P.E.R.C. NO. 87-138

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUNTERDON CENTRAL HIGH SCHOOL
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-318-44

HUNTERDON CENTRAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated by the full Commission in the absence of exceptions, dismisses a Complaint based on an unfair practice charge the Hunterdon Central High School Education Association filed against the Hunterdon Central High School Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act by refusing to negotiate with the Association before establishing the compensation for summer work performed by unit members. The Chairman, in agreement with a Commission Hearing Examiner and in the absence of exceptions, dismisses the Complaint as untimely and unmeritorious.

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EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Murray & Granello, Esqs.
(James P. Granello, of counsel)

For the Charging Party, New Jersey Education Association
(John A. Thornton, staff representative)

DECISION AND ORDER

On May 21, 1984, the Hunterdon Central High School Education Association ("Association") filed an unfair practice charge against the Hunterdon Central High School Board of Education ("Board"). The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(5),[1/] by refusing to negotiate with

1/ This subsection prohibits public employers, their representatives or agents from: "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 Association before establishing the compensation for summer work performed by unit members.

On September 14, 1984, a Complaint and Notice of Hearing issued. The Board filed an Answer asserting that the charge was untimely and it paid employees the rate specified in the parties' agreement and found to be appropriate in a binding arbitration award.

On June 3, 1985, Hearing Examiner Judith Mollinger conducted a hearing. The parties examined witnesses, introduced exhibits and filed letter briefs. When Hearing Examiner Mollinger left the agency's employ in April 1986, Susan Wood Osborn was assigned, pursuant to N.J.A.C. 19:14-6.4, to issue a report.

On March 25, 1987, Hearing Examiner Osborn recommended dismissing the Complaint. H.E. No. 87-55, 13 NJPER ___ (¶_____ 1987). She found the charge was untimely and unmeritorious.

The Hearing Examiner served her report on the parties and advised them that exceptions were due on or before April 7. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate. I adopt and incorporate them. Under all the circumstances of this case, and acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I also adopt her recommendation that the Complaint be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
May 18, 1987
ISSUED: May 19, 1987

H.E. NO. 87-55

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

In the Matter of

HUNTERDON CENTRAL HIGH SCHOOL
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-318-44

HUNTERDON CENTRAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Hunterdon Central High School Board of Education did not violate the New Jersey Employer-Employee Relations Act when it compensated child study team members for summer work at a rate contained in the parties' current collective negotiations agreement. The Hearing Examiner recommends that the Commission defer to an arbitrator's binding award finding that the compensation paid for summer work was correctly applied under the relevent contract clause. Further, the Hearing Examiner finds that the unfair practice charge was not filed within six months of the Board's alleged unilateral change in the child study team's summer compensation, or the Association's discovery of the alleged change, and thus is barred by the Act's statute of limitations.

A Hearing Examiner's Report and Recommended 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. 87-55

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

In the Matter of

HUNTERDON CENTRAL HIGH SCHOOL
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-318-44

HUNTERDON CENTRAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Murray & Granello, Esqs.
(James P. Granello, of Counsel)

For the Charging Party,
New Jersey UniServ Office
(John A. Thornton, Staff Representative)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 21, 1984, the Hunterdon Central High School Education Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") against the Hunterdon Central High School Board of Education ("the Board"). The Association alleged that the Board violated the New Jersey Employer-Employee Relations Act, ("the

Act"), specifically N.J.S.A. 34:13A-5.4(a)(5)[1/] by unilaterally establishing a compensation rate for summer work performed by unit members and refusing to negotiate that rate with the Association.

A Complaint and Notice of Hearing was issued on September 14, 1984. On September 20, 1984, the Board filed an Answer to the Complaint (Exhibit C-2) generally denying that the Board committed an unfair practice, denying that it unilaterally set compensation for summer employment, and affirmatively stating that: (a) the rate of pay for summer work is controlled by the parties' contract, (b) the issue of compensation for summer work has already been the subject of an arbitrator's decision in binding grievance arbitration, and (c) the charge is beyond the 6-month statute of limitations as set forth in N.J.S.A. 34:13A-5.4(c). A hearing was held before Hearing Examiner Judith Mollinger on June 3, 1985, at which time the parties were given the opportunity to examine witnesses and present evidence.[2/] Both parties filed letter

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1/ This subsection prohibits public employers, their representatives or agents from: "(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."

