

P.E.R.C. NO. 98-150

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-98-41

EAST BRUNSWICK EDUCATION
ASSOCIATION,

Respondent.

DECISION

The Public Employment Relations Commission denies the request of the East Brunswick Board of Education for a restraint of binding arbitration of a grievance filed by the East Brunswick Education Association. The grievance contests the inclusion of comments about a teacher's third period class in an observation report about a first period class. The Commission finds, in general, that a requirement that an evaluator confine his or her written comments to the lesson chosen for observation does not significantly interfere with the right to evaluate other lessons. If the Board bound itself to restrict observation reports to the class observed, enforcement of that restriction would not significantly interfere with educational policy, in general, or the right and duty to evaluate in particular.

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.

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Appearances:

For the Petitioner, Martin R. Pachman, P.C., attorney
(Lisa A. Thomas and Robin T. McMahon, of counsel and on
the briefs)

For the Respondent, Balk, Oxfeld, Mandell & Cohen,
attorneys (Randi Donor April, on the brief)

DECISION

On October 30, 1997, the East Brunswick Board of
Education petitioned for a scope of negotiations determination.
The Board seeks a restraint of binding arbitration of a grievance
filed by the East Brunswick Education Association. The grievance
contests the inclusion of comments about a teacher's third period
class in an observation report about a first period class.

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

The Association represents teaching staff members
employed by the Board. The parties entered into a collective

negotiations agreement effective from July 1, 1994 through June 30, 1997. The grievance procedure ends in binding arbitration.

Article XXI, Sections A and B provide:

A. All audio-monitoring and formal evaluation of the work performance of an employee shall be conducted openly and with full knowledge of the employee. There shall be no monitoring of the lounges and workrooms.

B. Any written evaluation made after an observation by an administrative officer shall be submitted to the employee within two (2) calendar weeks after such evaluation was made.

Board Policy 4115 addresses evaluation/supervision of certificated personnel. One section states, in part:

The evaluation process must be continuous and constructive and should take place in an atmosphere of mutual trust and respect. It is a cooperative effort on the part of the primary evaluator, appropriate supervisory staff, and the employee, designed to encourage productive dialogue between staff and supervisors and to promote professional growth and development.

Several techniques may be employed to formally collect data about staff effectiveness.

Formal Observation Observing the staff member perform in the job setting is a basic and important method of determining teacher effectiveness. Visitations 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 shall be conducted throughout the school year with either the teacher or supervisor initiating the evaluation process. Formal observations for the purpose of a written evaluation shall be conducted for a minimum duration of the class period in a secondary school, and for the duration of one complete subject lesson in an elementary school.

The other listed techniques are Data Collection and Solicited Information.

Tenured classroom teachers receive a minimum of three formal evaluations each year, including an annual summary evaluation. At least one classroom observation, followed by a written report, is made each semester and precedes the annual summary evaluation, also referred to as an annual performance report.

Michael Zielinski is a tenured math teacher in the Churchill Middle School. On November 22, 1996, the assistant principal formally observed Zielinski's ninth grade, first period math class. The principal prepared an observation report on a standard form. Skills are rated as "E-Effective," "S-Suggestion/Comment (see narrative)," and "N-Not Applicable/Not Observed." Zielinski was rated "Effective" in 15 of the 22 rating categories. In four categories he received both an E and an S. Two other areas were marked S and one category was deemed inapplicable. Under Class Management, Zielinski was given an S rating in the category of "Productively manages classroom activities" and both an E and an S in the category of "Maintains control and order in the classroom." The assistant principal wrote these comments:

This class was well managed and very productive. They followed good routines and you managed activities well.

I have more concerns about your period three class, where I see students out of your class,

either in the hall or the office and when passing the room I hear you arguing with them or raising your voice to exercise control.

The assistant principal also made suggestions for improvement.

Zielinski wrote the following response to the comments on class management:

I feel it was inappropriate for you to make any references to third period in this first period classroom observation. You make assumptions of things that cannot be verified. You make suggestions of things that I may already be doing. You make observations of things that may be misinterpreted. Either way there are no specifics that I can agree with or dispute. I suggest you visit my third period class for a formal evaluation. Then I can appropriately respond.

Zielinski filed an informal grievance; the assistant principal denied it. A formal grievance was then filed alleging a violation of Articles I, III, XXI.A and B, Board Policy 4115(a), and N.J.A.C. 6:3-4.3 by including comments in a formal observation report concerning a class other than the one observed. The grievance sought removal of the comments related to the third period class. The grievance was denied; the Association demanded arbitration; and 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 do not consider the contractual merits of the grievance or any contractual defenses the Board may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable and thus whether agreements over such subjects can be enforced through binding arbitration:

[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]

See also Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980).

