

P.E.R.C. NO. 92-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEANPORT BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-152

OCEANPORT ADMINISTRATORS
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Oceanport Administrators Association against the Oceanport Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it refused to pay a principal for unused vacation days after he resigned. On this record, the Commission cannot say that the Board's refusal to pay the principal, in this one instance, amounted to a repudiation of the Board's admitted contractual obligation to pay principals for unused vacation days.

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Charging Party.

Appearances:

For the Respondent, Kalac, Newman, Lavender & Campbell,
attorneys (Howard M. Newman, of counsel)

For the Charging Party, Wayne J. Oppito, attorney

DECISION AND ORDER

On November 28, 1989, Richard W. Entwistle and the Oceanport Administrators Association ("Association")^{1/} filed an unfair practice charge against the Oceanport Board of Education. The charge alleged that the Board violated subsections 5.4(a)(1), (5) and (7)^{2/} of the New Jersey Employer-Employee Relations Act,

1/ The charge was filed by Entwistle and the Oceanport Principals Association, but at the hearing the caption was amended to name the Oceanport Administrators Association instead.

2/ 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. (7) Violating any of the rules and regulations established by the commission."

N.J.S.A. 34:13A-1 et seq., when it refused to pay Entwistle, a principal, for unused vacation days after he resigned effective October 13, 1989. According to the Association, that refusal constituted a repudiation of the parties' collective negotiations agreement.

On February 2, 1990, a Complaint and Notice of Hearing issued.^{3/} On February 9, 1990, the Board filed an Answer denying that Entwistle had any unused vacation days or that it had violated any contractual obligations.

On March 29, 1990, Hearing Examiner Margaret A. Cotoia conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On December 4, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-13, 18 NJPER 4 (¶23002 1991). She concluded that Entwistle had not accumulated any earned vacation days at the time of his termination and therefore the Board did not have any contractual obligation to pay him any money.

On January 17, 1992, after receiving an extension of time, the Association filed exceptions. It asserts that the Board's official leave records showed that Entwistle had nine unused vacation days at the time of his termination and that the Board repudiated the collective negotiations agreement by refusing to pay him for these days.

^{3/} The Complaint named only the Principals Association as the charging party. Entwistle does not have standing to allege a contract repudiation.

On January 29, 1992, the Board filed a response. It asserts that Board policy requires that vacation days be earned at the rate of two vacation days a month (up to 20 days a year) and that under that policy Entwistle had used more vacation days than he had earned.

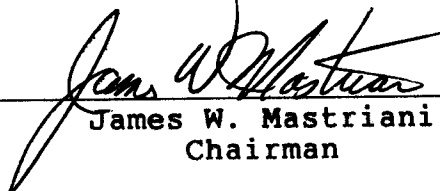
We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-11) are undisputed and accurate. We incorporate them.

The Board does not dispute that it has a contractual obligation to pay principals for all unused vacation days when their employment ends. It simply asserts that Entwistle did not have any unused vacation days at the time he retired. While Board records indicated that Entwistle had nine unused vacation days when he retired, the Hearing Examiner found that the crediting of vacation days at the beginning of the work year was a bookkeeping convenience; principals were still required to earn vacation days on a month-by-month basis; and Entwistle had already used more vacation days during the 1989-1990 school year than he had earned by the date of his termination. On this record, we cannot say that the Board's refusal to pay Entwistle, in this one instance, amounted to a repudiation of the Board's admitted contractual obligation to pay principals for unused vacation days. We accordingly dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: February 19, 1992
Trenton, New Jersey
ISSUED: February 20, 1992

H.E. NO. 92-13

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEANPORT BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-152

OCEANPORT ADMINISTRATORS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss an unfair practice charge against the Oceanport Board of Education alleging violations of N.J.S.A. 34:13A-5.3 (1) and (5). The Hearing Examiner finds that the Board's refusal to pay a principal for accrued vacation days was neither a contract repudiation nor a unilateral change in an existing term or condition of employment.

