D.U.P. NO. 93-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

WEST ESSEX BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-92-47

WEST ESSEX EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging that the West Essex Board of Education violated the Act when it created a new title and refused to negotiate terms and conditions of employment.

The Director determined that the recognition clause of the current agreement covers certificated employees only and that the disputed title is not certificated. Accordingly, the charge was dismissed.

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Appearances:

For the Respondent,
Schwartz, Pisano, Simon & Edelstein, attorneys
(Nathanya G. Simon, of counsel)

For the Charging Party,
Weinberg & Kaplow, attorneys
(Irwin Weinberg, of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 12, 1991, the West Essex Education Association filed an unfair practice charge with the Public Employment Relations Commission alleging that the West Essex Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (2), (3) and (5),[1/] when it created the position of equipment manager and refused to negotiate terms and conditions of employment.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

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The Board filed a response denying it engaged in any unfair practice and asserted that it was not obligated to negotiate such terms and conditions because the title is not eligible for inclusion in the existing negotiations unit.

On May 15, 1992, I issued a tentative decision dismissing the charge and I solicited responses. On May 27, the Association filed a response and an affidavit of the Association president. The Association argued that the Board "failed to negotiate a stipend with respect to a function that had been carried out by certificated personnel." It expressed concern about the "fragmentation" of duties normally assigned to coaches and a "substantial" amount of the equipment managers work is performed "after regular school hours." The affiant asserted that "functions attributable to the equipment manager were performed by coaches."

The Association asked that a complaint and notice of hearing be issued .

1/ Footnote Continued From Previous Page

rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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."

On June 5, 1992, the Board filed a response, asserting that the duties of the equipment manager "overlap the regular school day"; that the Association failed to properly amend the charge, and asserted reasons why a complaint should not be issued.

On June 16, I mailed a letter to the parties advising that the Association's May 27 response "represents facts and allegations not set forth in the [unfair practice] charge." I advised that unless I received an amendment to the charge by June 23, I would issue a final decision dismissing the matter.2/ No responses were filed. Accordingly, the refusal to issue a complaint is based on the original charge.

The Board and the Association have a three year agreement extending from July 1, 1988 to June 30, 1991. The recognition clause of the agreement states that the Association is the majority representative for "all full-time certificated personnel, including teachers, nurses, guidance counselors, librarians and social workers." The clause excludes "supervisory personnel, office, clerical, maintenance and operating employees, such as but not limited to principals, assistant principals, administrative assistants, department heads, coordinators, directors and aides."

The agreement also includes salary and stipend schedules A-E. Schedule E provides stipend rates under the category "other

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2/ N.J.A.C. 19:14-1.5 authorizes me to "permit the charging party to amend such charge at any time prior to the issuance of a complaint...."

duties", and sub-divided into "football" and "basketball/ wrestling". Under the "football" designation, the stipend functions include ticket supervisor - $30, ticket seller - $22, ticker taker - $22, timer - $23, photographer - $30, traffic control - $22 and marshall - $17.

Nearly identical functions appear under "basketball", which also has a "nurse" designation at $25.

On May 13, 1991, the Board approved the creation of the equipment manager "with full health benefits" for the 1991-92 school year. The Board named Al Olstar to the position. The job description states that the position under direction of the athletic director, "maintains and updates inventory of athletic department equipment..., issues out equipment..., assemble, maintain and repair athletic department equipment, etc. It is undisputed that the equipment manager does not supervise students.

Schedule E has been included in the parties' collective agreements since 1975. The functions are offered first to unit personnel, including coaching staff. When a unit employee is not available to fill the slot, it is offered to someone outside the unit. Coaches included in the negotiations unit are not released early to perform many job responsibilities of the equipment manager.

The Association alleges that the title was created unilaterally. It argues that prior to the creation of the position, the work was performed by coaching staff, and the fact that the work

was performed by coaches indicates that "the function" belongs in the teacher unit, and the Board's act is improper subcontracting.

The Board maintains that the job duties are operational or clerical in nature. The title assertedly does not supervise or instruct students, the duties could not have been performed by coaching staff since they overlap with the regular teaching day; moreover, coaching staff are full-time teaching staff members who cannot be released early to perform the duties of the equipment manager.

The Board also maintains that Schedule E has appeared in collective agreements since 1975 and all positions listed therein were always offered first to teaching staff members. When not filled, the duties were offered to non-unit personnel.

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charged.[3/] The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may

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3/ N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act.[4/] The Commission's rules provide that I may decline to issue a complaint.[5/]

A public employer has a managerial prerogative to create a new job title. See Willingboro B.d. of Ed., P.E.R.C. No. 85-74, 11 NJPER 57 (¶16030 1984); Bergen Pines Cty. Hosp., P.E.R.C. No. 87-25, 12 NJPER 753 (¶17283 1986). The rate of compensation for employees filling the title is generally negotiable. Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973).

The threshold question is whether the Association represents the equipment manager.

In Carlstadt-East Rutherford Reg. Bd. of Ed., P.E.R.C. No. 89-59, 15 NJPER 19 (¶20006 1988), the Commission considered a charge alleging that the employer violated the Act by unilaterally revising its coaches' employment contracts. A significant number of the part-time coaches were not certificated and had only a county substitute certificate. The coaches received stipends which were negotiated by the Association, although coaching titles did not appear in the parties' recognition clause.

4/ N.J.A.C. 19:14-2.1.

5/ N.J.A.C. 19:14-2.3.

In finding a violation of the Act, the Commission first examined the parties' recognition clause, which included "all certificated and non-certificated personnel...." The majority representative had initially represented only certificated personnel. The Commission stated, "Standing alone, the current recognition clause does not compel the coaches' inclusion or exclusion." It then considered the parties' practice, which included a "supplementary athletic guide setting stipends for coaches...", an instance when a stipend was presented to a fact finder and a "presumption that the stipends were negotiated to compensate someone." Based on the practice, the Commission concluded that the Association represented the coaches.

The recognition clause in this matter is limited to certificated personnel and the Association does not dispute that the equipment manager is not certificated. It appears that the recognition clause compels the exclusion of non-certificated personnel. See City of Clifton, P.E.R.C. No. 88-76, 14 NJPER 491 (¶19207 1988); State of New Jersey (Kean College), P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985). Moreover, in Carlstadt, the Commission considered the supplementary athletic guide as part of the parties' practice. It appears that Schedule E is not properly considered part of the Board and the Association recognition clause -- it relates only to their practice. Clear contract provisions prevail over contrary past practices. Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13202 1982).

Considering the parties' practice, I note that the Association does not contest that the services provided under Schedule E are first offered to certificated unit personnel. Nor has the Association alleged that it represents any of the non-certificated employees who performed the functions when certificated employees were unavailable. These facts demonstrate that the "schedule" is intended to benefit unit employees and benefits others incidentally. Accordingly, I am not persuaded that the Association's unit encompasses all persons performing Schedule E duties, even if one of them is a regular part-time employee.[6/]

The Commission's complaint issuance standard has not been met and I dismiss the charge.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: July 1, 1992
Trenton, New Jersey

6/ The Association has not alleged in its charge that it suffered a loss of unit work when the Board created the new title.