Under this balancing test, negotiated agreements cannot significantly interfere with an employer's right to establish evaluation criteria and to evaluate employee performance.

Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Hazlet Tp. Bd. of Ed., P.E.R.C. No. 79-57, 5 NJPER 113

(¶10066 1979), rev'd 6 NJPER 191 (¶11093 App. Div. 1980). A school board has a prerogative to evaluate all aspects of an employee's job performance and to record all pertinent information. Thus, a school board has the right to have an evaluator, without advance notice to the teacher, walk into a teacher's class, observe that instructional period, and prepare a written evaluation. See, e.g., Boonton Bd. of Ed., P.E.R.C. No. 80-78, 6 NJPER 12 (¶11006 1979). Also, a board has a non-negotiable right to issue a summary evaluation report based upon a teacher's complete performance in all teaching assignments and other duties. Manalapan-Englishtown Bd. of Ed., P.E.R.C. No. 97-15, 22 NJPER 326 (¶27166 1996); Ridgefield Pk. Bd. of Ed., P.E.R.C. No. 90-70, 16 NJPER 139 (¶21054 1990); Neptune Tp. Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988). And administrators may evaluate teachers on an ad hoc basis in memoranda or reports besides standard evaluation forms. Manville Bd. of Ed., P.E.R.C. No. 93-23, 18 NJPER 475 (¶23215 1992).

Procedures pertaining to the evaluation process that are consistent with statutes and regulations and do not impair a board's ability to evaluate staff performance are mandatorily negotiable. Bethlehem Tp. Bd. of Ed. They are also enforceable through binding arbitration. Newark State-Operated School Dist., P.E.R.C. No. 97-118, 23 NJPER 240 (¶28115 1997). While an employer has a right to set evaluation criteria and to apply those criteria, employees have a separate and negotiable interest in

assuring that there is an ordered and identifiable connection between the performance being observed and the performance being evaluated. Cf. Bethlehem Tp. Bd. of Ed. (observations shall not take place prior to or within ten days of previous evaluation conference). Employees also have an interest in the frequency and number of formal observations. Matawan-Aberdeen Reg. School Dist., P.E.R.C. No. 90-98, 16 NJPER 300 (¶21123 1990), recon. den. P.E.R.C. No. 91-4, 16 NJPER 434 (¶21185 1990), aff'd NJPER Supp.2d 257 (¶213 App. Div.1991). The most basic employee interests sought to be protected by evaluation procedures are having some form of notice of when the evaluation has taken place, being able to receive suggestions for improvement, know specific criticisms, and respond if appropriate. Ocean Tp. Bd. of Ed., P.E.R.C. No. 85-123, 11 NJPER 378 (¶16137 1985), aff'd NJPER Supp.2d 164 (¶144 App. Div. 1986), certif. den. N.J. (1986). Failure to follow evaluation procedures -- for example, the failure to supply an evaluation report before an evaluation conference -- can lead to expungement of the report, although the evaluation reflected in the report will have occurred, presumably to the benefit of the teacher and the evaluator, and given that subsequent evaluations can occur and be properly recorded. Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 130 N.J. 312 (1992), aff'g 259 N.J. Super. 397 (App. Div. 1991). Applying the negotiability balancing test to the specific factual context of this dispute, we hold that the procedural issue raised by this grievance may be submitted to

binding arbitration without significantly interfering with the Board's right to evaluate its employees.

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.


In this case, the comments about his undated third period class or classes were difficult for the teacher to confirm or dispute. The teacher suggested that an administrator visit his third period class so that he could appropriately respond. If the Board bound itself to restrict observation reports to the class

observed, enforcement of that restriction would not significantly interfere with educational policy in general, or the right and duty to evaluate in particular. If there is a problem in this teacher's third period class, the employer may identify it and seek to correct it. However, it may legally agree to do so in a manner that protects the teacher's interest in knowing when he has been observed so that he has a meaningful opportunity to respond. As is our policy, we express no opinion on whether the teacher is entitled to such protection or whether the contract was breached.

ORDER

The request of the East Brunswick Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Klagholz, Ricci and Wenzler voted in favor of this decision. Commissioners Boose and Finn abstained from consideration.

DATED: May 27, 1998
Trenton, New Jersey
ISSUED: May 28, 1998