H.E. NO. 92-13

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Appearances:

For the Respondent,
Kalac, Newman & Lavender, Attorneys
(Howard M. Newman, of counsel)

For the Charging Party,
Wayne J. Oppito, Attorney

HEARING EXAMINER'S REPORT AND
RECOMMENDED DECISION

On November 28, 1989, the Oceanport Administrators Association ("Association") filed an unfair practice charge alleging that the Oceanport Board of Education ("Board") violated subsections 5.4(a)(1), (5) and (7) of the New Jersey Employer-Employee Relations

Act, N.J.S.A. 34:13A et seq., ("Act")^{1/} by refusing to pay Richard W. Entwistle ("Entwistle") for unused vacation days accrued before his resignation. The Association contends that the Board's refusal to pay was a repudiation of the parties' collective negotiations agreement.

On February 2, 1990, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On February 9, 1990 the Board filed an Answer. The Board acknowledged that it did not pay Entwistle for his unused vacation time but it denied this amounted to repudiation of the parties' collective negotiations agreement. I conducted a hearing on March 29, 1990 at which the parties examined witnesses and presented exhibits. The parties filed briefs by June 25, 1990. ^{2/} Based upon the entire record I make the following:

FINDINGS OF FACT

1. The Oceanport Administrators Association represents all administrators employed by the Oceanport Board of Education. The

^{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; (7) Violating any of the rules and regulations established by the Commission."

^{2/} The Board also filed a letter brief in response to the Association's brief on July 13, 1990.

Association and the Board are parties to a contract effective from July 1, 1989 through June 30, 1990 (R-1).^{3/}

2. Prior to the Board's recognition of the Principals' Association in 1989, the Board negotiated with the principals' unit directly. Both principals--Entwistle and Fred Barron participated in negotiations. The results of those negotiations were collective agreements covering terms and conditions of employment. CP-5 covers the 1988-89 school year and CP-4 covers the 1987-88 school year.

3. The Principals' Association and the Board were in negotiations for the 1989-90 contract in October, 1989--when Entwistle left the district's employ. Therefore, the 1988-89 contract (CP-5) continued in effect until the execution of the new contract with the Principals' Association.

CP-5 provides in pertinent part:

The following Agreement was entered into this first day of September, 1988 by and between the Oceanport Board of Education and the Principals, Mr. Barron and Mr. Entwistle:

Item #2:

The principals shall have twenty (20) vacation days of of June 30, 1988. These days are to be used by June 30, 1989.

Should extenuating circumstances prevail and the Superintendent finds it impossible to grant the remaining vacation time prior to June 30th, the Superintendent shall, with notification to the Board of Education, grant compensation for the remaining days. This may be in the form of

^{3/} Exhibits are designated as follows: The Association's exhibits are "CP" and the Board's exhibits are "R".

financial reimbursement and/or extension of the vacation days to September 1st of that year.

All vacation request must be approved by the Superintendent of Schools.

Item #3:

Compensation shall be made for all unused vacation time upon termination of employment.

Compensation shall be based on the salary earned at the time of termination, provided termination does not take place prior to January 1st. If the termination takes place between July 1st and December 31st, the compensation shall be based upon the salary earned for the last full school year prior to termination. To compute the amount of compensation, divide the annual salary earned by 240 and multiply by number of days accumulated.

On July 15, 1987, Entwistle & Barron sent a memo to Dr.

Price stating, in relevant part:

The terms and conditions we agreed upon verbally with the Board of Education regarding vacations were as contained in the existing Board Policy 2130.1 (3. Vacations) with two changes namely that we were granted our twenty vacation days as of 7/1/87 and that compensation would be based upon a 240, rather than, a 260 day year.

Incorporating these changes the "vacation" section of our new contract should read as follows:

3. Vacations (Not applicable to 10-month administrators)

a. Vacation time shall be earned on a monthly basis, except for July and August and shall be credited to the administrator's account on the last day of each month. The school year for all administrators shall be from July 1 to June 30.

b. During the initial school year of employment, administrators shall earn one and one-half (1 1/2) days of vacation time per month until June 30th.

c. In the second and subsequent school years, two (2) days vacation time per month shall be earned starting with the month of September and ending with the month of June for a maximum of twenty (20) days.

d. A maximum of five (5) days of each year's earned vacation time may be carried over beyond September 1st and accumulated until a maximum of twenty-five (25) days is reached. If any or all of the accumulated leave is used, it shall be replenished at the rate stated above.

e. Unused vacation time that exceeds the maximum allowed on September 1st shall be lost.

h. Compensation shall be made for all unused vacation time upon termination of employment. Compensation shall be based on the salary earned at the time of termination, provided termination does not take place prior to January 1st. If the termination takes place between July 1st and December 31st, the compensation shall be based upon the salary earned for the last full school year prior to termination. To compute the amount of compensation, divide the annual salary earned by 240 and multiply by number of days accumulated.