2/ The transcript of the June 3, 1985 hearing will be referred to as "T".

At the conclusion of the Charging Party's case, Respondent moved to dismiss the charge based upon (a) the statute of limitations; (b) the arbitrator's award finding that the rate of pay was proper under the terms of the contract; and (c) the fully bargained clause of the contract (T59-T72). Hearing

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briefs, the last of which was received August 27, 1985. Hearing Examiner Mollinger resigned from the Commission's staff in April, 1986, and pursuant to N.J.A.C. 19:14-6.4, this matter was thereafter reassigned to me for a report and recommended decision.

Based upon the record, I make the following:

FINDINGS OF FACT

1. The Hunterdon Central High School District Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The Hunterdon Central High School Education Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Association is the majority representative of all certified personnel except administrators. The collective negotiations agreement between the Board and the Association for the period July 1, 1983 through June 30, 1986 covers these employees, including members of the guidance staff and the child study team (Exhibit J-1).[3/] Article I.B. of that agreement provides that the term "teachers" refers to all certified personnel, except as noted.

2/ Footnote Continued From Previous Page

Examiner Mollinger denied the motion to dismiss as to the timeliness of the charge, and reserved on the motion on its other bases (T73).

3/ Exhibits are designated as follows: "C- " refer to Commission exhibits; "J- " are joint exhibits; "CP- " are Association exhibits; and "R- " are Board exhibits.

4. Exhibit J-1 was the result of negotiations between the parties which began in October, 1982, and culminated in a memorandum of agreement signed by the parties on April 18, 1983 (Exhibit J-3; T11).

5. The 1983-86 agreement (Exhibit J-1) provides under Article VIII "Salaries", Section 7, that:

> The rate of compensation for summer school employment shall be ten percent (10%) of the teacher's salary as set forth in Schedule A to a maximum of $1,700...

Identical language appears in the "Salaries" article of the 1979-80/1980-81 agreement (Exhibit J-6), and also in the collective negotiations agreement covering the intervening period (T79).

6. Article II of Exhibit J-1, "Negotiation Procedure", provides that:

> E. Except as this agreement shall hereinafter 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 rules, regulations and/or policies of the Board in force on such date, shall continue to be applicable during the term of this agreement.
>
> G. This agreement incorporates the entire understanding of the parties on all matters which were or could have been the subject of negotiation. During the terms of this agreement, neither party shall be required to negotiate with respect to any such matter whether or not covered by this agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or executed this agreement.

7. The Board operated a summer school program until 1980, after which the program was abolished (T11-T12). According to the Board's 1982 budget, no funds were allocated for summer school beginning in the 1981-82 school year (Exhibit J-4).

8. Since at least 1980, guidance counselors have been assigned summer work.and were consistently paid at a rate of $79.60 per day (Exhibit CP-3; T19, 22, 48-49, 79-80). The parties agree that this rate was determined by breaking down $1,700, the maximum contractual rate for summer school employment, into a daily rate (Exhibit J-2).

9. Vicki Fox, the Association's Chief Negotiator for the 1983-86 contract, acknowledged that during negotiations beginning in October, 1982, through April, 1983, the Association was aware that guidance counselors worked during the summers (T11). Fox, however, was not aware of the compensation rate for guidance counselors until December 1984, when she was given copies of 1980 memoranda (Exhibits CP-1, 2, 3, 4) between the Director of Guidance, his staff, and the Superintendent concerning compensation for summer work (Exhibit 5; T19, 21).

