P.E.R.C. NO. 83-61

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-393-24

FREEHOLD REGIONAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Freehold Regional High School Education Association had filed against the Freehold Regional High School Board of Education. The charge had alleged that the Board violated the New Jersey Employer-Employee Relations Act when it refused to execute a collective negotiations agreement with the Association unless the agreement included a separate salary guide for long-term substitute teachers. Under all the circumstances of this case, including stipulations that the Board paid long-term substitutes according to the established past practice and that the Association had not sought to change this practice during negotiations, the Commission finds that the Board did not refuse to negotiate in good faith.

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EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Kenney & McMannus, Esqs.
(Malachi J. Kenney, of Counsel)

For the Charging Party, Chamlin, Schottland, Rosen & Cavanagh, Esqs.
(Thomas W. Cavanagh, Jr., of Counsel)

DECISION AND ORDER

On June 26, 1981, the Freehold Regional High School Education Association ("Association") filed an unfair practice charge against the Freehold Regional High School Board of Education ("Board") with the Public Employment Relations Commission. The Association alleged that the Board 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), and (5),[1/] when

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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; 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."

it refused to execute a collective negotiations agreement with the Association unless the agreement included a separate salary guide for long-term substitute teachers. The charge contained the following specific allegations. The parties had executed a memorandum of understanding and a supplemental memorandum which recognized, for the first time, that the Association would represent long-term substitutes. The memoranda contained negotiated salary guides for regular teachers and other non-teaching employees. The Board then prepared a collective negotiations agreement which included a separate salary guide (Schedule A-9) for long-term substitutes and refused to sign any agreement which did not contain this separate salary guide. The Association contends that the Board's insistence on inclusion of this separate salary guide in addition to the negotiated salary guides for regular teachers and other employees constituted a refusal to negotiate in good faith and to incorporate the parties' previous memoranda into a final document.2/

On August 27, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On September 28, 1981, the Board filed an Answer. It asserted that the parties had not negotiated over a salary guide for long-term substitutes and that in the absence of such negotiations, it was entitled to continue its established past practice of paying long-term substitutes

2/ On August 5, 1981, the Association amended its charge to allege aviolation of subsection 5.4(a)(6). This subsection makes it an unfair practice for a public employer to refuse "...to reduce a negotiated agreement to writing and to sign such agreement."

according to the first step of the regular teachers' salary guide, a past practice the Board memorialized in Schedule A-9.[3/]

On September 28, 1981, the Board filed a motion to defer the matter to binding arbitration. The Association did not file any opposing papers. The parties, however, disagreed on what "contract" an arbitrator would interpret: a "contract" with Schedule A-9 or a "contract" without.

On October 14, 1981, Commission Hearing Examiner Edmund G. Gerber conducted a hearing. The Hearing Examiner initially denied the Board's motion to defer to arbitration. He reasoned that a deferral to arbitration must be predicated upon the existence of a binding contract and here both the nature and existence of the contract were in dispute.

The parties then entered extensive stipulations. They stipulated, among other things, that during negotiations they agreed to include long-term substitutes in the recognition clauses for the first time; that the Board included Salary Schedule A-9 in its contract draft because it believed this schedule embodied the parties' understanding and the Board's past practice concerning what long-term substitutes would be paid; that Schedule A-9 did in fact embody the Board's past practice concerning what long-term substitutes would be paid; that the Association refused to sign

3/ The Association's witnesses testified, as will be discussed, that they believed the parties' memoranda -- without Schedule A-9 -- would have required the Board to pay a long-term substitute on the same step of the salary scale for regular teachers as the Board would a regular teacher with the same number of years of service. Thus, if a long-term substitute had five years of service, the long-term substitute would be paid the same as a regular teacher with five years of experience.

the Board's draft agreement because it included Schedule A-9; and that the Board refused to execute any agreement which did not include Schedule A-9.

The Association then moved for summary judgment, arguing that the Board was bound to execute the collective negotiations agreement absent Schedule A-9. The Hearing Examiner denied the Association's motion, ruling that parol evidence was necessary to determine the parties' intent with respect to the salary to be paid long-term substitute teachers.

Thereafter, the parties examined witnesses and presented evidence. The parties waived oral argument and filed post-hearing briefs by February 25, 1982.

