final step].

N.J.S.A. 34:13A-27 continues:

a. If there is a dispute as to whether a transfer of an employee between work sites or withholding of an increment of a teaching staff member is disciplinary, the commission shall determine whether the basis for the transfer or withholding is predominantly disciplinary.

b. If the commission determines that the basis for a transfer is predominately disciplinary, the commission shall have the authority to take reasonable action to effectuate the purposes of this act.

c. If the commission determines that the basis for an increment withholding is predominately disciplinary, the dispute shall be resolved through the grievance procedures established pursuant to law and shall be subject to the provisions of section 8 of this act.

d. If a dispute involving the reason for the withholding of a teaching staff member's increment is submitted to the commission pursuant to subsection a. of this section, and the commission determines that the reason for the increment withholding relates predominately to the evaluation of a teaching staff member's teaching performance, the teaching staff member may file a petition of appeal pursuant to *N.J.S.A.18A:6-9* and *N.J.S.A.18A:29-14*, and the petition shall be deemed to be timely if filed within 90 days of notice of the commission's decision, or of the final judicial decision in any appeal from the decision of the commission, whichever date is later.

In the present instance, the petitioner sought arbitration on the posture that her increment was withheld for disciplinary reasons, and it was the Board's own responsive action – filing a petition with the Public Employment Relations Commission contending that the withholding was evaluative rather than disciplinary, so that arbitration should be enjoined – that

created a dispute subject to the provisions of paragraph a. of *N.J.S.A.* 34:13A-27, so as concomitantly to trigger application of paragraph d. in the event the commission concurred with the Board's position. Therefore, as found by the ALJ, the petition of appeal in this matter cannot be held untimely filed and must be considered on its merits notwithstanding that it challenges the Board's action on procedural rather than substantive grounds.

With respect to the challenged action itself, the Commissioner must concur with the ALJ that – once the petitioner's increment vested on July 1, 2005, as it did based on her status as a twelve-month employee governed by applicable collective bargaining agreement and Board salary policy provisions – the plain language of statute prohibited reduction of her salary absent the filing of tenure charges; therefore, the Board's July 12, 2005 increment withholding action cannot stand. *Henry Pruitt et al. v. Board of Education of the City of Englewood, Bergen County*, Commissioner of Education Decision No. 262-93, decided October 25, 1993; affirmed with clarification, State Board of Education Decision No. 67-93, decided August 2, 1995. (<http://www.nj.gov/education/legal/sboe/1993/sb67-93.pdf>)

Accordingly, for the reasons expressed therein, as amplified above, the Initial Decision of the OAL – granting the petitioner's motion for summary decision in her favor – is adopted as the final decision in this matter.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: February 19, 2008

Date of Mailing: February 19, 2008

² This decision 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.* 6A:4-1.1 *et seq.*