H.E. NO. 87-40

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

In the Matters of

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-87-66-39

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

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MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Respondent,

-and- Docket No. CE-87-5-44

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Charging Party.

## SYNOPSIS

A Hearing Examiner, in an interlocutory decision during the course of the hearing, sua sponte, defers a portion of the Association's Unfair Practice Charge to final and binding arbitration under the parties' negotiated grievance procedure, relying upon the Commission's decision in New Jersey Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The Association is granted ten days from the said Order to request review by the Commission (N.J.A.C. 19:14-4.7).

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DISTRICT BOARD OF EDUCATION,

Charging Party.

Appearances:

For the Board
Kenney, McManus & Kenney, Esqs.
(Malachi J. Kenney, Esq.)

For the Association
Oxfeld, Cohen & Blunda, Esqs.
(Mark J. Blunda, Esq.)

HEARING EXAMINER'S INTERLOCUTORY DECISION IN SUPPORT OF SUA SPONTE DEFERRAL TO ARBITRATION OF A PORTION OF THE ASSOCIATION'S UNFAIR PRACTICE CHARGE

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on

September 5, 1986 by the Matawan Regional Teachers Association (hereinafter the "Charging Party" or the "Association") alleging that the Matawan-Aberdeen Regional School District Board of Education (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), inter alia, in that the Respondent on September 2, 1986, issued staff schedules and advised high school teachers that it was unilaterally increasing their workday by ten minutes and, further, that it was unilaterally increasing homeroom assignments, and, further, that it was unilaterally increasing teacher-pupil contact time and duty periods and, finally, that it was unilaterally decreasing professional and preparation time (¶21, Association's Unfair Practice Charge).[1/] The Association's Unfair Practice Charge as to the allegations in ¶21, supra, implicate only alleged violations by the Board of §§5.4(a)(1) and (5) of the

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1/ The additional 23 paragraphs of the Association's Unfair Practice Charge are not set forth herein as they are not the subject of the question of deferral to arbitration of a portion of the allegations in ¶21 of the Association's Unfair Practice Charge, supra. Also, reference is not made at this time to the Unfair Practice Charge filed by the Board on August 25, 1986, Docket No. CE-87-5-44, inasmuch as that Unfair Practice Charge is not the subject of disposition at this time on deferral to arbitration of a portion of the Association's Unfair Practice Charge as set forth above.

Act.[2/] Thus, the Hearing Examiner is not considering at this time the allegations by the Association that the Board also violated §§5.4(3) and (7) of the Act.

The allegations of the Unfair Practice Charge filed by the Association having been considered by the Director of Unfair Practices to constitute possible violations of the Act, a Complaint and Notice of Hearing was issued on October 1, 1986.[3/] Pursuant to the Complaints and Notices of Hearing, supra, hearings were scheduled and held on December 16 and December 18, 1986, in Newark, New Jersey, at which time the Charging Party proceeded to present its case by the examination of witnesses and the offer of documentary evidence. On the second day of hearing, December 18th, the Hearing Examiner, after hearing considerable testimony by the Charging Party's initial witness, Marie Panos, the President of the Association, both on direct examination and cross-examination, decided sua sponte on the record to defer a portion of the

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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; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

3/ On October 9, 1986, a Complaint and Notice of Hearing was also issued by the Director of Unfair Practices as to the Board's Unfair Practice Charge. However, as noted above, this Complaint is not before the Hearing Examiner at this time.

Association's Unfair Practice Charge, as set forth in ¶21 supra, to arbitration, notwithstanding that the Hearing Examiner was not aware of any precedent for making such a decision during the course of a hearing, based on prior decisions of other Hearing Examiners or the Commission.

After rendering his oral decision to defer certain portions of ¶21 of the Association's Unfair Practice Charge to arbitration, based on his reading of the Commission's decision in New Jersey Department of Human Services, P.E.R.C. No 84-148, 10 NJPER 419 (¶15191 1984), the Hearing Examiner entertained a motion for reconsideration of his decision as requested by counsel for the Association. A briefing schedule was established wherein counsel for the Board filed a brief in support of the Hearing Examiner's decision to defer on December 26, 1986, and counsel for the Association filed a brief in opposition, which urged the Hearing Examiner to reverse his sua sponte decision, supra, on December 30, 1986.