On June 18, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 82-60, 8 NJPER 410 (¶13188 1982) (copy attached). He concluded that the Board had not violated subsections 5.4(a)(1),(2), and (5) of the Act when it included Schedule A-9 in its draft agreement and refused to execute a contract without it. The Hearing Examiner reasoned that the Board's inclusion of Schedule A-9 did not constitute a refusal to negotiate in good faith because, in the absence of any negotiations concerning the salaries of long-term substitutes, the Board had the right to conclude that the Association had waived negotiations on this subject and to follow the established past practice of paying long-term substitutes according to the first step of the teachers' salary scale.

On July 12, 1982, after receiving an extension of time, the Association filed Exceptions. It argues that the Hearing

Examiner erred in not finding, at the least, that the Board's refusal to execute the parties' agreement as detailed in the previous memoranda of understanding technically violated the Act. The Association further contends that once the Hearing Examiner made this finding, he should have deferred to arbitration, instead of himself deciding, the issue of how much the contract without Schedule A-9 required the Board to pay long-term substitutes.4/

On July 15, 1982, the Board filed a response supporting the Hearing Examiner's report in all respects.

We have reviewed the record. Substantial evidence supports the Hearing Examiner's findings of fact (pp. 2-5). We adopt and incorporate them here.

The issue in this case is whether the Board refused to negotiate in good faith when it refused to sign any agreement which did not contain Schedule A-9. Ordinarily, a party drafting a collective agreement cannot deviate from the terms and conditions of employment written into a memorandum of agreement. In re Long Branch Bd. of Ed., P.E.R.C. No. 77-70, 3 NJPER 300 (1977) (Board commits unfair practice when it drafts collective agreement deleting salary schedule required by memorandum of agreement). Two crucial and undisputed facts make this case different: (1) Schedule A-9 precisely reflects the Board's established past practice concerning the compensation of long-term substitutes, and (2)

4/ The Association also excepts to the length of time (approximately four months) it took the Hearing Examiner to decide this case after the submission of post-hearing briefs. The Board responds that the case was a complicated one requiring extended consideration. Without commenting on the merits of this exception, we note that it does not provide a basis for relief since the Association was not prejudiced.

the Association concedes that it did not seek to negotiate the issue of salaries for long-term substitutes and hence no proposals seeking to modify this past practice were raised or discussed during negotiations. Thus, we accept the Hearing Examiner's finding and conclusion that the Board merely codified a term and condition of employment which both sides had implicitly accepted and neither side had sought to change. The Hearing Examiner properly found no greater entitlement for long-term substitutes than the carrying forward of prior practice which adjusted their rate of pay in relationship to adjustments in first year level teacher salaries. We disagree with the Association that the Hearing Examiner's findings in this regard were misplaced. Confronted with an alleged violation of subsection 5.4(a)(5), the Hearing Examiner properly inquired into the "understanding of the parties" based upon their behavior during negotiations. Under these very narrow, and perhaps unique, circumstances, we will not find that the Board violated subsections 5.4(a)(1), (5), or (6) when it insisted upon the inclusion of Schedule A-9 in the successor contract.[5/] Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Suskin and Butch voted for this decision. Commissioner Graves voted against this decision. Commissioners Hipp and Newbaker abstained. Commissioner Hartnett was not present at the time vote was taken.

DATED: Trenton, New Jersey
November 17, 1982
ISSUED: November 18, 1982

5/ Contrast In re Long Branch Bd. of Ed., supra, where the Board deleted a salary schedule the parties had negotiated because it was dissatisfied with the amount it would have to pay.

H. E. No. 82-60

STATE OF NEW JERSEY
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Charging Party.

SYNOPSIS

A Hearing Examiner recommends that an unfair practice charge brought against the Freehold Regional High School Board of Education be dismissed in its entirety. A new contract was negotiated between the parties and long-term substitutes were included in the contract recognition clause for the first time. No negotiations for salaries for these employees were conducted during the negotiations for the new contract. The memorandum of agreement signed by the parties made no mention of a salary for these employees. The employer included language in the subsequently printed contract stating that long term substitutes shall be paid at the same level of new incoming teachers (as was the practice prior to the substitutes' inclusion in the contract). The Hearing Examiner found that this did not constitute an unfair practice for in the absence of establishing a salary in negotiations for these long term substitutes the employer had a right to assume, given the totality of the circumstances, that the union waived a demand for salary increases for these long term substitutes.

