H. E. No. 84-62

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

In the Matter of

OAKLAND BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-116-81

OAKLAND TEACHERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board did not violate the New Jersey Employer-Employee Relations Act when it failed to sign an agreement which would have included language for a maintenance of benefits clause as proposed by the Association. The Hearing Examiner found that conditions precedent existed in the parties' memorandum of agreement and a Board resolution which were not met, and the Board never actually approved the memorandum. The Hearing Examiner further found that the parties' subsequent attempt to agree upon language for a maintenance of benefits clause resulted in a failure of the meeting of the minds.

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.

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Appearances:

For the Respondent
Parisi, Evers & Greenfield, Esqs.
(Irving Evers, of counsel)

For the Charging Party
John Biondi, NJEA UniServ Representative

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 27, 1983 by the Oakland Teachers' Association ("Association") alleging that the Oakland Board of Education ("Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association has alleged that the Board failed to place a negotiated maintenance of benefits clause into the parties' collective agreement and failed to sign such an agreement all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(6) of the Act. 1/

The Association argued that the parties had agreed in a

1/ This subsection prohibits public employers, their representatives or agents from: "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

memorandum of agreement to insert the Association's proposed maintenance of benefits clause into the parties' collective agreement, and that the entire Board signed the memorandum and subsequently ratified the memorandum. The Association argued that since all Board members signed the memorandum it was binding at that point, and it seeks to compel the Board to sign a collective agreement which includes that maintenance of benefits clause.

The Board denied committing any violation of the Act and argued that its acceptance of the memorandum of agreement was subject to formal Board approval, and that the Board never formally adopted the Association's maintenance of benefits clause. In fact, the Board raised as an affirmative defense that the parties subsequently agreed to modify the Association's proposed clause and that the Board signed an agreement which included the modified language.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 30, 1984. The Answer denying any violation and raising affirmative defenses was filed on February 7, 1984. A hearing was subsequently held in this matter on April 5, 1984 in Newark, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Both parties submitted post hearing briefs the last of which was received on May 17, 1984.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing

briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

Findings of Fact

1. The Oakland Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The Oakland Teachers Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The record shows that in December 1982 the parties began their negotiations for a new collective agreement. The Association submitted a package of proposals to the Board within which was contained the proposal for a maintenance of benefits clause designated as item 26 of Exhibit CP-1. 2/ (Transcript "T" p. 12). The parties' negotiations, however, reached impasse and remained at impasse through the mediation process. A fact finding hearing was scheduled for June 21, 1983, but on that day the fact

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2/ The proposed maintenance of benefits clause in CP-1 provides:

> 26. Except as this agreement shall otherwise provide, all terms and conditions of employment applicable on the effective date of this agreement to employees covered by this Agreement as established by the administrative procedures and practices in force on said date, shall continue to be so applicable during the terms of this agreement. Unless otherwise provided in this agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce nor otherwise detract from any teacher benefit existing prior to its effective date.

finder was successful in assisting the parties in reaching an agreement. That agreement was embodied in a Memorandum of Agreement (Exhibit J-1 attached to the Charge) which was actually signed by both parties, including all Board members, on the early morning of June 22, 1983. That Memorandum began with the following paragraph:

> The Oakland Board of Education and Oakland Teachers Association, subject to formal Board approval and ratification by the Association, hereby agree to resolve all issues in dispute at fact finding as follows:

Item 6 of that Memorandum, the matter in dispute, provided that:

> Effective 1983-84 the contract shall include the Association's proposal for a maintenance of benefits clause.

There are no other items in dispute. 3/

The following day, June 23, 1983, the Association ratified the Memorandum (T p. 23), and then on June 27, 1983 the Board, in a special meeting, formally voted upon and passed the following resolution designated as Exhibit CP-2.

> Motion by Mrs. Kamm, seconded by Mr. Codd, approving Memo of Agreement between the Oakland Board of Education and the Oakland Teachers Association for 1983-86, subject to reduction to writing and terms satisfactory to both sides, the Board of Education and the Oakland Teachers Association, and legal review by the Board Attorney. On roll call vote, motion carried unanimously.

Subsequently, by memorandum dated August 11, 1983, the Board Secretary, Edmund Kotula, forwarded the Board's draft of the parties' collective agreement (Exhibit CP-3) to Paul Kraivanger, Association Chief Negotiator, and Mary Siebold, Vice President of the Association. That document did not contain the maintenance of

3/ The Association stipulated that all other provisions of the contract as agreed to by the parties have been included in a document offered by the Board as the parties' collective agreement. (T p. 77).

benefits language that was set forth in CP-1, but it did, in Article 10 section 11, contain the following sentence in lieu of the other language.

> Except as this agreement shall otherwise provide, all fringe benefits to teachers previously in effect shall be maintained.

