TEACHER TENURE
&
DISCIPLINE POLICIES

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I. INTRODUCTION


   Discipline includes all forms of discipline, except tenure charges filed
   pursuant to the provisions of subsubarticle 2 of subarticle B of Article 2
   of chapter 6 of Subtitle 3 of Title 18A of the New Jersey Statutes,
   N.J.S. 18A:6-10, et seq., or the withholding of increments pursuant to

B. Management has a well-accepted right to impose discipline on its employees,
   subject to certain restrictions. [See N.J.S.A. 34:13A-24(a)]

C. However, the right is not absolute, as there are restrictions.

D. School employees have greater rights and protections than other public
   employees in New Jersey. While other public employee have the right to
   negotiate a grievance procedures which may include binding arbitration, school
   employees have a statutory right to binding arbitration over “disputes concerning
   imposition of reprimands and discipline” (N.J.S.A. 34:13A-29)

E. Tenure rights involved (Certificated Staff, Teachers, Secretaries, and Custodians
   when not appointed to a fixed term.)

F. Tenured (or tenure eligible) v. Non-tenure eligible

G. What events could give rise to the disciplining of employees?

H. Civil Service issues
II. TENURE CHARGES

See handouts and materials from Adam S. Herman, Esq., from the law firm of Adams, Gutierrez, & Lattiboudere, LLC

III. INCREMENT WITHHOLDING

A. TWO TYPES OF WITHHOLDING
   - Disciplinary withholding
   - Evaluative Withholding

B. NON-CERTIFICATED STAFF
   - Predominately Disciplinary withholdings = subject to mandatory binding arbitration
   - Predominately evaluative withholdings = may be appealed through the grievance procedure, which might include binding arbitration
   - Whether arbitration is available depends upon the language of the contract

C. CERTIFICATED STAFF WITHHOLDINGS
   - Predominately disciplinary withholdings = subject to mandatory binding arbitration
   - Predominately evaluative withholdings = appeal goes to the Commissioner of Education
   - PERC’s role = Determines the appropriate forum for the review (mandatory binding arbitration or the Commissioner of Education)

D. PERC’S DECISION ON APPROPRIATE FORUM
   - A body of caselaw exists (case-by-case analysis)
   - Look to the reasons submitted by both parties
   - Simply because it was in evaluation does not mean it is evaluative
   - Was it based on evaluation of actual performance in the classroom?
   - Withholdings have been found to be predominantly evaluative when the Board’s reasons have been found based on demonstrated deficiencies in the classroom performance.
   - Withholdings have been found to be predominantly disciplinary when the primary reasons for the action does not relate to a subjective assessment of the classroom performance.
- When reasons include both deficiencies in classroom performance and conduct outside the classroom = PERC will scrutinize the Board’s underlying and predominant motive.

  - If preponderance of reasons relate to an assessment of teaching performance – PERC said predominately evaluative and Commissioner of Education Review (Board of Educ. Of Vocational Schools of County of Bergen, PERC No. 91-70, 17 NJPER 22060)
  - When a concern with instructional problems was more significant in substance and timing than the cited misconduct, PERC has found that the withholding was predominately evaluative, and thus subject to review by the Commissioner of Education. (Southern Gloucester County Reg., H.S., PERC No. 93-26, 19 NJPER 23218)
  - When record shows that the increment would not have been withheld simply because of the performance concerns = then predominately disciplinary and subject to mandatory binding arbitration. (Morris School District, PERC No. 93-50, 19 NJPER 24023)

- Some examples of those withholdings that PERC has found to be evaluative and thus, subject to review only by the Commissioner of Education are as follows:
  - Long-standing deficiencies in classroom management (Dumont Bd. of Ed., PERC No. 2007-1, 32 NJPER 134)
  - Teaching skills, and inappropriate language in the classroom (Upper Saddle River Bd. of Educ., PERC No. 91-69, 17 NJPER 22059)
  - Inappropriate methods of disciplining students (Tenafly Bd. of Educ., PERC No. 91-68, 17 NJPER 22058)
  - Deviations from the established curriculum (Holmdel Bd. of Educ., PERC No. 92-6, 17 NJPER 22178; Passaic County Regional H.S., PERC No. 92-125, 18 NJPER 23156.)
  - Grading of students (Mahwah Twp. Bd. of Educ., PERC No. 2008-71, 34 NJPER 93)