The Hearing Examiner having fully considered the oral argument of counsel for the parties on December 18, 1986, during the course of the second day of hearing, and further having considered the post-hearing briefs of the parties on the issue of deferral, hereby renders the following interlocutory decision.

* * * *

There can be no doubt but that the Commission's decision in Department of Human Services, supra, was thoroughly predicated upon

earlier Commission policy to defer issues of contract interpretation to resolution by the grievance procedure voluntarily agreed upon by the parties: see Department of Human Services, 10 NJPER at 420, 421, citing and quoting extensively from East Windsor Regional Board of Education, E.D. No. 76-6, 1 NJPER 59 (1976) and Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 267 (¶14122 1983). Thus, deferral to arbitration of contractual interpretation issues stands on a high pedestal in the decisional history of the Commission in cases involving alleged violations of §5.4(a)(5) of the Act.

Further, in Department of Human Services the Commission said at p. 421:

> ...We conclude that a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures..."

The Commission at p. 422 of its decision in Department of Human Services noted further that its policy is to encourage the parties to use their negotiated grievance procedures and that they "...should not be entitled to substitute this Commission for a grievance procedure which they have specifically agreed upon..." However, the Commission also made clear that its holding in Department of Human Services did not mean that a breach of contract was never to be evidence of an unfair practice. The Commission then went on to cite several decisions and to give examples of what may constitute the basis for the issuance of a complaint and the

litigation of a §5.4(a)(5) violation of the Act. For example, if an employer has already repudiated a contract clause and raised a scope of negotiations defense then this would warrant the issuance of a complaint. Similarly, a claim of repudiation may also be supported by a contract clause "...that is so clear that an inference of bad faith arises from a refusal to honor it..." In addition, the Commission stated that it would entertain an unfair practice charge in which "...specific indicia of bad faith over and above a mere breach of contract are alleged..."

Although the Commission stated that its list of examples of instances where a complaint might issue was not exhaustive, the Hearing Examiner herein is satisfied that the examples listed above are sufficient to dispose of the Association's objections to his deferral of portions of ¶21 of the Association's Unfair Practice Charge to arbitration.

It is conceded by all parties that the Board's unilateral lengthening of the workday for high school teachers by ten minutes as of September 2, 1986, is an arguable violation of the Act and the Board does not contend that this aspect of the charge should be deferred to arbitration. Additionally, the Board does not dispute that the Hearing Examiner should hear and determine the Board's alleged violation of the Act in having extended the homeroom from six to 16 minutes per day. In both instances, it would appear to the Hearing Examiner that these two unilateral changes by the Board arguably constitute a repudiation of the prior collective

negotiations agreement, namely the memorandum set forth in J-1 at p. 51.

However, as to the allegations that the Board has also increased pupil contact time for certain teachers, over and above that set forth in J-1, supra, and reduced preparation time for certain teachers, the Hearing Examiner is persuaded that these matters are sufficiently covered by the grievances filed by the Association, which are proceeding to final and binding arbitration. Further, these unilateral changes do not affect all teachers uniformly as in the case of the increase in the workday by ten minutes for all 135 high school teachers and the significant number of teachers affected by the increase of ten minutes in homeroom duty (48 teachers).

The testimony elicited to date, and the supporting exhibits (see A-16 & A-17), indicate to the Hearing Examiner that other than the lengthening of the high school day by ten minutes for all high school teachers and the increase by ten minutes in homeroom duty for some 48 teachers, the matters which would be relegated to arbitration by the Hearing Examiner's deferral involve 41 teachers, who have incurred varying increases in marking periods, and seven other teachers in miscellaneous categories (see A-17, ¶'s 3-8). It is this latter group of teachers, which would be the subject of final and binding arbitration of the grievances filed on their behalf that the Hearing Examiner is deferring to arbitration.

Before proceeding to analyze and discuss the several post-Department of Human Services decisions of the Commission, which were brought to the attention of the Hearing Examiner on December 18, 1986, by counsel for the Association, the Hearing Examiner notes that under the rules and regulations of the Commission, setting forth the duties and powers of a Hearing Examiner in an unfair practice proceeding, he is invested with the power, "...to dismiss complaints or portions thereof;...and upon motion, order proceedings consolidated or severed prior to issuance of the Hearing Examiner's recommended report and decision...(emphasis supplied) N.J.A.C. 19:14-6.3(a)(8). This Hearing Examiner does not read the above provisions of the Commission's rules regarding the powers and authority of Hearing Examiners as requiring, as a condition precedent, that a motion be made by a party prior to his exercising the authority to sever a portion of an unfair practice charge, i.e., defer to arbitration, prior to the issuance of his recommended report and decision. The Commission has recognized that Hearing Examiners may exercise their authority in certain situations sua sponte: see Tp. of Teaneck, P.E.R.C. No. 81-142, 7 NJPER 351, 353 (¶12158 1981) and Wojacik v. Pollock, 97 N.J. Super. 319, 323 (Law Div. 1967).