The Association did not sign CP-3 and approximately one week after CP-3 was delivered to the Association representatives, a meeting was held between Kraivanger and the Board where Kraivanger pointed out that the problem with CP-3 was that it did not contain the maintenance of benefits proposal set forth in CP-1 as agreed to in J-1. (T pp. 29-31). Kraivanger then alleged that unnamed representatives of the Board responded that:

> Well, if the Association proposal is what it has to be, that's what we'll have to abide by since that's what the Memorandum of Agreement says. (T p. 31).

Subsequently, between September 1 and September 15, 1983, another draft of the contract (Exhibit CP-4) was provided to Kraivanger from the Board. 4/ (T pp. 31-32). Article 10 § 9 of CP-4 included the same maintenance of benefits clause as contained in CP-1. Nevertheless, although Kraivanger indicated that there was nothing in CP-4 which would have prevented the Association from signing that document (T pp. 33-34), the Association never established that it signed or ratified CP-4.

In addition, the Association did not establish what - if anything - (other than the filing of the Charge) occurred regarding

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4/ Unlike CP-3, CP-4 does not contain a memorandum transmitting the draft to Kraivanger. Therefore, it is not clear who on behalf of the Board forwarded CP-4 to Kraivanger, but Kraivanger testified that CP-4 was a Board offer, and the Board did not present any evidence to the contrary.

CP-4 and the instant dispute between September 15 and early December 1983. The facts then show that on or about December 13, 1983 a conference was held between the parties and a Commission staff agent in an attempt to resolve the matter. (T p. 63). Then on December 19, 1983 the Board apparently ratified an agreement in accordance with the agreement reached on December 13, and subsequently on December 20, 1983, Board Secretary Kotula forwarded another draft of the parties' contract (Exhibit R-1) to Kraivanger and Association President Carol Pierce. Article 10 § 9 of that document contained the maintenance of benefits clause as set forth in CP-1, but added to it was the following language:

> provided, however, that nothing contained herein shall be deemed to limit the right of the Board to make any transfers, assignments or reassignments within the scope of the certification of the teachers, and provided further that the provisions of Article 5 of this agreement are not violated nor are any other managerial prerogatives encroached upon.

The Board maintained that the new language in Art. 10 § 9 of R-1 was agreed upon by the Association on December 13. (T pp. 98-99). However, the Association argued that it never approved R-1, and R-1 was not admitted into evidence to prove that the Association agreed to it. (T p. 79), it was only admitted to show that R-1 was offered to the Association as a contract signed by the Board. The Board never filed a charge against the Association regarding R-1.

The same day R-1 was sent to the Association, December 20, 1983, Kotula sent a letter (Exhibit R-2) to Pierce confirming that she refused to accept the delivery of R-1.

4. Kraivanger testified that the parties' prior procedure for reaching collective agreements was for the parties to

sign and then ratify a memorandum of agreement, then for the parties to clear up any language problems and then sign the agreement. (T p. 48).

5. The facts further show that the Board discussed the instant Memorandum of Agreement and the maintenance of benefits clause in CP-1 with its counsel sometime after June 27, 1983, and that the Board counsel expressed reservations about the language and indicated it was not agreeable. (T pp. 76A-77; 89-90).

6. Finally, both Alfred Solomon, the Board's President, and William Risser, the Board's Superintendent, testified that they thought the Association had agreed to the maintenance of benefits language in R-1. (T pp. 85-86, 98-100).

Analysis

Having reviewed the entire record the undersigned finds that the Association failed to prove by a preponderance of the evidence that the parties had reached a final agreement on the maintenance of benefits language. The issue in this case is primarily limited to whether the Board was bound by the language in the Memorandum of Agreement, and the undersigned finds that it was not. But a secondary issue also exists as to whether the parties subsequently reached a meeting of the minds. Once again, the undersigned finds that they had not.

The Association in its post hearing brief argued quite clearly that it believed that since all Board members signed the Memorandum on June 22, that it was bound to that language at that point. It further argued that the Memorandum did not set forth any conditions under which either party could void a contract. Finally,

the Association argued that the Board's "formal" ratification on June 27 could not alter the effects of their actions on June 22. The Association's arguments are factually and legally incorrect. The Association has failed to give the proper legal weight to the conditions precedent in both the Memorandum of June 22, and the Board resolution of June 27, 1983. In addition, at the very least, there appears to be a failure of the meeting of the minds regarding R-1.

The Commission has held that, absent express qualifying conditions (conditions precedent), it may be presumed that an employer's negotiators have the authority to conclude a binding agreement upon the signing of a memorandum of agreement. 5/ See In re Bergenfield Bd.Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975); In re E. Brunswick Bd.Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976); In re Mt. Olive Bd.Ed., P.E.R.C. No. 78-25, 3 NJPER 382 (1977). However, where the memorandum indicates it is subject to ratification or some other condition precedent, the memorandum is not binding unless the precondition(s) has been satisfied. See In re Camden Fire Dept., P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982), affirming In re Camden Fire Dept., H.E. No. 82-34, 8 NJPER 181 (¶13078 1982).