4. Entwistle was employed as a principal by the Board from August 1, 1979 to October 13, 1989 (T8)^{4/}. When Entwistle was hired in 1979 it was as a twelve month principal. There was no principals or administrators association at that time (T9). When Entwistle was hired, he was entitled to 15 days of vacation per year, or 1 1/2 days for each month (T10, T30). He was granted the 15 days pursuant to board policy and not under a collective negotiations agreement (T10). In 1980, Entwistle worked 11 months before he took his first vacation days (T31). Board policy provides

^{4/} "T" is the hearing transcript dated March 29, 1990.

that vacation time for 12 month administrators shall be earned on a monthly basis (CP-1). First year administrators earned 1 1/2 days of vacation per month (15 days a year for 10 months) and two days per month (20 days a year) in their second and subsequent years (CP-2) (T14). Entwistle's leave records for the 1980-81 and 1981-82 school years show 20 accumulated vacation days (CP-2, T14, T15). Leave records are kept by the Board Secretary (R-2, T119, T120).

5. In June of 1982, Entwistle had 24 accumulated vacation days (T15). He became a ten rather than a twelve month principal and was paid for excess accumulated days (T15, T16). For the 1982-83, 1983-84 and 1984-85 years, Entwistle was a ten-month principal and accumulated no vacation days (T16).

6. In the spring of 1986, Entwistle, Barron, Superintendent of Schools Dr. Price and eight of nine board members met at the Maple Place school teacher's lounge and discussed changing the principals from a 10 to a 12 month work year (T16, T44, T45). The principals were told that they were being moved to 12 month positions by Mrs. Nadler, a board member (T17, T45). Both principals had other summer plans and did not work full time ^{5/} during the summer of 1986 (T17, T18). However, at the spring 1986 meeting, the principals were told that they should consider themselves 12 month employees because the Board's intention was that they would be 12 month employees in a year so they should not plan

^{5/} The principals did work 10 to 18 days in the summer but were paid per diem (T19).

anything for the next summer (T18, T95). Entwistle does not recall discussing vacation day entitlement at that meeting (T18).

Entwistle's vacation leave records for the 1986-87 school year do not show any accrued vacation time (T19, CP-2).

7. John W. Ibex ("Ibex") has been a member of the Oceanport Board of Education for seven years (T92). He is a member of the Board's personnel committee (T93). According to Ibex, the principals and the Board discussed the vacation problems the transition from 10 to 12 month principals would create (T97). If the Board strictly followed a policy of earning vacation, the principals would have waited 22 months to take a vacation -- the period when they were 10 month principals and were not entitled to vacation plus 12 months they would have to work before earning vacation as 12 month principals (T97). Ibex stated that the Board gave the principals the right to borrow against their vacation days with the understanding that the days must be earned at some point in time (T97, T98). Ibex testified that the concept of "borrowing" vacation days was explained to both Entwistle and Baron (T98, T99, T100). If a principal had taken all 20 vacation days in July and left the district in August, the Board would have required reimbursement for the unearned vacation days (T99). Ibex explained that Entwistle's leave records show 20 vacation days earned as of July 1, 1987 as "a matter of bookkeeping convenience for the office staff..." (T97).

8. The principals became 12 month employees as of July 1, 1987 (T96). The Association was formed in 1987 (T19). Pursuant to an agreement between the Board and the two principals (CP-4), Entwistle received 20 vacation days for the 1987-88 school year (T19, CP-2). Entwistle and Barron sent a memo to Superintendent Price memorializing their verbal agreement regarding vacation days for the twelve-month principals (CP-3, T20). An agreement between the principals and the Board was signed in the summer of 1987 (CP-4). It provided for 20 vacation days for principals, accrued as of June 30, 1987, to be used by June 30, 1988 (CP-4, T24). The vacation days were granted for months the principals had worked from September thorough June of the 1986-87 school year (T59).

