P.E.R.C. NO. 2000-103

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WOODSTOWN-PILESGROVE REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2000-85

WOODSTOWN-PILESGROVE REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Woodstown-Pilesgrove Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Woodstown-Pilesgrove Regional Education Association. The grievance contests the inclusion in a teacher's personnel file of a memorandum evaluating her performance during a classroom visit by the high school principal. The Commission concludes, on balance, that prohibiting a memorandum whenever an informal classroom visit does not last an entire period would significantly interfere with the ability of administrators to conduct such visits, evaluate instruction, and suggest improvements.

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

P.E.R.C. NO. 2000-103

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WOODSTOWN-PILESGROVE REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2000-85

WOODSTOWN PILESGROVE REGIONAL
EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Capehart & Scatchard, P.A., attorneys (Alan R. Schmoll, on the brief)

For the Respondent, Waltman, Reilly & Rogovoy, attorneys (Ned P. Rogovoy, on the brief)

DECISION

On February 23, 2000, the Woodstown-Pilesgrove Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Woodstown-Pilesgrove Regional Education Association. The grievance contests the inclusion in a teacher's personnel file of a memorandum evaluating her performance during a classroom visit by the high school principal.

The parties have filed briefs, exhibits, and affidavits. These facts appear.

The Association represents teachers and other employees of the Board. The parties entered into a collective negotiations

agreement effective from July 1, 1997 through June 30, 2000. Their grievance procedure ends in binding arbitration.

Mary Mills is a tenured teacher. On September 21, 1999, the high school principal visited a class taught by Mills. According to the principal, the visit was not a formal observation but resulted from his "monitoring the educational process as a whole in the school." After the class, he prepared this memorandum:

> On Tuesday, September 21, during eighth period, I visited your German II class. When I entered, two students were engaged in conversation and you were assisting them. I like that type of interactivity and it would be helpful to those two students. My concern continues to be that these two students were engaged but the other students weren't. One student was there just writing away continually, another student had their book closed and was gazing out the window and another student had their book closed and was basically gazing at the floor.
>
> From time to time, after the conversation was done, you would ask other students questions. I am not sure how long the conversation had been going on before I walked in, however, during the conversation which continued for approximately five minutes, none of the other students were engaged at all. They were not being monitored by you either. That is the main area that we continue to need to work on. You need to monitor the whole class. All students need to be engaged and need to be a part of it, even if you have just two students engaged in the discussion.
>
> Please see me with any questions that you may have.

The memorandum was placed in Mills' personnel file.

The Association's grievance committee wrote to the principal objecting to the placement of the memorandum in the personnel file. It stated that the observation was not for a full class period and that using it as a formal evaluation would violate New Jersey education laws. It asked that the memorandum be removed from Mills' personnel file and that future observations last a full class.

The principal denied the grievance. He wrote, in part:

> It is my belief that short visits like this can only help the staff to become better instructors. I also believe that Dr. Mills will have many opportunities to demonstrate her instructional ability during the year. This in no way violates the statutes because Dr. Mills will have at least one full evaluation during the coming year.

The grievance was also denied by the interim superintendent and the Board on the grounds that short visits were necessary to evaluate staff and were not violative of education laws.

The Association demanded arbitration. The demand alleged that the Board violated education laws by placing a memorandum in a teacher's personnel file as the result of "a casual drop-in classroom visit." This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or

> even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we cannot consider the merits of the grievance or any of the Board's contractual defenses.

There is no dispute that this memorandum is evaluative, not disciplinary. See, e.g., Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd NJPER Supp.2d 183 (¶161 App. Div. 1987). The question is whether excluding this memorandum from Mills' personnel file because the principal did not stay for an entire class would significantly interfere with the employer's ability to evaluate teachers. Answering that question requires us to apply these negotiability tests set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982):

> [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 404-405]

The Association asserts that N.J.A.C. 6:3-4.3(h)6 supports its argument that the principal was required to stay for an entire class period. That regulation defines "observation" for purposes of conducting the formal observations required by the education laws. It provides:

> "Observation" means a visitation to an assigned work station by a certified supervisor for the purpose of formally collecting data on the performance of a teaching staff member's assigned duties and responsibilities and of a duration appropriate to same.

The regulation does not specify that an observation of a tenured teacher must last an entire period. Contrast N.J.A.C. 6:3-4.1(a)(each of three observations of a non-tenured teacher required by N.J.S.A. 18A:27-3.1 must be conducted for a minimum duration of one class period). Further, the principal was not conducting a formal observation as contemplated by the education laws but was instead visiting a class informally. The education laws did not require that this visit last the entire period.

