P.E.R.C. NO. 90-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UPPER PITTSGROVE BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-90-12

UPPER PITTSGROVE EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Upper Pittsgrove Education Association. The grievance alleged that the Upper Pittsgrove Board of Education violated the parties' collective negotiations agreement by amending the observation reports of several teachers. The Commission holds that the employer could agree to an evaluation procedure calling for observation reports, teacher responses, and no further rebuttals.

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Appearances:

For the Petitioner, William C. Horner, Esq.

For the Respondent, Selikoff and Cohen, Esqs.
(Steven R. Cohen, of counsel)

DECISION AND ORDER

On September 13, 1989, the Upper Pittsgrove Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Upper Pittsgrove Education Association. The grievance alleged that the Board violated the parties' collective negotiations agreement by amending the observation reports of several teachers.[1/]

1/ On September 28, 1989 Commission designee Edmund G. Gerber denied an interim restraint of arbitration. I.R. No. 90-9, 15 NJPER 590 (¶20240 1989).

The parties have filed briefs, reply briefs and exhibits.[2/] These facts appear.

The Association represents the Board's teachers. The parties entered into a collective negotiations agreement effective July 1, 1987 through June 30, 1990. The grievance procedure ends in binding arbitration. The contract allows teachers to inspect their personnel files and add comments. It also provides:

> The teacher will receive a written report of all formal classroom observations. The teacher may add pertinent comments to the report. A conference between the teacher and the evaluator shall follow receipt within fifteen (15) days. All non-tenure teachers shall be evaluated openly and with full knowledge of the teacher three (3) times per year.

During November 1988, a number of teachers were observed by supervisors and received written evaluations. Some submitted comments on those evaluations. The evaluators then issued responses to the teachers' comments.

On March 8, 1989, the Association filed a grievance on behalf of three teachers. The grievance alleged that the contract does not allow an administrator to respond to a teacher's rebuttal and that administrators' rebuttal letters had been improperly placed in the teachers' personnel files. It asked that administrators be directed to end this practice and that the

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2/ The parties requested oral argument. We deny that request. All issues have been adequately addressed in the parties' briefs.

rebuttal letters be removed from the personnel files and destroyed.[3/]

The superintendent responded that administrators would stop writing rebuttals to teachers' rebuttals and that the responses would be removed from the teachers' files. However he also stated that evaluators could amend observation reports, subject to the teachers' right to respond to amendments. The administrators then amended the observation reports to include verbatim portions of their responses.[4/]

In her comments, one teacher claimed that a worker fixing a heater and an emotionally disturbed student's failure to take medication caused disruptions that prevented the teacher from getting a satisfactory evaluation report. The amendment noted that the worker was in the room less than three minutes and that the teacher was responsible for dealing with the disturbed child.

A second teacher claimed that the observed lesson was not typical and that he preferred to deal with behavioral problems after class. The amendment stated that since the observation was pre-scheduled, the teacher should have prepared to demonstrate a typical lesson. It also stated that the after-class talks did not appear to have worked and that a disruptive student should be referred for counseling.

3/ The grievance raises two other issues, but we do not consider them because they were not challenged by the petition.

4/ The responses are not in the record, but the arbitrator found that the amendments were identical to the earlier responses.

A third teacher denied that there was confusion in the class and claimed that two of the administrator's recommendations were not in harmony with the text and teachers' guide. The comments explained certain organizational matters at the beginning of the class and noted that the teacher had requested a chalkboard the previous winter. The amendment reiterated that the administrator found confusion in the classroom, stated that professional judgment may require critical evaluation of the use of a teacher's guide and noted that a portable chalkboard had been available since the previous spring.

The Association continued processing the grievance. It alleged that the amendments were a continuation of the practice of administrators writing rebuttals to rebuttals. The grievance was not resolved and the Association demanded arbitration. This petition ensued.

The arbitrator found that the amendments, made several months after the evaluation reports, were a "sham for including evaluators' rebuttals to the teachers' rebuttal comments." He concluded that placing the amendments in the teachers' files violated the contract's evaluation procedure. He ordered that the amendments be removed.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and

> directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 403-404]

Evaluation procedures which do not conflict with statutes or regulations are generally mandatorily negotiable and enforceable through grievance arbitration. Bethlehem Tp. Ed. Assn. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Greater Egg Harbor Reg. H.S. Dist., P.E.R.C No. 88-37, 13 NJPER 813 (¶18312 1987).

The predominant issue here is whether an employer can agree to a contractual procedure that precludes rebuttals to teachers' comments. Applying Local 195, we find that it can. Requiring an employer to adhere to such a negotiated procedure when formally evaluating its teaching staff does not significantly interfere with its ability to assess performance. The procedure does not restrict the number of times the formal procedure may be used. It does not preclude informal observations or discussions between teachers and supervisors concerning teaching performance. Compare Fair Lawn Bd. of Ed. P.E.R.C. No. 84-39, 9 NJPER 648 (¶14281 1983). It does not interfere with the employer's right to observe a teacher's performance and place a report of that observation in the teacher's personnel file. It simply prevents an employer from later

responding to a teacher's comments under the guise of an amendment to the original evaluation. Nothing herein precludes an employer from negotiating a procedure which provides for additional rebuttals.[5/]

ORDER

The Board's request for permanent restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Smith and Johnson voted in favor of this decision. None opposed. Commissioner Bertolino abstained from consideration. Commissioners Reid and Ruggiero were not present.

DATED: Trenton, New Jersey
February 28, 1990
ISSUED: March 1, 1990

5/ Trenton Bd. of Ed., P.E.R.C. No. 89-82, 15 NJPER 99 (¶20046 1989) is consistent with this determination. It allowed arbitration over an alleged violation of promotion procedures. See also Ocean Tp. Bd. of Ed., P.E.R.C. No. 85-123, 11 NJPER 378 (¶16137 1985), aff'd App. Div. Dkt. No. A-4753-84T1 (4/9/86), certif. den. ___ N.J. ___ (1986); Lacey Tp. Bd. of Ed., P.E.R.C. No. 89-81, 15 NJPER 99 (¶20045 1989). Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/89) and Lincoln Park Bd. of Ed., P.E.R.C. No. 87-45, 12 NJPER 829 (¶17318 1986) are inapposite. They involved determinations that a response to a rebuttal and a follow-up letter were predominately evaluative, not disciplinary. They did not involve claims that the employers' actions violated negotiated procedures.