The child study team also worked during the summer of 1983 and were compensated at the rate of $79.60 a day (T80).[4/] In May or

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4/ Dr. Lewis, the School Psychologist, a witness for the Association, testified that he did not believe any member of the child study team, other than himself, worked during the summer of 1983 (T56-T57). However, Superintendent Wolsiefer admitted that, to the best of his knowledge, other members of

Footnote Continued on Next Page

June, 1983, Dr. Lewis, the School Psychologist, told Association President Thomas Ryan that that he had been asked to work during the summer of 1983 at a rate of $79.60 a day (T24-T26), a smaller rate than what Lewis believed he was entitled (T55). The basis of Lewis' belief that he was entitled to more money was that, in the summer of 1980, he was compensated $125 a day, a rate negotiated between Lewis and the personnel director (T55). At that time, however, he had not yet been appointed to a bargaining unit position (Exhibit J-2; T54-T55). At the end of the summer, 1983, Dr. Lewis requested the Association to file a grievance concerning his rate of summer pay (T12, 16). In the course of investigating Lewis' grievance, the Association became aware that members of the child study team worked during that summer, and that they were paid $79.60 per day (T26). The Association filed Lewis' grievance at Step II on October 17, 1983, alleged that:

> Lewis' salary for services rendered during contracted time periods had been established as a per diem amount based on the following year's annual salary. Even though he provided these services during the summer of 1983, his salary was reduced. This represents a reduction in salary without the required negotiations.
>
> Remedy: Dr. Lewis should be paid the difference between the salary he should have received and

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4/ Footnote Continued From Previous Page

the child study team did work during the summer of 1983 (T80). Since that testimony amounts to an admission of fact against Respondent's interest, and there is other testimony to corroborate it (T26, 49, 52), I credit that testimony.

> the rate at which he was paid, or pay for child study team work should be negotiated" (Exhibit R-1).

The grievance was denied at steps 1 and 2 and proceeded to step 3 on November 29, 1983 (Exhibit ER-1).

10. Step 3 of the grievance procedure is an advisory Conflict Resolution Board composed of two board members, two Association representatives, and two members of the community: one selected by the Board and one by the Association (T45, 50). That committee met on November 29, 1983, and recommended that the summer rate for all child study team personnel be negotiated before the following summer (Exhibit CP-2).

11. In December 1983, Association President Ryan met with the Superintendent and asked, as part of the resolution of the grievance, to negotiate over compensation for summer work (T41, 43). At the December Board meeting, the Board voted to reject the recommendations of the Conflict Resolution Board, including the suggestion to negotiate summer employment compensation (T84-T85). The Association President renewed his request to negotiate a rate of pay for summer work at a January 1985 meeting with the Board (T27, 42). Ryan, however, admitted that the issue of negotiating compensation as a separate entity (from Lewis' grievance) was never discussed (T27). The Board admits that it refused to re-open negotiations on the issue of summer pay (Exhibit C-2).

12. On January 31, 1984, the Association requested that Dr. Lewis' grievance proceed to arbitration (Exhibit R-1). On

May 30, 1984, Arbitrator Robert Light, having considered all of the issues including the past practice of the parties, issued his binding arbitration award (Exhibit J-2). He found that the rate of $125 a day was negotiated individually between the Board's representative and Lewis when he was a member of the administrators' unit, and that when Lewis was appointed to a position in the teacher's unit in September 1980, the $125 rate was superceded by the rate established in the teachers' contract. Relying on the "clear and unequivocal language" of Article VIII. B. 7 of Exhibit J-1, he found that the grievant was paid the proper contractual rate of $79.60 a day for summer work (Exhibit J-2).

ANALYSIS

The Association alleges that paying Dr. Lewis and any other member of the child study team who worked during the summer of 1983 at a rate of $79.60 per day constitutes a unilateral change in terms and conditions of employment without negotiations in violation of Section 5.4(a)(5) of the Act. In order to find such a violation, the charging party bears the burden of proving: (1) a change; (2) in a term and condition of employment; (3) without negotiations. The Board, however, may defeat such a claim if it establishes that it had a managerial prerogative or contractual right to make such a change. E.g., State of New Jersey (Ramapo State College), P.E.R.C. 86-28, 11 NJPER 580 (¶ 16202 1985); Willingboro Bd. of Ed., P.E.R.C. 86-76, 12 NJPER 32 (¶ 17012 1985).