We next consider how an agreement to require an administrator to stay an entire class period or forego placing a memorandum about that class in a tenured teacher's personnel file would affect the relative interests of tenured teachers and the Board. We will apply the balancing test in the context of our cases addressing related issues.

In Fair Lawn Bd. of Ed., P.E.R.C. No. 84-39, 9 NJPER 648 (¶14281 1983), a principal visited classes for periods ranging from 10 to 30 minutes, but did not place his notes concerning

those visits in personnel files. A grievance sought to require the principal to write and file an observation report every time he visited a class. We held that such a requirement was not mandatorily negotiable, but we also held that a principal could be required to write a report whenever he observed a problem serious enough to affect a teacher's formal evaluation. We distinguished between formal evaluations and informal visits:

> Nevertheless, we recognize, from a practical perspective, that the requirement that every visit be recorded could have a deleterious impact on the principal's freedom and interfere with his ability to keep a hand on the pulse of the school. Thus, an informal classroom visit is different from a formal classroom observation: the principal is not solely or narrowly concerned with teacher performance; instead, he may make a spotcheck for a variety of reasons unrelated to teacher evaluation. The usefulness of these spotchecks as an educational policy tool might be diminished if they were overly formalized and always seen as a teacher "observation." A principal might well be inhibited from making such visits if every visit entailed a written report which would transform and formalize the visit into an employee evaluation rather than an inspection of the educational process as a whole. [Id. at 650]

In Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986), we reiterated that a contract cannot be construed to require a report for every informal visit. We also held mandatorily negotiable a requirement that any report specify the time spent in observation.

In Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997), we considered the negotiability of this clause:

> The duration of the observation should last for a minimum of one class period in the high and middle schools, and for the duration of one complete subject lesson in the elementary school.

We stated:

> Section A(5) is basically procedural: it does not affect evaluation criteria and is designed to ensure that formal observations are long enough to enable a supervisor to assess a teacher's performance in accordance with Board-established criteria. We note that N.J.A.C. 6:3-4.1(a)1 requires that statutorily-mandated observations of non-tenured teachers be conducted for a minimum duration of one class period in the secondary schools and one complete subject lesson in the elementary schools. With respect to non-tenured teachers, Section A(5) incorporates this procedural provision. With respect to tenured teachers, the clause is mandatorily negotiable. However, consistent with Fair Lawn, the clause cannot be construed to set a minimum duration for informal classroom visits. [Id. at 25]

Finally, in East Brunswick Bd. of Ed., P.E.R.C. No. 98-150, 24 NJPER 319 (¶29152 1998), aff'd 25 NJPER 306 (¶30128 App. Div. 1999), a grievance contested the inclusion of comments about a third period class in a formal observation report about a first period class. In declining to restrain arbitration, we stated:

> In general, a requirement that an evaluator confine his or her written observation report to the lesson chosen for observation does not significantly interfere with the right to evaluate other lessons. The Board had a prerogative to have an evaluator visit and observe the third period class or comment on the third period class through a timely informal evaluation or passing comment to the teacher. Fair Lawn Bd. of Ed., P.E.R.C. No.

> 84-39, 9 NJPER 648 (¶14281 1983)(cannot require written report after every classroom visit, but can require report where visit might affect subsequent formal evaluations). Enforcement of an alleged agreement or policy restricting the first period observation report to the class being observed would not have prevented an evaluation of the third period class and the recording of the pertinent information. Such a restriction protects the employee's interest in having timely notice of what has been observed and an opportunity to know and respond to evaluative suggestions and criticisms specified in the observation. [Id. at 321]

In affirming our decision, the Appellate Division cited its agreement with the quoted paragraph as well as with another paragraph recognizing the right of administrators to evaluate teachers on an ad hoc basis in memoranda or reports besides evaluation forms. See also Manville Bd. of Ed., P.E.R.C. No. 93-23, 18 NJPER 475 (¶23215 1992).

We appreciate the interest of tenured teachers in having an informal classroom visit last long enough to give a fair and contextual sense of a teacher's performance that day and we reiterate that an agreement may require that a formal observation report be based on a full class observation. Teachers may also negotiate for an opportunity to respond to memoranda such as the instant one and for a requirement that any memorandum specify the time spent in a classroom visit. But, on balance, we believe that prohibiting a memorandum whenever an informal visit did not last an entire period would significantly interfere with the ability of administrators to conduct such visits, evaluate instruction, and suggest improvements. For example, such a requirement would

automatically prohibit any memorandum resulting from a visit that did not start at the beginning of a class. We will therefore restrain arbitration of this grievance.

ORDER

The request of the Woodstown-Pilesgrove Regional Board of Education for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: June 29, 2000
Trenton, New Jersey
ISSUED: June 30, 2000