In this case both the Memorandum and the Board resolution contained conditions precedent which were not satisfied. Thus the Memorandum never really became a binding agreement. The Association's contention therefore that because all Board members signed

5/ This case does not concern an apparent authority issue. The Board members as a group certainly had the authority to enter into an agreement. Rather, this case concerns whether there were conditions precedent in J-1 that would prevent the Memorandum from automatically operating as a binding agreement.

J-1 that it then became automatically binding, and the contention that the Memorandum contained no conditions, is without merit and factually incorrect. The opening paragraph in the Memorandum clearly made that Agreement "subject to formal Board approval and ratification by the Association," which was a condition precedent for both the Board and the Association. Consequently, without formal Board approval the Board could not be bound by the Memorandum.

The issue then shifts to whether the Board "formally approved" or ratified the Memorandum in its resolution of June 27, 1983(CP-2). The Association's argument that the Board's formal action on June 27 could not alter its actions of June 22 is also factually and legally incorrect. The Association's argument in that regard presupposes that the Memorandum was already a binding agreement. But it was not. It was subject to formal Board approval and the Board resolution of June 27 contained two clear conditions precedent of its own. Ratification of the Memorandum was subject to (1) written terms satisfactory to both sides, and (2) legal review by the Board attorney. Unless both conditions precedent in the Resolution were satisfied J-1 could not operate as a binding collective agreement.

The facts show that the Board then exercised its reserved right to seek legal review of the Memorandum, and when it did, the Board counsel advised against the language in the proposed maintenance of benefits clause as written. The Board's action at that point was a rejection of the Memorandum at least as to item No. 6, the maintenance of benefits clause. The Board then, as an apparent counter-offer, and in an apparent exercise of its reserved right to

arrive at terms satisfactory to both sides, drafted its own maintenance of benefits language in Art. 10 § 11 of CP-3, but that language was rejected by the Association. Consequently, up to that point, there was a tentative agreement (J-1) which was rejected by the Board (only as to the maintenance of benefits clause), and a counter-offer by the Board which was rejected by the Association. Thus, no binding agreement was reached.

The focus of the case then shifts to whether there was a subsequent agreement or a failure of the meeting of the minds. In an apparent attempt to resolve the matter between the parties the Board in CP-4 made another counter-offer and actually offered the same maintenance of benefits language as contained in CP-1. CP-4 was given to Kraivanger in early September 1983, but no evidence was produced to show that the Association ever accepted, ratified, or signed that contract.

In fact, other than the filing of the instant Charge on October 27, 1983, the Association presented no evidence to show what occurred between the receipt of CP-4 in September, and the settlement conference of December 13, 1983. There is no evidence that the Board withdrew CP-4 as an offer prior to December 13, or that the Association was prevented from signing or ratifying CP-4 prior to the December conference. Yet the Association never even alleged, nor did it establish, that it accepted or ratified CP-4.[6/]

6/ The Association never alleged that CP-4 acted as the Board's approval of the Memorandum. The Association's case, as enunciated in its post-hearing brief was that the Board was bound to the Memorandum when it was signed because all Board members signed it. The Association argued that what happened thereafter was of little consequence.

The undersigned does not believe that CP-4 operated as the Board's approval of the Memorandum, partly because no such argument was advanced by the Association, but primarily because CP-4 was never agreed to, and was either withdrawn or rejected. In the sequence of events CP-4 was nothing more than a new offer by the Board which was withdrawn in favor of the language in R-1.

Subsequently, the parties conferenced on December 13, and the uncontroverted evidence in this hearing was that they reached an agreement on the maintenance of benefits language which was subsequently placed in R-1. The Association admitted participating in the December conference, but it denied that an agreement was reached. Its denial, however, came from its representative at the hearing and was not supported by either documentary or testimonial evidence. The Board, however, established through its witnesses that R-1 was prepared as a result of the parties' agreement at the December conference. Since this case does not concern a charge against the Association it is unnecessary, and indeed improper, for the undersigned to find whether the Association violated the Act. 7/ It is enough for this case, however, to find that, at the very least, because the parties disagreed as to the results of the December conference, there was no meeting of the minds regarding the maintenance of benefits language in R-1. 8/

In the alternative, and even assuming that CP-4 represented the Board's offer to agree to the Memorandum at that point, the undersigned finds that notwithstanding a failure of the meeting of

7/ The Board in its Answer asserted as an affirmative defense in the instant case that the Association violated the Act by not signing R-1. However, the Board never filed a charge against the Association. The Board was certainly entitled to raise the circumstances concerning R-1 as an affirmative defense herein, but it was not entitled, absent a charge against the Association, to prosecute a case against the Association in this hearing. The Board, therefore, is not entitled to a finding herein as to whether the Association's actions violated the Act.