9. Entwistle earned 20 vacation days for the 1987-88 school year and he used them during that school year (T25, CP-2). Entwistle earned 20 vacation days during the 1988-89 school year which were credited to him as of July 1, 1988 (T25, CP-2). Entwistle and Barron had an agreement with the Board covering 1988-89 (CP-5). That agreement also provided 20 vacation days (CP-5, T25, T60). Entwistle used 19 vacation days during the 1988-89 school year (T26, CP-2). Entwistle also earned 20 vacation days for the 1989-90 school year and used 12 days in July and August, 1989 (T26, T53, CP-2). That left Entwistle with a vacation day balance of nine days as of September 1989 (T26, CP-2). At that time, there was not a collective negotiations agreement in effect between the principals and the Board (T26). CP-4 and CP-5 were

negotiated between the Board and the two principals (T103, T110, T111). The Board was represented by a negotiations committee consisting of members Ibex, Nadler and Gatta (T110). Both CP-4 and CP-5 state that the principals shall have 20 vacation days as of June 30, 1987 or 1988 and those days are to be used by June 30 1989 or 1988 (T103, T118, T119). Ibex understood that language to mean that the principals were entitled to 20 vacation days earned over the school year which could be borrowed against with the understanding that they would be earned later (T104).

10. Entwistle left the Oceanport district on October 13, 1989. When he left the district, he had nine vacation days accrued (T27). He requested payment for those days and the Board denied payment (T27). The contract between the Board and the Association was signed after Entwistle left, in February, 1990 and he received a retroactive check for salary differential covering July 1, 1989 to October 13, 1989 (T43, T106, T107).

11. The Oceanport principals were not organized when the 1987 and 1988 contracts were signed (CP-4, CP-5, T32). The 1989-90 contract between the Board and the Association (R-1) is the first to contain a recognition clause which recognizes the Association as the representative of building principals and the Director of Special Services (T33, T34). Negotiations for R-1 took place in the late spring or early summer of 1989 (T34, T35). Entwistle was on the negotiations committee for R-1 and helped negotiate portions of it, but was not involved in negotiating article IV, C., "Vacation" (T36,

T37). Entwistle was not aware that article IV, C. stated that: "Vacation days are earned throughout the year at the rate of twenty/twelfth (20/12) per month ." (T38). Entwistle agrees that article IV, C. means that vacation days earned means earned from July 1 through June 30 (T40). The 1989-90 contract also contains a retroactivity provision rendering all benefits retroactive to the July 1, 1989 (R-1, T40, T41). Entwistle worked under R-1 until he left the district (T61). Based on the vacation article in R-1, Entwistle believed that he earned 70/12ths vacation days for the period of July 1 to October 13, 1989. That is approximately six days (T62). He also had 20 accumulated vacation days from the previous year of 1988-89 (T61). Entwistle therefore believes that he was owed 27 vacation days when he left the district on October 13, 1989 (T61). Of those days, he had only used 12 in the summer of 1989, leaving a balance of 15 unused vacation days (T62). Entwistle's leave record shows a balance of nine days (CP-2) and it is those nine days that he is seeking reimbursement for (T62, T63), plus three additional days he calculated using the former system of two days per month (2 days for September and one for October) (T63). Entwistle believed that under the 20/12ths policy, he was actually entitled to five and five-sixths days for July to October 1989, although he only sought reimbursement for 3 days (T63). According to Ibex, in 1989 Entwistle carried over one vacation day and earned slightly less than six days between July 1 and October 13, 1989 (T104, T105).

12. The Board's Policy Manual, Section 2130.1, was revised in 1986 and in 1988. CP-1, entitled "Administrative Vacations, Leave, Absences and Benefits" is the version prior to the revisions; R-2, entitled "Vacations, Leaves, Absences and Benefits for Superintendent" is the version after the revisions. Ibex testified that R-2 applied to all 12-month employees (T102, T123). Both policy statements (CP-1 and R-2) contain provisions for vacations which are identical in every respect except one: CP-2 (the older policy) provides that vacations scheduled must be approved by the Superintendent of Schools; R-2 does not contain such a provision. R-2 also provides for Board of Education approval of the Superintendent's vacation and permits the Superintendent to accumulate vacation time under certain circumstances.

ANALYSIS

The Association asserts that the Board's refusal to pay Entwistle for his unused vacation leave repudiates the contract and violates the Act. The Board asserts that Entwistle had no earned vacation leave to compensate.