- Some examples of those withholdings that PERC has found to be disciplinary in nature, and therefore subject to mandatory binding arbitration are as follows:
  - A teacher’s deficiencies in supervising students during her noninstructional periods (Hunterdon Central Reg. H.S., PERC No. 92-72, 18 NJPER 23028)
  - Violations of district policies and procedures (Greater Egg Harbor Reg. H.S., PERC No. 92-9, 17 NJPER 22181)
  - Violations of district’s supervisory directives (Franklin Twsp. Bod. of Educ., PERC No. 2000-90, 26 NJPER 31105)
  - Excessive absenteeism when the record did not indicate concerns with teaching performance (Scotch Plains-Fanwood, PERC No. 91-67 (1990)
  - Where the concerns with an employee’s inability to perform were related to the employee’s absenteeism (Middlesex Bd. of Educ., PERC No. 2000-86, 26 NJPER 31089)
A. **END OF YEAR (NON-RENEWAL)**

- Board has right to renew (or not renew) employees.  

- All Renewals (disciplinary or not)

- Unless clear unmistakable waiver by the Board in the collective bargaining agreement – there is no arbitration

- Any ambiguity as to whether there was a waiver – arbitration will apply  
  *(N.J.S.A. 34:13A-5.3)*

- Right to *Donaldson* hearing

B. **MID-CONTRACT TERMINATIONS**

- Mid-contract terminations fall within the broad definition of “discipline”  
  *(Pascack Valley Regional High School Board of Education v. Pascack  
    Valley Regional Support Staff Ass'n., 192 N.J. 489 (2007))*

- Case-by-case determination as to whether subject to arbitration; look at the specifics language of the contract

- No *per se* legal requirement that mid-contract terminations are subject to arbitration, but rely specifically on the language of the collective negotiations agreement.

- Any Ambiguity as to whether there was a waiver – arbitration will apply  
  *(N.J.S.A. 34:13A-5.3)*

- The notice timeframe set forth in the individual contract must yield to the collective negotiations agreement

V. **OTHER FORMS OF DISCIPLINE**

A. **LETTERS OF REPRIMAND** = Can be subject to the grievance procedure and the requirement of mandatory binding arbitration.

- If this letter is deemed to criticize the employee for misconduct which is unrelated to teaching performance = subject to mandatory binding

B. **TRANSFERS** = Disciplinary transfers cannot be made between worksites

- N.J.S.A. 34:13A-25 specifically prohibits boards from transferring employees between worksites for disciplinary reasons.

- Disciplinary transfers that are not between worksites are permissible. (But these types of transfers may be challenged through the grievance procedure and are subject to mandatory binding arbitration.)
- Non-disciplinary transfers are permitted between worksites

- PERC has interpreted the “between worksites” term to mean transfers from one building to another.

- If PERC finds that a disciplinary transfer was made between worksites (between buildings), it will order the board to rescind the transfer and return the teacher to their former position.

C. **WHAT CONSTITUTES DISCIPLINARY TRANSFER?**

- PERC will find that a transfer was not disciplinary if the Board demonstrates that its decision was based on legitimate educational reasons, such as:
  
  o the employee’s performance or qualifications for the assignment
  o the district’s curricular and educational needs
  o its enrollment pattern the district’s operational needs

- Transfers that do not implicate punitive actions and are not related to displeasure with the teacher’s conduct will not be found to be disciplinary. (Middle Township Board of Educ., PERC No. 99-3, 24 NJPER 29187)

VI. **DISCIPLINE STANDARDS**

A. What are Disciplinary standards?

- The standard by which an arbitrator will review the Board’s decision to impose discipline. ("Just Cause" – "For Cause" – "Arbitrary and Capricious")

B. Mandatory subject of negotiations (the inclusion of this standard in a school employees’ contract can have great significance)

- Arbitrator must apply the standard which is set forth in the contract

- Silence = typically uses the “just cause”

- Can have differing standards for different categories
  
  o tenured v. non-tenured
  o permanent v. probationary
  o teachers v. bus drivers

C. **"JUST CAUSE"**

- Most common standard

- This is a bad for the Board as it requires an extensive series of conditions be met to impose discipline
modified or reversed

- Is typically what is used if the contract is silent as to the disciplinary standard

- There are seven hallmarks/tests of Just Cause:

  1. Was the Employee forewarned about possible disciplinary consequences?

  2. Did the rule reasonably relate to the orderly, efficient and safe operations of the business?

  3. Did the employer make efforts to determine if the employee did violate the rule?

  4. Was the investigation fair & objective?

  5. Was substantial proof found during the investigation that the employee violated the rule?

  6. Has the rule and penalties been applied evenhandedly and without discrimination to all employees?

  7. Did the degree of discipline administered by the employer reasonably related to:

    a. Seriousness of the employee's offense

    AND

    b. The employee's past disciplinary record

VII. **CONCLUSION**
TEACHER TENURE & DISCIPLINE POLICIES

HYPOTHETICAL
You have been advised that an employee has been falling asleep on the job, and has been arriving every morning 7 minutes late.