The first post-Department of Human Services decision cited by the Association is City of So. Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984) where the Commission ordered the Director of Unfair Practices to issue a complaint as to a charge, which alleged

that the City unilaterally changed insurance carriers without providing equivalent benefits as provided for in the contract of the parties. The Commission analyzed the situation as involving not a "mere breach of contract," but rather a dispute predominantly concerning the protected statutory right of employees to bargain collectively with regard to changes or reductions in health insurance benefits: Accord: Boro of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). Thus, the Commission found nothing remotely involving a mere breach of contract merely because of the City's defense that the contract permitted the unilateral action in changing carriers. So. Amboy does not appear to the Hearing Examiner to deal with the type and quality of issues herein involved, namely, the instant Board's having required that a group of 40-odd teachers engage in additional marking periods, etc. (see A-17, supra).

A second case cited by the Association is Maywood Bd. of Ed., P.E.R.C. No. 85-36, 10 NJPER 571 (¶15266 1984). In this case the Commission found a violation where the Board in changing 13 years of past practice eliminated half-days and established full days without negotiations over compensation. Here the Association did not assert the right to have the status quo ante restored but merely wanted additional compensation as to which the Board refused to negotiate. There are several features which distinguish Maywood from the instant case: first, the Commission rejected the Board's deferral to arbitration argument because the grievance procedure did

not end in binding arbitration; secondly, the Board there asserted a scope of negotiations defense, which was specifically waived by the Board herein at the hearing on December 18, 1986; and, finally, the Association in Maywood had not filed a grievance as was done in the instant case.

In Liberty Tp. Bd. of Ed., P.E.R.C. No. 85-37, 10 NJPER 572 (¶15267 1984), a case similar to Maywood, supra, the Association there sought additional compensation due to the elimination of a certain half-day and the establishing of a full-day. The Commission found no contractual defense asserted by the Board directed to compensation for all affected employees with negotiations over any future changes in days worked. Significantly, the Board there did not assert deferral as being appropriate but did assert a scope of negotiations defense, which is not involved in the instant case.

At the Hearing on December 18th, counsel for the Association also cited Linden Bd. of Ed., P.E.R.C. No. 84-137, 10 NJPER 349 (¶15162 1984) but failed to refer to this decision in its written memorandum of December 29, 1986. However, the Board in its post-hearing memorandum does discuss Linden where the Commission affirmed the conclusion of the Hearing Examiner that the association failed to prove by a preponderance of the evidence that there was a change in the negotiated terms and conditions of the teachers' lunch periods and that the Board "...had a contractual right and managerial prerogative to make the changes it is..." (10 NJPER at 349, 350).

The Hearing Examiner represents to the parties that he has read all of the additional citations set forth in the Association's memorandum of December 29, 1986, beginning with Andover Reg. Bd. of Ed., P.E.R.C. No. 87-4, 12 NJPER 601 (¶17225 1986) etc. et al and is fully persuaded that further detailed discussion of each case cited would not be fruitful, given the cases cited by the Association and heretofore discussed in detail. The Hearing Examiner is fully persuaded that his decision made on the record sua sponte on December 18, 1986, is correct. And, accordingly, the Hearing Examiner makes the following:

INTERLOCUTORY ORDER

The Hearing Examiner hereby defers to final and binding arbitration under the parties' negotiated grievance procedure all portions of the allegations in ¶21 of the Association's Unfair Practice Charge, except (1) those dealing with the unilateral lengthening of the workday for high school teachers by ten minutes, effective September 2, 1986, and (2) the unilateral extending of homeroom duty from six minutes to 16 minutes per day.[4/]

Alan R. Howe
Hearing Examiner

Dated: January 6, 1987
Trenton, New Jersey

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4/ Additional amplification of the particularity and scope of the deferral is found in Paragraphs three (3) through eight (8) of Association Exhibit A-17.