



NH Supreme Court affirmed in part, reversed in part this decision on December 28, 1999, Slip Op. No. 97-738, Appeal of Pittsfield School District, 144 NH 536 (2000).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

EDUCATION ASSOCIATION OF
PITTSFIELD, NEA-NEW HAMPSHIRE

Complainant

v.

PITTSFIELD SCHOOL DISTRICT

Respondent

CASE NO. T-0250:13

DECISION NO. 97-071

APPEARANCES

Representing Education Association of Pittsfield:

Janet Paddleford, UniServ Director

Representing Pittsfield School District:

Jay C. Boynton, Esq.

Also appearing:

Wayne Petrovek, Pittsfield
Paul C. Moccia, Pittsfield School District
Bernadette McLaughlin, Pittsfield School District
Noel DeSousa, Pittsfield School District
Hugh M. Sanborn, Educational Assistants of Pittsfield
Richard Towne, Jr., Educational Assistants of Pittsfield
Laurence Hallin, Educational Assistants of Pittsfield

BACKGROUND

The Education Association of Pittsfield, NEA-New Hampshire (Association) filed unfair labor practice (ULP) charges against

the Pittsfield School District (District) on January 31, 1997 alleging violations of RSA 273-A:5 I (a), (e) and (g) resulting from the District's unilateral implementation of a new teacher evaluation plan and refusal to bargain. The District filed its answer on February 18, 1997, inclusive of a motion to dismiss. The motion to dismiss was denied in proceedings before a PELRB hearing officer in Decision No. 97-034 dated March 19, 1997. After a continuance sought and granted for the hearing date of April 22, 1997, the PELRB heard this matter on May 6, 1997 and June 24, 1997, at the conclusion of which the record was closed.

FINDINGS OF FACT

1. The Pittsfield School District is a "public employer" of teachers and other personnel within the meaning of RSA 273-A:1 X.
2. The Education Association of Pittsfield/NEA-New Hampshire is the duly certified bargaining agent for teachers and other personnel employed by the District.
3. The Association and the Pittsfield School Board are parties to a collective bargaining agreement (CBA) for the period September 1, 1995 to August 31, 1997. (Association Exhibit No. 13) Article VIII of that agreement is entitled "Employee Evaluation." Sections 8.1 through 8.9 read as follows:
 - 8.1 Observation of the work performance of an employee certified to be represented by the Association will be conducted openly. Formal observation sessions shall be with the full knowledge of the employee. All other observations of the employee's work performance which are to be made part of his file will be made known to the employee.
 - 8.2 An employee shall be given a copy of any evaluation report prepared by his evaluators before or during any conference held with him to discuss it. If the employee is dissatisfied with this evaluation conference, he may request additional conference time.

- 8.3 The importance and value of a procedure for assisting and evaluating the progress and success for both newly employed and experienced personnel for the purpose of improving instruction is recognized.
- 8.4 No written evaluation report shall be placed in the employee's file or otherwise acted upon without affording the employee an opportunity for a prior conference thereon. The employee shall sign such report in acknowledgment that the employee has read it, but in no way to indicate agreement with the contents thereof.
- 8.5 Those comments or reports regarding an employee made to any member of the administration by a parent, student or other person which are used in evaluating an employee shall have been promptly investigated as to their accuracy. An employee shall be given, to the extent practicable, an opportunity to respond to and meet with a person making derogatory or degrading comment or report for purpose of rebuttal. Where such opportunity cannot practically be afforded, the record thereof shall be so noted and the comment or report given such minimal weight, if any, as the circumstances accord.
- 8.6 The employee shall acknowledge that he has had the opportunity to review such comment or report by affixing his signature to the copy to be filed, with the expressed understanding that such signature in no way indicates agreement with the contents thereof. The employee shall also have the right to submit a written answer to such comment or report or to any material filed in his personal file and his answer shall be reviewed and commented upon in writing by the Superintendent or his designee and both answer and comment thereon attached to the file copy.
- 8.7 All documents shall be filed, signature notwithstanding, and such action shall be so indicated by the employee's supervisor. The Association

shall be informed if any such employee has refused to sign derogatory or evaluation material that is being placed in his file.

8.8 Each employee shall be entitled to knowledge of and access to supervisory records and reports of his competence, personal character and efficiency as are maintained in his personal file in evaluation of his performance as an employee of the District.

8.9 In the event the Board removes from the teacher's file any materials, a dated notation shall be placed in the file stating what materials have been removed.

4. The Pittsfield School District of SAU #51 currently has a plan for conducting observation/evaluations of teachers. Its cover is dated "July, 1996." Page 1 thereof is the first page of a three page memo dedicated to explaining the background, outcome, contents and recommendations pertaining to this plan. It is dated "9-01-96." (Association Exhibit No. 1) According to testimony from Superintendent Paul Moccia, the Pittsfield School adopted this plan as a "revision" to the "Handbook on Teacher Evaluation" dated September 25, 1981 (Association Exhibit No. 14) on June 17, 1996 (Appendix B to District's Motion to Dismiss). Middle School Principal Noel DeSousa testified that he distributed this plan (Association Exhibit No. 1) to teacher mail boxes on or about June 20, 1996. Elementary Principal Bernadette McLaughlin testified that she circulated this plan to her staff on June 20, 1996. (Appendix Exhibit No 9) DeSousa issued three staff memos on June 20, 1996, September 5 and 9, 1996 directing each teacher to develop a minimum four (4) goal action plan, as a requirement under Association Exhibit No. 1 (Association Exhibit No. 2 and Appendix Exhibit No. 10). McLaughlin issued a staff memo on September 9 seeking submission of performance goal(s) by October 15, 1996 (Association Exhibit No. 3). Notwithstanding the foregoing dates, Wayne Petrovek, testified that he did not receive his copy of Association Exhibit No. 1 until a teacher meeting on

August 26, 1996. Likewise, faculty member High Sanborn said he did not get his copy until the last week of August, 1996.