8/ The Commission has previously dismissed (a)(6) allegations because of the failure of the meeting of the minds. See In re Borough of Wood-Ridge, P.E.R.C. No. 81-105, 7 NJPER 149 (¶12066 1981); In re Tinton Falls Bd.Ed., P.E.R.C. No. 79-19, 4 NJPER 475 (¶4214 1978); In re Lower Twp. Bd.Ed., P.E.R.C. No. 78-32, 4 NJPER 24 (¶4013 1977); and In re Mt. Olive Twp. Bd.Ed., P.E.R.C. No. 78-25, 3 NJPER 382 (1977).

the minds regarding R-1, and continuing the offer and acceptance discussion from above, since the parties subsequently met in December to reach terms satisfactory to both sides, and, since the evidence herein established that the Board believed R-1 reflected an agreement of the parties, the signing of R-1 by the Board also, at the very least, represented a withdrawal of CP-4 as an offer for an agreement. The Board's last offer, therefore, could only be R-1.

The Commission has not often had the opportunity to consider the application of traditional offer and acceptance principles. The Hearing Examiner in Camden Fire Dept., supra, as affirmed by the Commission, supra, did apply traditional offer and acceptance principles in finding that an attempted modification of a tentative contract constituted a rejection of the tentative agreement. 9/ However, the Commission has not had the opportunity to consider the application in New Jersey public sector labor relations of the offer and acceptance policy established by the National Labor Relations Board and the Federal Courts for private sector labor relations. The Courts in Presto Casting Co. v. NLRB, 708 F.2d 495, 113 LRRM 3013 (9th Cir. 1983); and, Pepsi-Cola Bottling Co. v. NLRB. 659 F.2d 87, 108 LRRM 2454 (8th Cir. 1981), affirmed the NLRB's rejection of the strict reliance upon traditional offer and acceptance rules in collective bargaining and instead found that offers in collective bargaining are not automatically terminated by counter-offers. 10/ The NLRB and the Courts adopted a three-part

9/ See also In re Ocean County College, P.E.R.C. No. 84-99, 10 NJPER 172 (¶15084 1984); and, In re Union County Educational Services Comm., P.E.R.C. No. 84-46, 10 NJPER 31 (¶15018 1983), which to a certain extent concerned the rejection of proposals and the making of counterpproposals, and/or the attempted withdrawal of a proposal.

10/ The Circuit Court decisions enforced the following NLRB decisions: Presto Casting Co., 262 NLRB No. 47, 111 LRRM 1111 (1982); and, Pepsi-Cola Bottling Co., 251 NLRB No. 28, 105 LRRM 1119 (1980).

test and held that offers may be accepted within a reasonable time unless:

1) it was expressly withdrawn;

2) it was made expressly contingent on a condition subsequent; or

3) circumstances intervening between offer and purported acceptance would characterize the latter as simply unfair. 113 LRRM at 3015-3016; 108 LRRM at 2456.

Even with the application of the above test the undersigned finds that there was never an agreement on CP-4. First, the Association did not establish that it accepted or ratified CP-4. Second, the third part of the Presto/Pepsi-Cola test applies. There were intervening circumstances after CP-4 was offered which would have made any attempt by the Association to claim an agreement over CP-4 as simply unfair. The intervening circumstances here was the December 13 conference and the alleged agreement to the language in R-1.

Whether the standard offer and acceptance principles as set forth in Camden Fire Dept., supra, are applied, or whether the Presto/Pepsi-Cola test is applied, the result herein is the same. The sequence of events herein cannot be considered separately, they must be viewed as a total package. A pattern of offer and counter-offer existed through the point where the parties reached different conclusions regarding the viability of R-1. The offer of CP-4 cannot be separated from the fact that the parties subsequently met in December in an attempt to reach agreement over the language eventually placed in R-1, and CP-4, therefore, had to be considered as either withdrawn or rejected at that point, and it could not then have acted as a vehicle to an agreement. Having examined

the totality of the facts it is apparent to the undersigned that for purposes of this case, no meeting of the minds ever really existed. 11/

Accordingly, based upon the entire record and the above analysis, the Hearing Examiner makes the following:

Conclusions of Law

The Oakland Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(6) by failing to sign an agreement with maintenance of benefits language proposed by the Association.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Arnold H. Zudick
Hearing Examiner

Dated: June 5, 1984
Trenton, New Jersey

11/ It is also vital to note that since the parties apparently never agreed on "terms satisfactory to both sides," at least one condition precedent in the Board's resolution of June 27 (CP-2) remains unsatisfied. Thus, the Board never formally approved the Memorandum and no final agreement exists between the parties.