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.

H. E. No. 82-60

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Appearances:

For the Respondent
Murray, Granello & Kenney, Esqs.
(Malachi J. Kenney, Esq.)

For the Charging Party
Chamlin, Schottland, Rosen & Cavanagh, Esqs.
(Thomas W. Cavanagh, Jr., Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On June 26, 1981, the Freehold Regional High School Education Association (Association or Charging Party) filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the Freehold Regional High School Board of Education (Board of Respondent) engaged in an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a)(1), (2) and (5).[1/] 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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."

Association and the Board were parties to a collective bargaining agreement which terminated on June 30, 1980. On September 26, 1980, the parties executed a memorandum of agreement for a successor collective bargaining agreement . During the negotiations it was agreed that "long term substitute teachers" were to be included in the recognized unit of the Association. Prior to the agreement these substitute teachers were not included in the unit. It was alleged by the Association that when the Board drafted and signed the new successor contract it contained a provision in the salary schedule stating that long term substitute teachers will be paid at a rate equal to the first step of the salary guide. It was contended by the Charging Party that this language is an addition to the language of the collective bargaining agreement and cannot be inserted in the contract unless it was agreed to in the earlier memorandum of understanding. It was alleged that the Board's refusal to sign a contract without this language constituted an unfair practice.

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 27, 1981. A hearing was held on October 14, 1981, at which time both parties were given an opportunity to present evidence, examine and cross-examine witnesses, argue orally and submit briefs. 2/

It is undisputed that the parties entered into negotiations for a successor agreement and prior to the actual negot-

2/ All briefs were submitted by February 25, 1982.

iations, representatives of the Board and the Association composed a document called a scattergram. The scattergram included all teachers employed by the school district on a date certain and lists them according to their current salaries and place on the salary schedule at that time. This scattergram included teachers who were on long term leave, but did not include teachers who would be subsequently hired the following year or teachers who at that time were long term substitutes. It was on the basis of this scattergram that the parties would be able to compute the actual cost of salary increases on the salary schedule.

On March 20, 1980, the parties agreed to include long term substitutes in the recognition clause of the new contract. On September 26, 1980, the parties signed a memorandum of agreement which provided that in the first year of the agreement the current economic benefit package of the Association would be increased by $807,000. The second year the benefit package would be increased by an additional $820,000. There were provisions concerning increases in the amount of dental insurance and major medical insurance programs. There were other provisions concerning compensation levels for home instruction, supplemental instruction, etc. Nothing in the memorandum of agreement made reference to the long term substitute teachers. After the memorandum was signed, representatives of the Association and Board worked out a method of distributing the raises. None of this money would go to the salaries of incoming first-year teachers although the Board did raise those salaries; they were raised from funds above and beyond the funds

agreed upon in the memorandum of agreement. There was no discussion as to any specific monies to be allocated for long term substitute teachers. When the Board had the new contracts prepared, there was a paragraph inserted into the contract under Schedule A, Listing of Salary Schedules, which stated the salary of long term substitute is the same as first-year incoming teachers. The Association objected to this language, insisting that was not their understanding of the agreement, that they believed the long term substitute teachers should be paid on the appropriate level of the salary scale as determined in the regular teacher salary guide (i.e. based upon level of education and years of experience). The Board refused to withdraw the language in the contract claiming that long term substitute teachers had always been paid on that basis in the past, that there was no specific negotiations concerning these salaries and therefore they were under no obligation to pay them in a manner which differed from past practice.

The Association witnesses testified that it was always their assumption that once the long term substitutes were included in the recognition clause they would be entitled to receive the same salaries as other teachers. They did admit that the level of salaries for these teachers was never expressed in negotiations. They point to two provisions in the contract to show that once they were included in the recognition clause their salaries had to be the same as that of other teachers, one provision being the recognition clause itself, the other provision being Article XII,

"Salaries and Tuition Reimbursement," which provide that "The salaries of all personnel covered by this agreement are set forth in Schedule A which is attached hereto and made a part hereof."

The Board points out that the recognition clause not only includes teachers, it also includes attendance officers, nurses, security guards and secretaries.