5. The contents, requirements and forms of the 1996 plan (Association Exhibit No. 1) are not similar to either the contract provisions recited in Finding No. 3 or the 1981 evaluation plan (Association Exhibit No. 14). High Sanborn, who has taught in the District for twenty years, said the Association voted to ratify and accept the 1981 evaluation plan and that he could recall no votes by the Association to modify it thereafter.
6. On September 13, 1996, after the start of the 1996-97 school year, Petrovek wrote a letter to Pittsfield School Board chair, Michael Psznowsky, objecting to the implementation of Association Exhibit No. 1, asking that it be set aside and that changes in the existing plan be negotiated (Association Exhibit No. 4). There is an issue in controversy following this letter because the District (pleadings, para. 3) has claimed they have been negotiating a new contract "during the entire time period covered in this case." District pleadings also indicate impasse occurred on December 19, 1996.
7. Petrovek is a nine-year teacher in the District who has also served as acting and assistant principal as well as Association president. He testified that the new evaluation plan is not a "revision" because there are differences involving the definitions of informal and formal evaluations, when and how they will be conducted, in requirements for setting and defining professional goals, conversion of informal evaluations into formal evaluations and in the forms utilized. He also stated that Association Exhibit No. 1 violates CBA articles 8.1, 8.2 and 8.4 because of changes to past practice thereunder. For instance, he said that the "full knowledge" of Article 8.1 could be taken to mean something other than the "prior knowledge" it has meant for the past nine years.
8. Hugh Sanborn has been a teacher in the District for twenty years. He testified that Association Exhibit No. 1 has changed or eliminated the pre-observation

conference and what formerly was an agreement on which classes would be visited. By way of example, this past year, he said his unannounced visit by his principal ultimately became his formal evaluation for the year and that he neither received a copy of it nor discussed it with the principal after the fact.

9. Richard Towne, Jr., a technical education teacher, said Association Exhibit No. 1 changed the manner in which his evaluation was conducted during the past school year. His "goals" which he submitted replaced his pre-observation meeting and his self-evaluation process replaced what was formerly a check list procedure. He indicated that the new procedures required four to five hours of work versus the check list technique which used to require 20 to 25 minutes. He also indicated that the new assessment forms no longer contain the supervisor's renewal recommendation on them, as did the forms under the former procedures.

10. The District contends that the change in evaluation procedures is a managerial policy under RSA 273-A:1 and that Association Exhibit No. 1 merely replaces the previous handbook (Association Exhibit No. 14) which was a management document from its inception.

DECISION AND ORDER

The issue of teacher evaluations is not new to this Board. We addressed it in Laconia Association of Support Staff v. Laconia School Board, Decision No. 84-78 (October 25, 1984), which is similar to this case in that the parties were covered by a CBA at the time. Unlike this case, their contract was silent on the issue of evaluations. While we agreed with the Laconia School Board that "evaluation of employees must be viewed as an exclusively managerial function involving the employer's control over the 'functions, programs and methods of the public employer,'" we also said, "insofar as this new managerial policy may impact other effects, 'either terms and conditions of employment,' these other effects must be proper subjects of negotiations." The parties were ordered to negotiate the impact of the new policy.

By July 1, 1985, upon petition, we agreed to hear further argument on this matter of an evaluation policy. In Laconia Association of Support Staff v. Laconia School Board, Decision No. 85-86 (October 25, 1985), we said:

Insofar as the Laconia School Board seeks to make a decision adopting a policy of evaluation stipulating their concerns for employee performance[,] the decision per se is not of itself a mandatory subject of negotiation but rather is a reserved management prerogative. However, insofar as procedures and/or "methods" of implementation are adopted, these procedures and/or methods will effect the "conditions of employment" encompassed and foreseen by the act and are therefore themselves mandatory subjects of negotiations.

On June 2, 1989 the Concord Education Association filed a ULP alleging that the Concord School District refused to negotiate the implementation and procedures of a new evaluation model by which members of the bargaining unit will be evaluated and that it unilaterally adopted and implemented this plan which effected terms and conditions of employment. As here, there was a CBA in force; it did not expire until August 31, 1990. Also as here, it did contain language about how teacher evaluations shall be conducted. We found that the school board "acted improperly in implementing an evaluation policy that could impact terms and conditions of employment and ...commit[ted] an unfair labor practice." The board was ordered "to negotiate with the bargaining unit the revised teacher evaluation model...and its implementation." Concord Education Association v. Concord School Board, Decision No. 90-27 (April 11, 1990). After denial of rehearing by the PELRB (Decision No. 90-65, July 30, 1990), this matter was appealed to the New Hampshire Supreme Court which declined that appeal on November 9, 1990 (Docket No. 90-380).

This case presents essentially the same facts as Concord, supra, i.e. a unilateral change in an evaluation procedure or methodology mid-term to a CBA which already addresses the issue. Thus, our results should be the same. The District has committed a ULP both by making the unilateral change to terms and conditions of employment, i.e., a breach of the current agreement [RSA 273-A:5 I (h)] and by refusing to negotiate [RSA 273-A:5 I (e)], to the extent such an obligation exists mid-term to a CBA. The School Board is ordered to CEASE and DESIST in these unilateral changes forthwith and to negotiate any future changes

in the evaluation plan or its implementation with the certified bargaining agent.

So ordered.

Signed this 1st day of AUGUST, 1997.


EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding.
Members Seymour Osman and Socrates Makris present and voting