P.E.R.C. NO. 83-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WHARTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-81-250-175

WHARTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Wharton Education Association filed against the Wharton Board of Education. The charge had alleged that the Board violated subsections N.J.S.A. 34:13A-5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally required teachers requesting personal leave to submit a new and more detailed leave request form and when it refused to submit the validity of the change on the form to binding arbitration. The Commission concludes that the parties' contract implicitly authorized the new form and did not require the Board to submit the Association's grievance to arbitration.

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Appearances:
For the Respondent, Fullerton, Porfido & Wronko, Esqs.
(Eugene J. Porfido, of Counsel)

For the Charging Party, Katzenbach, Gildea & Rudner, Esqs.
(Arnold M. Mellk, of Counsel)

DECISION AND ORDER

On February 27, 1981, the Wharton Education Association ("Association") filed an unfair practice charge against the Wharton Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4 (a)(1) and (5),[1/] when on September 2, 1980, it unilaterally adopted a new personal leave policy under which teachers seeking such leave had to submit a new and more detailed leave request

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

form.[2/] The Association also alleged that the Board violated these same subsections by refusing to submit a grievance concerning the change in personal leave policy to binding arbitration.

On June 22, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board filed an Answer in which it admitted that it had adopted a more comprehensive form, but asserted that it had a managerial prerogative as well as a contractual right to make the change.

On October 19 and 20, 1981, Commission Hearing Examiner Edmund G. Gerber conducted hearings and afforded the parties an opportunity to examine witnesses, present evidence, and argue orally. The parties filed post-hearing briefs by January 8, 1982.

On June 22, 1982, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 82-63, 8 NJPER ___

2/ The Association attached a copy of the challenged leave request form to its charge. Essentially, the form requires that when a teacher requests leave under a category other than for "without reason" certain detailed information must be provided. For example, under the category "Legal Matters" the following questions must be answered: "(1) What is the nature of the legal matter?; (2) Why can't this matter be attended to after school hours and (3) What is the name and phone number of your attorney (where appropriate)?"

Under the old leave request form, teachers merely had to check the appropriate reason for the personal leave -- e.g., legal matters, death in immediate family -- without giving the particulars involved.

In addition, the new leave request form must be accompanied by a copy of the teacher's lesson plan. Under the old procedure, the lesson plan was left on the teacher's desk.

Finally, the parties' collective negotiations agreement also provides for three days of personal leave to be taken without having to give a reason. The new form does not affect the employees' right to take these personal leave days.

(¶_____ 1982) (copy attached). He found that the Board did not violate the Act when it adopted the new personal leave request form. He reasoned, in part, that the new form did not ask for information which went beyond the requirements of the parties' collective negotiations agreement and merely allowed the Board to verify that the personal leaves were being used for contractually permissible purposes.

The Hearing Examiner also found that the new requirement that teacher lesson plans be attached to the leave request form, instead of kept at the teacher's desk, was a de minimis procedural change which did not rise to the level of an unfair practice.

In addition, the Hearing Examiner found that while the Board may not have asked for such detailed leave request information in the past, the Board had not waived its right to ask for that information now.

On July 8, 1982, the Association filed Exceptions. It contends that the Hearing Examiner erred in finding that: (1) the Board's actions did not alter the terms and conditions of employment of the teachers; (2) the requirement that lesson plans be submitted along with the request was not an unfair practice; and (3) the Board had not waived its right to ask for the information requested in the new form. Additionally, the Association contends that the Hearing Examiner should have found that the instant dispute is a proper subject of binding arbitration and that the Board violated the Act by not agreeing to arbitration.

We have reviewed the record. We adopt the Hearing Examiner's factual findings and his analysis of the issues raised in the first three Exceptions. Accordingly, we dismiss these Exceptions.

Additionally, the Association contends that the Hearing Examiner erred in failing to hold that this matter is a proper subject of arbitration and that the failure of the Board to allow the grievance concerning leave requests to proceed to binding arbitration violates the Act. We disagree.

The parties' collective negotiations agreement has a clause on binding arbitration which provides:

> Any grievance not resolved to the employees' satisfaction after review by the Board of Education may, at the request of the Association or the employee(s) and with concurrence of the Board of Education and the grieved employee(s), be submitted to arbitration and in such event the decision of arbitration shall be binding with costs shared equally with the Board and the Association. (Emphasis added)

It is clear that this provision gives the Board discretion not to concur in submitting grievances to arbitration. We, therefore, conclude that the Board did not violate the Act by refusing to submit the grievance to arbitration. See, In re South River Bd. of Ed., P.E.R.C. No. 77-62, 3 NJPER 174 (1977) (Board does not violate Act when it refuses to arbitrate dispute when contract conditions arbitration on parties' agreement that there is a dispute).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett and Suskin voted for this decision. Commissioner Graves was opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
September 14, 1982
ISSUED: September 15, 1982

H. E. No. 82-63

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Respondent,

-and-

Docket No. CO-81-250-175

WHARTON EDUCATION ASSOCIATION,

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SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Wharton Board of Education did not violate the New Jersey Employer-Employee Relations Act when it imposed new conditions on applying for the taking of personal leave days under the contract. The new conditions did not exceed the express language of the contract.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. No. 82-63

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Katzenbach, Gildea & Rudner, Esqs.
(Arnold M. Mellk, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On February 27, 1981, the Wharton Education Association (Association or Charging Party) filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the Wharton Board of Education (Board or Respondent) has engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (5). 1/

It was specifically alleged that the Association and the Board are signatories to a collective negotiations agreement for

1 These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

the period of July 1, 1979 through June 30, 1981. A provision of the contract provides for the taking of personal leave days for certain specified reasons. Prior to September 2, 1980, the teachers used a certain simple form to request the taking of leave days. On September 2, 1980, the Board announced that it was going to use a larger, more comprehensive form and required all teachers to use it in order to apply for personal leave days. It was claimed that the imposition of the new form constituted an unlawful unilateral change in the terms and conditions of employment and constituted an unfair practice within the meaning of the Act.