Further, Schedule A is not a simple salary schedule for teachers but rather includes salary schedules for secretarial and clerical employees, one for 10-month and one for 12-month employees, and a salary guide for attendance officers and security personnel as well as the disputed paragraph, i.e. "long term substitute teachers will be paid at the same level as first-year teachers." Had Schedule A consisted of only one salary guide the Association's argument may have been compelling. Here the reference to Schedule A in Article XII means no more than that is where salaries are listed within the contract. It should be noted that the salary of first-year teachers has gone up for both the 1980-81 school year and the 1981-82 school year. The Board witnesses testified that no one ever discussed salary for the long term substitute teachers nor were the positions of long term substitute teachers ever included in the scattergram.

The Board properly points out here that it is a well settled principle of contract law that an agreement cannot be modified or nullified by reason of a secret or unexpressed understanding or intention of one of the parties. The unstated assumption here that the substitutes would be paid at the level of regular

teachers was held only by the Association. Both Board witnesses testified that they were never aware of the Association's belief that long term substitute compensation would be based upon the regular teachers salary guide. In Leitner v. Braen, 51 N.J. Super. 31 (App. Div. 1958), the court stated:

> The concept of mutual assent is customarily stated as one of the primary requisites to the formation of an informal contract. Such mutual assent is, however, unimportant except as it is manifested by one party to the other, generally by a communicated offer and acceptance. Restatement, contracts, Section 20 (1932); 1 Williston, contracts (rev. ed. 1936), Section 22; Soloff v. Josephson, 21 N.J. Super. 106, 109 (App. Div. 1952). So the obligation depends not on the so-called real intent of a party, but on that expressed. Corn Exchange National Bank & Trust Company of Philadelphia v. Tarbel, 113 N.J.L. 605, 609 (E. & A. 1934). The phrase, meeting of the minds, can properly mean only the agreement reached by the parties as expressed, i.e., their manifested intention, not one secret or undisclosed, which may be wholly at variance with the former. Van Name v. Federal Deposit Insurance Corporation, 130 N.J. Eq. 433, 447 (Ch. 1941), aff'd 132 N.J.Eq. 302 (E. & A. 1942). It is in this sense only that the formation of a contract can be said to require the meeting of the minds of the parties. Id. at 38.

In the instant case the expressed, manifested intention of the parties in the memorandum is simply that the employer would provide $807,000 in increased benefits the first year and $820,000 in increased benefits the second year and that the parties would reach a subsequent agreement as to distribution of those sums. There was such an agreement. It cannot be forgotten that the long term substitute teachers did receive benefits under the contract in terms of access to the grievance procedure, etc. which were expressed in the contract.

The parties knew what the past method for payment for these individual employees were. It is significant that regular substitutes were also included in the recognition clause for the first time in the 1980-82 contract. The prior method of payment for these employees was to pay them on a pro-rated daily basis based upon the regular teachers salary schedule. There were no negotiations for their salaries either. The provisions for their salary was memorialized in Schedule A of the contract by the employer and the Association has no quarrel with that. In this instance the employer had the right to rely on past practice of its employees. See Barrington Bd/Ed, P.E.R.C. No. 81-122, 7 NJPER (¶12108 1981).

As the Commission held in City of Jersey City Public Library, P.E.R.C. No. 81-116, 7 NJPER (¶12207 1981), although salary is unquestionably a mandatory subject for negotiations, it is well settled that a party may agree to limit or waive its right to negotiate concerning a term and condition of employment. The burden here is on the Charging Party to prove by a preponderance of the evidence that an unfair practice has been committed. Borough of Bogota, P.E.R.C. No. 76-22, 2 NJPER 70. The evidence here does not weigh in the Association's favor. Accordingly I will recommend that the Commission find that inclusion in Schedule A of the contract of the paragraph stating the salary of long term substitute teachers is the same as first-year, incoming teachers does not constitute an unfair practice within the meaning of the Act. The employer did not refuse to negotiate in good faith when that language was included in the contract for there were no negotiations

concerning salaries of long term substitutes. The employer had the right to conclude that any negotiations concerning salary for these people was waived by the Association. It is therefore recommended that the charge be dismissed in its entirety.

Edmund G. Gerber
Hearing Examiner

Dated: June 18, 1982
Trenton, New Jersey