H. E. No. 84-41

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

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-93-53

EMPLOYEES ASSOCIATION OF THE
WILLINGBORO SCHOOLS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denies a Motion and Cross-Motion for Summary Judgment filed by the parties in an unfair practice charge which alleged that the Board violated subsections a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4, by unilaterally reducing the hours of certain employees from six to four hours per day.

The Hearing Examiner found that certain material factual issues remained in dispute which justified a full hearing.

A Hearing Examiner's decision on a Motion for Summary Judgment which does not resolve the issues in the complaint shall not be appealed directly to the Commission except by special permission of the Commission as set forth in N.J.A.C. 19:14-4.6.

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Appearances:

For the Respondent
Barbour & Costa, Esqs.
(John T. Barbour, Of Counsel)

For the Charging Party
Katzenbach, Gildea & Rudner, Esqs.
(Douglas B. Lang, Of Counsel)

DECISION AND ORDER ON MOTION AND
CROSS-MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 4, 1983 by the Employees Association of the Willingboro Schools ("Association") alleging that the Willingboro Board of Education ("Board") has 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 alleged that on May 24, 1983 the Board unilaterally reduced the work hours of certain food service workers (lead elementary employees) from six hours to four hours daily per week and therefore unlawfully failed and refused to negotiate over the reduction in hours, all of which is alleged to be in violation of

N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. [1/]

It appearing that the allegations of the Unfair Practice Charge, if true, constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 6, 1983. Thereafter, on December 13, 1983 the Board filed its Answer to the Complaint and denied committing any violation and asserted several defenses. The Board alleged that the Association waived its right to negotiate over the reduction in hours because the parties' collective agreement permitted the Board to make such a change. The Board also asserted a managerial right to reduce the work hours as a partial reduction in force.

Subsequently, on January 9, 1984, the Commission received a Motion for Summary Judgment from the Association with a supporting brief seeking a decision directing the Board to reinstate the affected employees to six hours per day plus all back pay. Pursuant to N.J.A.C. 19:14-4.8(a), the Chairman of the Commission on January 20, 1984, referred the Motion to the undersigned Hearing Examiner for determination. Thereafter, on January 23, 1984, the Board filed a Cross Motion for Summary Judgment with a supporting brief, and brief in opposition to the Association's Motion, and alleged that the parties' collective agreement permitted the instant change, and that any contract interpretations were more appropriate for the parties' grievance procedure. On January 25, 1984, the Association submitted a reply brief and asserted that

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; (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."

the contract did not permit a reduction in hours.

In order to render a decision in favor of a motion for summary judgment there must be no genuine issue as to any material fact, and the moving party must be entitled to prevail as a matter of law. See N.J.A.C. 19:14-4.8(d) and N.J.A.C. 1:1-13.2.

Upon the record as it exists to date, the Hearing Examiner makes the following:

Undisputed Findings of Fact

1. The Willingboro Board of Education is a public employer within the meaning of the Act, is subject to its provisions, and is the employer of the employees involved herein.

2. The Employees Association of the Willingboro Schools is a public employee representative within the meaning of the Act, is subject to its provisions, and is the majority representative of the employees involved herein.

3. The Board and Association are parties to a collective agreement effective from July 1, 1982-June 30, 1985. Article 12 of that agreement provides in pertinent part for hours of work as:

> 1. There shall be four (4) work day classifications within the bargaining unit, namely:
>
> (a) three (3) hours
> (b) four (4) hours
> (c) six (6) hours; or
> (d) eight (8) hours
>
> New Hires may be employed in three (3) hour positions to replace openings in four (4) hour or more positions. Present employees grandfathered in position held as of July 1, 1982.

In addition, Schedule "A" to that agreement which lists salary schedules includes a salary schedule for lead elementary employees which

says: "Lead Elementary - 6 hours."

4. On May 24, 1983 the Board unilaterally reduced the hours of the lead elementary employees from six to 4 hours daily.

Analysis

Having reviewed all of the pleadings and briefs of the parties the undersigned is not satisfied that all material facts remain undisputed for the following particular reasons.

First, at page 5 of the Board's brief and Cross-Motion for Summary Judgment it asserts that the last sentence of the above-cited hours clause in Article 12 was not intended to restrict the:

> ...accepted ability of the Board to unilaterally determine whether a position should be a four (4) hour, six (6) hour or eight (8) hour position or from time to time unilaterally modify that determination as the Board determined appropriate.

The Board then concludes that:

> This was accepted as a long standing collectively negotiated right of the Board which continues unabated up until the present.

The undersigned recognizes that the issue herein is the reduction of hours and not the number of hours to be worked by new hires. However, the above-cited Board statement raises at least one factual question, *i.e.*, are any of the lead elementary employees new hires who would be subject to the "new hires" language in Article 12?

Second, at page 9 of its brief and Cross-Motion the Board asserted that

> ...the parties' past practice has long established that the Board could determine to employ personnel in any position represented by the EAWS for either four (4) hours, six (6) hours or eight (8) hours per day.

Similarly, beginning at the bottom of page 9 the Board asserted that there was no restriction on:

> The Board's longstanding ability to shift any current position among the other allowed work days....

These assertions by the Board go to the heart of the application of Article 12. What has been the past practice of the parties in the hours of work for lead elementary employees? Has the Board in fact unilaterally changed the hours of lead elementary employees, or other existing employees (not new hires) in the past?

The undersigned is aware of the Association's argument enunciated in its reply brief that the Board's above arguments are merely an attempt to obfuscate the real issue herein. However, the undersigned believes that it would be inappropriate to decide this Charge on Summary Judgment when doubt remains as to material facts i.e. past practice, and whether any lead elementary employees are new hires, which can be resolved by the conduct of an evidentiary hearing. As the New Jersey Supreme Court held in In re Kallen, 92 N.J. 14, 28 (1983), wherein it approved of the remand of a case to an administrative law judge, the requirement for additional testimony reduced the risk of capricious error. Similarly, the conduct of a hearing in this matter, even if ultimately no additional facts are presented, if anything will reduce the risk of any error that might be committed by deciding this case on Summary Judgment.

Since the undersigned believes that material factual issues remain in dispute, Summary Judgment is not appropriate pursuant to the Rules cited hereinabove.

Accordingly, based upon the foregoing analysis the Hearing Examiner makes the following:

Conclusions of Law

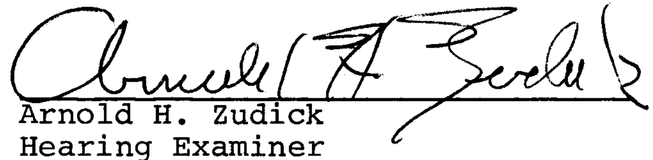
The Motion and Cross-Motion for Summary Judgment are denied.

ORDER

For the above-stated reasons, it is hereby ORDERED that:

1. The Motion and Cross-Motion for Summary Judgment are denied.

2. A hearing shall be conducted regarding this matter on March 20 and 21, 1984, at 9:30 a.m. at the P.E.R.C. Office, 429 East State Street, Trenton, New Jersey, at which time both parties will be expected to be prepared to present their respective cases. 2/



Arnold H. Zudick
Hearing Examiner

Dated: February 3, 1984
Trenton, New Jersey

2/ This finding does not necessarily mean that the hearing is limited to the issues discussed above. Both parties will have the opportunity to fully present their cases and all relevant facts will be admissible at the hearing.