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 22, 1981. Pursuant thereto hearings were held on October 19, 1981, in Wharton, New Jersey, and on October 20, 1981, in Trenton, New Jersey. At the hearings both parties were given an opportunity to present evidence, to examine and cross-examine witnesses, to argue orally and present briefs. 2/

The Association and Board are parties to a collective negotiations agreement. Article V of that agreement provides for various types of personal leave. Three days of personal leave is "without reason." This leave obviously may be taken without giving a reason. Four days leave per year shall be granted for death in the immediate family. Immediate family consists of spouse, son(s), daughter(s), mother and father, sister(s), brother(s), father-in-law

2/ Briefs in this matter were received by January 8, 1982.

mother-in-law, son-in-law and daughter-in-law. The provision further states that leave is allowed without loss of pay for the following reasons: (1) Serious illness in the immediate household or immediate family; (2) legal matters - e.g.: house closing, court appearance, etc.; (3) observance of religious holidays; (4) death for any other family member other than a member of the immediate family as defined above; (5) any other reasons as approved by the Superintendent. Provided, however, that the total absences allowed under this paragraph C shall not exceed three (3) days per school year.

In order to take an absence for any of the days permitted, the employee is required to give 48 hours written notice to his or her principal in advance of the contemplated absence or such shorter notice as is practical in the situation.

From approximately 1975 until 1980 when a teacher requested the taking of a personal leave day, a one-page form was filled out which simply required the teacher to fill in the number of days required and the dates of the leave. Space was provided so one could check the appropriate box for the reason for the leave, e.g. serious illness in the immediate household, legal matters and so forth. In September 1980 the Board promulgated two new forms. One of the forms was "Leave Without Reason." It required that either a lesson plan for the day of absence be attached or a reason given why no lesson plan was necessary. The other form was "Personal Day Leave With Reason." It listed each major reason separately and asked certain questions concerning each reason.

Under "legal matters" it asked the nature of the legal matter, asked if the matter could be attended to after school hours and asked for the name and phone number of the attorney involved where appropriate. For observance of religious holidays, it asked the name and date of the religious holiday and so forth. The form also asked that a written, detailed class lesson plan be attached to the application or reason given why a lesson plan was not attached.

In "serious illness in the immediate household or family," the form asked for the relationship of the individual, the nature of the illness, if a physician was contacted and if so what was the name of that physician.

The Association here claims that the imposition of these new forms changed the terms and conditions of employment of the teachers. I do not believe that it did. The information asked for on the forms does not ask for information which goes beyond the requirements of the contract. By example, under leave for family illness the contract spells out which family members qualify for such leave and the contract specifically limits such leave to incidents of "serious illness." Asking for this information only confirms that the requirements of the contract have been met.

The contract states that a request to take annual leave shall be made in writing. Unquestionably, this provision does not require the specific form which has been promulgated but it cannot be seriously disputed that the terms of the contract provide that the employer has the right to know the information which is

requested on the forms. The forms themselves are not unduly burdensome. They do not violate the spirit of the contract language. It should be noted that for the five years prior to the implementation of these forms, other forms were used and the Association never questions their use.

It was argued that the forms now require the submission of lesson plans when, prior to promulgation of the form, no lesson plans were required to be submitted. Yet the Association witnesses uniformly testified that lesson plans were prepared prior to the taking of personal leave days and Mr. Markosfky testified that this requirement was established by past practice. Their only objection was that, prior to the promulgation of the forms, the lesson plans were kept at the desk of the teacher rather than being attached to the form itself. While this does constitute a procedural change, it is so de minimis that it does not rise to the level of an unfair practice.

The Association had approximately 15 witnesses testify as to how, in prior years, they were not required to provide the information that is now demanded of them. Yet this testimony itself was not uniform. One witness testified that while the old form was still in use she applied for leave to have a will drawn. She was asked by the principal if this could be accomplished either after school hours or on Saturday. When it was found out that her attorney did keep Saturday hours the request for a personal day was denied. The failure of the Board to ask for information in the past does not mean the Board has waived its right to

ask for that information. Simply because an employer chooses not to enforce the provisions of the contract that his right to enforce a contract is somehow waived. In New Brunswick Bd/Ed, P.E.R.C. No. 78-47, 4 NJPER 84 (1978), aff'd Docket No. A-2450-77 and Town of Irvington, P.E.R.C. No. 82-63, 8 NJPER 94 (¶113037 1982), the Commission held that the language of the contract takes precedence over an established past practice. Accordingly it is recommended that the unfair practice in this matter be dismissed in its entirety.

Edmund G. Gerber
Hearing Examiner

Dated: June 22, 1982
Trenton, New Jersey