N.J.S.A. 34:13A-5.3 provides, in part:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

In addition, N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice for a public employer to refuse to negotiate in good faith with the majority representative concerning employees' terms and conditions of employment. A public employer may violate these obligations in two separate fashions: (1) implementing a new rule or changing an old rule concerning a term and condition of employment without first negotiating in good faith to impasse or having a managerial prerogative or contractual defense authorizing the change, and (2) repudiating a term and condition of employment it had agreed would remain in effect throughout a contract's life. Willingboro Bd. of Ed., supra; Ramapo State College, supra; Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

This Complaint alleges that the Board unilaterally changed a term and condition of employment -- compensation for summer work for Lewis and Child Study Team members -- without first negotiating with the Association. This case, accordingly, involves the first type of alleged violation.

The issue in dispute is whether the District has an obligation to negotiate summer pay for members of the Child Study Team, or whether they should be paid under Article VIII B.7, the contractually established rate for summer employees. In other words, the Association argues that the contractual rate of summer

pay should not apply to members of the child study team, but rather their summer rate is a unilateral change in terms and conditions of employment. The Association, however, submitted this very issue to binding arbitration on March 27, 1984. On May 30, 1984, Arbitrator Robert Light determined that the Board had properly paid Dr. Lewis the rate required by Article VIII B.7 of the collective negotiations agreement.

The Board contends that deferral to Arbitrator Light's decision is appropriate because the same issue has already been properly decided by an arbitrator. The Association argues that deferral to the arbitrator's award is inappropriate because the grievance concerned only Dr. Lewis, and the charge involves all members of the child study team.

The Commission has a longstanding policy of deferring disputes over interpretation of the collective negotiations agreement to arbitration unless: (1) the dispute was not promptly submitted to arbitration and resolved, (2) the arbitration procedures were not fair and regular, or (3) the result of arbitration is repugnant to the Act. State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977). See also, County of Hudson, P.E.R.C. No. 86-127, 12 NJPER 439 (¶ 17162 1986); Passaic County, P.E.R.C. No. 84-65, 10 NJPER 22 (¶ 15012 1983); Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶ 14122 1983); City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶ 13172 1982); Town of Harrison, P.E.R.C. No. 82-73, 8 NJPER 118 (¶

13051 1982). Accord, Spielberg Mfg. Co., 112 NLRB No. 1080, 36 LRRM 1152 (1952).

The Arbitrator properly exercised his authority and decided the issue of contract interpretation before him. He determined that that summer rate set forth in the contract was binding on the Board and the Association with respect to members of the teachers' bargaining unit, including Dr. Lewis. There is no reason why the resolution of the dispute with respect to Dr. Lewis should not apply to other members of the Child Study Team. The dispute was promptly submitted to arbitration and resolved is a fair and regular manner. Since the result is not repugnant to the Act, I find that deferral to Arbitrator Light's findings is appropriate.[5/]

Additionally, I find that there was no unilateral change. The record shows that the Board employed non-teaching staff to work during the summer since at least 1980. The Association was aware that certain staff were engaged in summer work. While Art. VIII B7 may have originally been intended to cover staff teaching summer school[6/] the Association permitted other staff to be paid under

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5/ The Board also argues that under State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶ 15191 1984), the Complaint should be dismissed because the issue is purely one of contractual interpretation. In light of my finding that the dispute should be deferred to the Arbitrator's findings, it is unnecessary to consider the Human Services argument.

6/ There is no record evidence to establish specifically what the parties intended when the summer work clause was negotiated.

that clause, and did not seek to renegotiate that clause or a new clause to cover non-teaching summer work.[7/]

There is no evidence that the employer was acting in bad faith when it applied the contractual compensation rate to the child study team in accordance with the contract. It was not an attempt to modify or repudiate the contract. See Human Services, supra. Where the employer's action in administering the contract is consistent with the parties' past practice, no violation will be found. State of New Jersey, Office of Employee Relations, D.U.P. No. 84-12, 10 NJPER 3 (¶15002 1983).

Here, the Board continued the past practice of employing non-teaching staff for summer work and paying them under the terms of Article VII.B.7 of the contract. Therefore, there is no change in terms and conditions of employment.[8/]

7/ The fact that the clause continues to appear in the successor contract some two years after the Board abolished summer school suggests a strain of the credibility of the Association witnesses' testimony that the Association did not know how guidance counselors were paid for summer work until December 1984. However, it is not necessary to make a credibility determination on this issue in order to reach a conclusion.

