P.E.R.C. NO. 77-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH RIVER BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-76-338-10

SOUTH RIVER EDUCATION ASSOCIATION,

Charging Party.

ERRATA

The Commission's decision, P.E.R.C. No. 77-62, in the above-entitled matter that issued on May 13, 1977 is hereby corrected as follows:

PAGE	LINE	DELETE	SUBSTITUTE
5	3 of the Commission's vote	voted against this decision	abstained

Jeffrey B. Tener
Chairman

DATED: May 26, 1977
Trenton, New Jersey

P.E.R.C. NO. 77-62

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SOUTH RIVER BOARD OF EDUCATION,

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-and-

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SOUTH RIVER EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In a decision in an unfair practice proceeding, the Commission finds the exceptions filed by the Association relating to findings of fact and conclusions of law of the Hearing Examiner to be without merit. The complaint alleged that the Board had refused to enter into a joint request to the American Arbitration Association for arbitration, pursuant to the operative collective negotiations agreement between the parties, and thus had refused to process a grievance presented by the Association in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(5). The Commission, in agreement with the Hearing Examiner, finds that the provision in the agreement between the parties relating to arbitration was conditional in nature and that in order for a matter to proceed to arbitration, both the Board and the Association had to agree that there was a dispute as to the interpretation of the agreement. The Commission further concludes that inasmuch as the Board had not agreed in this instant matter that there was a dispute as to the interpretation of the agreement, no unfair practice had been committed by the Board. The Commission therefore dismisses the complaint in its entirety.

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Charging Party.

Appearances:
For the Respondent, Wilentz, Goldman & Spitzer, Esqs.
(Mr. Alfred J. Hill, of Counsel and On the Brief)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER

On June 14, 1976, an Unfair Practice Charge was filed with the Public Employment Relations Commission by the South River Education Association (the "Association"). The Association alleged that the South River Board of Education (the "Board") had 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. (the "Act") in that the Board had refused to enter into a joint request to the American Arbitration Association for arbitration, pursuant to Article III, Section D.1 of the operative collective negotiations agreement between the parties and thus had refused to process a grievance presented by the Association in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).[1/]

1/ These subsections prohibit employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by
(Continued)

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 July 21, 1976. Pursuant to the Complaint and Notice of Hearing, a hearing was held before Stephen B. Hunter, Hearing Examiner of the Commission, on September 22, 1976, in Newark, New Jersey, at which all parties were given an opportunity to present evidence, to examine witnesses, and to argue orally. The Association submitted a post-hearing letter memorandum and the Board submitted a post-hearing brief. These submissions were filed by December 13, 1976. On April 22, 1977, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 77-16, 3 NJPER ___ (1977), which Report included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof.

The Association has filed timely exceptions to the Hearing Examiner's Recommended Report and Decision although these exceptions do not designate by precise citation the page and portions of the record relied upon as required by the Commission's Rules and are otherwise very general. See N.J.A.C. 19:14-7.3(a)

1/ (Continued) 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."

and (b).

The Hearing Examiner found that the provision in Article III, Section D.1 of the agreement between the parties relating to arbitration was conditional and that, in order for a matter to proceed to arbitration, both the Board and the Association had to agree that there was a dispute as to the interpretation of the agreement.[2/] The Hearing Examiner also went beyond the contract language itself to review the negotiations history relating to the disputed clause and he found and determined that this history was consistent with the words of the contract itself.

The Association takes exception to the fact that the Hearing Examiner considered the negotiations history, contending that both parties maintain that the clause is unambiguous. While both parties have argued that the dipusted clause is unambiguous, if they did not disagree as to its meaning, there would be no case before us. This entire case turns upon the meaning of that clause.