While a good faith dispute over the interpretation of a contractual provision is not an unfair practice, repudiation of a contract provision is. New Jersey Transit, P.E.R.C. No. 89-29, 14 NJPER 638 (¶19267 1988).

In New Jersey Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission held that with certain exceptions, alleged contract violations do not warrant the exercise of the Commission's unfair practice jurisdiction. However, it found that:

A specific claim that an employer has repudiated an established term and condition of employment may be litigated in an unfair practice proceeding pursuant to subsection 5.4(a)(5). A claim of repudiation may also be supported, depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause (citations omitted) Id. at 423.

The Association has not proven that the Board repudiated a clear contract term. Entwistle's entitlement to payment depends upon whether he had accumulated vacation leave left. To show such an entitlement, the Association would have to demonstrate that either Entwistle earned the vacation time in a prior year and carried it over, that the contract entitled an employee to an unearned allotment of vacation days at the beginning of each school year, or that the parties' past practice established such an entitlement. I find that the Association has not proven any of these elements.

The 1987-88 school year began on July 1, 1987. The Board did not make the principals 12-month employees until July 1, 1987. It is uncontroverted that 10-month employees do not accrue vacation days. Therefore, I reject the Association's argument that Entwistle

earned the vacation credits while he was a ten-month employee during the 1986-87 school year. Second, the record shows that neither the contract nor past practice entitles Entwistle to the vacation days. The contract merely guarantees that "Each administrator shall be entitled to twenty (20) paid vacation days per year." This is common contract language used to indicate the number of annual vacation days to which each employee is entitled.

While the timesheets show that Entwistle had 20 vacation days to his "credit" as of July 1, 1987, Ibex's unrefuted testimony was that this was shown as a "credit" at the beginning of the year merely as a bookkeeping convenience. In actuality, the principals were still required to earn vacation time at the rate of two days per month during the 10 month school year. This is consistent with the Board's policy on vacations (either the unrevised version CP-1 or the revised version R-2), which provides at item 3 (a), "Vacation time shall be earned on a monthly basis, except for July and August, and shall be credited to the Administrator's account on the last day of each month." (emphasis added) Moreover, although the principals' memorandum to the Superintendent requests a change in the contract language to reflect a "verbal" agreement with the Board that "we were granted our twenty vacation days as of July 1, 1987...", this memorandum does not demonstrate that principals received an unearned "bank" of twenty days to be credited July 1, 1987.^{6/} While the

^{6/} Such an unearned "bank" of twenty vacation days would have been in addition to the twenty earned days as provided for in the Board policy manual.

memorandum requests contract language changes, the actual contract, signed in August, 1987, contained no such changes. Additionally, the memorandum was addressed to the Superintendent, not to the Board or its negotiators. The memorandum to the Superintendent recites the actual Board policy that "Vacation time shall be earned on a monthly basis...." (emphasis added). I can only conclude that the memorandum was intended to confirm an agreement that principals were to receive their 20 days vacation allotment on July 1, 1987, but would still have to earn vacation days monthly.

Finally, according to CP-2, the past practice was that Entwistle earned vacation and was then paid for unused time. In the first year of his employment (1979-80), he was credited vacation time as he earned it and used none. In the second year (1980-81), he began the year with the 15-day allotment he earned the previous year. He earned 20 days and used 17 the following year, carrying forward 18 days into his third year (1981-82). By the end of 1981-82 he had 24 earned days remaining and was paid cash for them. (See CP-2).

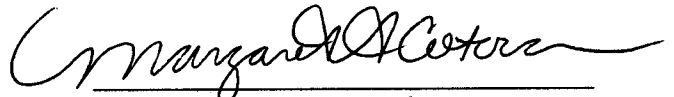
Since Entwistle began the 1989-90 school year with one day carried over and used 14 vacation days, he is not entitled to additional payment. The Board did not repudiate the contract nor did it unilaterally change an existing term and condition of employment.

CONCLUSION

The Oceanport Board of Education Board did not violate N.J.S.A. 34:13A-5.4(a)(1) or (5) by refusing to pay Richard Entwistle for accrued vacation days.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.



Margaret A. Cotoia
Hearing Examiner

DATED: December 4, 1991
Trenton, New Jersey