8/ The Board also argues that by the zipper clause in Article II. G of the 1983-86 contract, the Association has waived its right to negotiate during the term of the contract. A contractual waiver will not be found unless a unilateral change is clearly, unequivocally and specifically authorized. Red Bank Regional Ed. Assn., 78 N.J. 122, 140 (1978); Twp. of Edison, P.E.R.C. 86-124, 12 NJPER 17149 (1986); Long Branch Bd. of Ed., P.E.R.C. 86-97, 12 NJPER 17080 (1986); Willingboro Bd. of Ed., supra; Such a zipper clause does not meet this test, State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723

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Even assuming arguendo that the compensation of the child study team in the summer of 1983 amounted to a new or changed term and condition of employment, there remains the statute of limitations issue.

The Board contends that the charge is barred by the statute of limitations. N.J.S.A 34:13A-5.4 (c) provides that:

> ...no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

The 6-month statute of limitations cannot be imposed mechanically. The Commission must consider the facts and equitable considerations. See Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978); Town of Kearny, P.E.R.C. 80-34, 6 NJPER 446 (¶ 11229 1980).

8/ Footnote Continued From Previous Page

(¶ 116254 1986); Deptford Twp. Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶ 12015 1982), and cannot act as an employee representative's blanket waiver of its 5.3 right to negotiate concerning proposed changes in terms and conditions of employment during the life of the contract. Borough of Mountainside, P.E.R.C. No. 83-94, 9 NJPER 81 (¶ 14044 1982); Ocean Township, P.E.R.C. No. 81-133, 7 NJPER 333 (¶ 12148 1981). Thus, if compensation for child study team members were a change in terms and conditions of employment, I find that the zipper clause does not operate as the Association's waiver of its right to bargain such a change with the Board. However, as I have already found, the Board did not implement a new term and condition of employment or unilaterally change an existing one, but rather, it continued the past practice of applying the contract article "summer school" to unit summer work.

The Association asserts that the time period for filing its charge began with its December, 1984 demand for negotiations over summer work.

The statute of limitations, however, begins to toll when the alleged violation occurs, or when the charging party initially learns of the alleged violation. In this case, the alleged violation is the Board's compensation of Child Study Team members at $79.60 per day in the summer of 1983. The Association learned for the first time in early fall, 1983, that child study team members worked during the summer of 1983. In fact, one of the remedies sought in the Lewis' grievance was to negotiate compensation for child study team members. That grievance was first filed in writing at Step 2 by the Association on October 17, 1983. The Association, however did not file this charge until May 21, 1984 -- clearly outside of the six month period.

Instead the Association filed and processed a grievance, in part, demanding to negotiate compensation rate for summer work of all child study team members. The filing of a grievance concerning the subject matter of an unfair practice does not toll the statute of limitations. State of New Jersey (Department of Corrections), D.U.P. No. 84-31, 10 NJPER 387 (¶15178 1984); State of New Jersey (Stockton State College), P.E.R.C. No.77-14, 2 NJPER 308 (1976), aff'd. 153 NJ Super. 91 (App. Div. 1977) pet. for certif. den. 78 N.J. 326 (1978).

The record does not establish that the child study team will continue to work summers -- therefore, it cannot be said that there was a continuing violation. The charge was ripe to be filed within six months of the Association's discovery that the child study team was asked to work for contractual compensation, that is, within six months of September, 1983. However, the charge was not filed until May, 1985, well beyond the six-month period. E.g., Twp. of Ocean, D.U.P. No. 85-6, 10 NJPER 542 (¶ 15252 1984).

Upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

The Hunterdon Central High School did not violate N.J.S.A. 34:13A-5.4(a)(5) by compensating bargaining unit members, and specifically the child study team, $79.60 a day in accordance with the terms of the collective negotiations agreement.

RECOMMENDATIONS

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

Susan Wood Osborn
Susan Wood Osborn
Hearing Examiner

Dated: March 25, 1987
Trenton, New Jersey