You want to discipline this employee.
- Can you discipline?
- What discipline can you seek to impose?

WHAT IS DISCIPLINE?
Discipline includes all forms of discipline, except tenure charges filed pursuant to the provisions of subsubarticle 2 of subarticle B of Article 2 of chapter 6 of Subtitle 3 of Title 18A of the New Jersey Statutes, N.J.S. 18A:6-10, et seq., or the withholding of increments pursuant to N.J.S. 18A:28-14. (N.J.S.A. 34:13A-22)
FORMS OF DISCIPLINE

- Letters of Reprimand
- Increment Withholding
- Transfers (disciplinary transfers are illegal between worksites)
- Termination of non-certificated staff
- Tenure Charges

TENURE
MANDATORY BINDING ARBITRATION

"The grievance procedures that employers covered by this act are required to negotiate... shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act."

(N.J.S.A. 34:13A-29a.)

INCREMENT WITHHOLDING

- Certificated v. non-certificated staff

- Non-Certificated staff
  - Disciplinary increment withholding = subject to mandatory binding arbitration
  - Evaluative increment withholding = may be appealed through the collectively bargained grievance procedure, which may include binding arbitration

CERTIFICATED STAFF WITHHOLDINGS

- Predominately Disciplinary Increment withholding = subject to mandatory binding arbitration

- Predominately Evaluative increment withholding = may be appealed through the Commissioner of Education

- PERC is involved in Determining if predominately disciplinary or evaluative
Perc Determines Appropriate Forum

- Was it based on evaluation of the actual classroom performance?
- Simply because something is included in the evaluation does not mean it is evaluative
- When the reasons for the withholding do not relate to a subjective assessment of the classroom performance = **it is disciplinary**

Mixed Reasons for Withholding?

- Perc scrutinizes Board’s underlying and predominant motive
- Preponderance of reasons relate to an assessment of teaching performance = **evaluative withholding**
- When a concern with instructional problems was more significant in substance than the cited misconduct = **evaluative withholding**
- If the withholding would not have occurred simply based on the performance issue = **disciplinary withholding**

Non-Renewals

- Board has a right to renew or not
- Not subject to arbitration (unless clear & unmistakable waiver by the Board in labor contract)
- **Donaldson** hearing
MID-CONTRACT TERMINATIONS

- Falls within the definition of "discipline"
- Arbitrable?
  - No *per se* legal requirement
  - Look to the specific language of the union contract
  - Case-by-case determination
  - Any ambiguity? = arbitration will apply (N.J.S.A. 34:13A-53)

DISCIPLINE STANDARDS

- Negotiable topic
- Arbitrator must apply the standard which is set forth in the contract
- Silence = typically uses the "just cause"
- Can have differing standards for different categories
  - tenured v. non-tenured
  - permanent v. probationary
  - teachers v. bus drivers

EXAMPLES OF DISCIPLINE STANDARDS

- "No Employee shall be disciplined without reason or basis"
- "No Employee shall be disciplined arbitrarily of capriciously"
- "No Employee shall be disciplined without cause"
- "No Employee shall be disciplined unreasonably or unreasonably"
- "No Employee shall be disciplined without just cause"
“JUST CAUSE”

- Most common
- Bad for the Board
- requires an extensive series of conditions
- Increase the likelihood of management's action being modified or reversed
- Is typically what is used if the contract is silent as to the disciplinary standard

7 HALLMARKS OF “JUST CAUSE”

1. Was the Employee forewarned about possible disciplinary consequences?

2. Did the rule reasonably relate to the orderly, efficient and safe operations of the business?

3. Did the employer make efforts to determine if the employee did violate the rule?

7 HALLMARKS OF “JUST CAUSE”

4. Was the investigation fair & objective?

5. Was substantial proof found during the investigation that the employee violated the rule?

6. Has the rule and penalties been applied evenhandedly and without discrimination to all employees?
7 HALLMARKS OF "JUST CAUSE"

7. Did the degree of discipline administered by the employer reasonably related to:
   a) Seriousness of the employee's offense
      AND
   b) The employee's past disciplinary record