We do agree, as the Hearing Examiner found, that the matter can be disposed of without resort to an examination of the negotiations history relating to the clause. However, we would point out that such a review could only inure to the advantage of the Association because we agree with the Hearing Examiner that the contract language itself is clear and consistent with the position of the Board. Were that history inconsistent

2/ The cited clause is quoted in full in note 1 of the Hearing Examiner's Report.

with the contract language itself, then we would have to determine whether evidence regarding the negotiations history was relevant and admissible. However, we are not faced with that problem because, as stated, the matter can be resolved without recourse to that evidence.

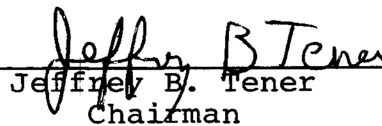
The other exceptions relate to the Hearing Examiner's analysis of the negotiations history. Because we agree that this matter can be and should be disposed of on the basis of the contract language itself, we need not pass upon these exceptions. Suffice it to say that we have carefully reviewed the entire record herein, we reject the exceptions[3/] to the Hearing Examiner's Recommended Report and Decision, and we adopt the findings of fact and conclusions of law rendered by the Hearing Examiner. Given the language in Article III, Section D.1 of the collective negotiations agreements, the Board has not violated the cited subsections of the Act by refusing to enter into a joint request with the Association to the American Arbitration Association for arbitration.

3/ Among the Association's contentions is that the Superintendent, as agent for the Board, agreed that there was a dispute as to the interpretation of the contract. We do not agree. We have found his testimony, both on direct and cross-examination, to have been consistent. He testified that before a matter could be submitted to arbitration, both parties had to agree that there was a dispute as to the interpretation of the contract. Tr. p. 75 line 13 to p. 76 line 11 and p. 78 lines 19-24.

ORDER

For the reasons hereinbefore set forth, the Commission hereby adopts the Hearing Examiner's Recommended Order and dismisses the Complaint in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst and Hartnett voted for this decision.
Commissioners Hipp and Hurwitz voted against this decision.
Commissioner Parcells was not present.

DATED: Trenton, New Jersey
May 12, 1977

ISSUED: May 13, 1977

H.E. No. 77-16

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

In the Matter of

SOUTH RIVER BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-76-338-10

SOUTH RIVER EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner issues his Recommended Report and Decision in an unfair practice proceeding. The Complaint alleges that the Board had refused to enter into a joint request to the American Aribtration Association for arbitration, pursuant to the operative collective negotiations agreement between the parties, and thus had refused to process a grievance presented by the Association in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). The Hearing Examiner concludes that the provision in the agreement between the parties relating to arbitration was conditional in nature and that in order for a matter to proceed to arbitration, both the Board and the Association had to agree that there was a dispute as to the interpretation of the agreement. The Hearing Examiner further finds that inasmuch as the Board had not agreed in this instant matter that there was a dispute as to the interpretation of the agreement, no unfair practice had been committed by the Board. The Hearing Examiner also went beyond the contract language itself to review the negotiations history relating to the disputed clause and determined that this history was consistent with the words of the contract itself. The Hearing Examiner therefore recommends that the Complaint be dismissed in its entirety.

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. 77-16

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

In the Matter of

SOUTH RIVER BOARD OF EDUCATION,

Respondent,

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Docket No. CO-76-338-10

SOUTH RIVER EDUCATION ASSOCIATION,

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Appearances:

For the Respondent, Wilentz, Goldman & Spitzer, Esqs.
(Mr. Alfred J. Hill, of Counsel and On the Brief)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by the South River Education Association (the "Association") on June 14, 1976. The Association alleged that the South River Board of Education (the "Board") had 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. (the "Act"), in that the Board had refused to enter into a joint request to the American Arbitration Association (the "AAA") for arbitration, pursuant to Article III, Section D. 1. of the operative collective negotiations agreement between the parties, [1/]

[1/] Article III D. 1. reads as follows:

"In the event that the Board and the Association agree that there is a dispute as to the interpretation of this agreement then a request shall be made jointly, to the American Arbitration Association for arbitration. The arbitrator shall confer with representatives of the Board and of the Association and shall proceed with a hearing and submit a written report in the shortest possible time setting forth his findings of fact, reasoning, and a decision. The arbitrator shall be without power or authority to make any decision contrary to law and shall render his decision consistent with the terms of this agreement. His decision shall be binding on the parties. In the event of arbitration, the costs shall be shared equally by the Association and the Board.

and thus had refused to process a grievance presented by the Association, as the recognized majority representative of professional employees employed by the Board, in violation of the Act. [2/]

It appearing that the allegations of the Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 21, 1976 by Carl Kurtzman, Director of Unfair Practice Proceedings. Pursuant to the Complaint and Notice of Hearing, a hearing was held on September 22, 1976, in Newark, New Jersey, at which time all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. The Association submitted a post-hearing letter memorandum in support of its contentions. The Board submitted a post-hearing brief in support of its position. All of these submissions were filed by December 13, 1976. Upon the entire record in this proceeding the Hearing Examiner finds:

1. The South River Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

2. The South River Education Association is an employee representative within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

3. An Unfair Practice Charge having been filed with the Commission alleging that the South River Board of Education has engaged in or is engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for its determination.

2/ More specifically, the Association asserted that the actions of the Board had violated N.J.S.A. 34:13A-5.4(a)(1) and (5). These subsections prohibit 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."

BACKGROUND

On November 25, 1975 the Association filed a request for arbitration with the AAA claiming that Ms. Susan Basaman's teaching assignment had been changed without proper notification as set forth in Article IX, subsection B of the collective negotiations agreement between the Board and the Association, covering the period between July 1, 1974 and June 30, 1976. 3/ During the processing of Ms. Basaman's grievance through the first four levels of the grievance procedure agreed upon by the parties and contained within Article III of the agreement, the Board's designated representatives had determined that Ms. Basaman had been notified concerning her class and building assignments for the following school year in accordance with the contract between the parties. The Board itself at level four of the grievance procedure also determined that Ms. Basaman had failed to file a statement setting forth her definite plans concerning possible grade and/or subject reassignments or transfers for the upcoming year by March 1, 1975, as required in Article X, subsection A of the agreement between the parties. 4/

By letter dated April 15, 1976, the AAA, after consideration of substantial documentation submitted to it by the Board and the Association with regard to the Association's request for arbitration in this matter, closed its file in this instant case without appointing an arbitrator. The Board essentially in its correspondence with the AAA had contended that the arbitration clause in question required that the Board enter into a joint request for arbitration only if (a) there was a dispute between the Board and the Association and (b) both the Board and the Association agreed that the dispute was one of contractual interpretation and not of fact. The Board submitted that the operative arbitration clause was included within the contract only to

3/ Article IX, Subsection B reads as follows:

"Teachers shall be notified of their class and building assignments as soon as possible. All personnel shall be notified of their assignments as soon as possible and, except in cases of emergency, not later than August 15."

4/ Article X, Subsection A reads as follows:

"Teachers desiring to change grade and/or subject assignment or who wish to transfer to another building may file a written statement with the Superintendent by March 1. Such requests for transfers shall be considered."

cover certain rare instances when both parties would agree that the ambiguity of a certain section of the agreement needed clarification and could not be settled between the parties themselves. When the AAA closed its file in this matter it stated in part that its labor arbitration rules did not permit it to process a request for arbitration when one of the parties to a contract refused to enter into a joint request for arbitration, when the relevant contract provided that this joint request was a necessary quid pro quo for the AAA to process that request. The instant unfair practice matter was therefore initiated by the Association thereafter.

MAIN ISSUE

Whether the Board's refusal to enter into a joint request for a panel of arbitrators from the AAA, pursuant to Article III, section D. 1. of the operative collective negotiations agreement between the parties, constituted a refusal to process a grievance presented by the Association, in violation of N.J.S.A. 34:13A-5.4(a)(1) [5/] and (a) (5)?

POSITION OF THE ASSOCIATION

The Association contends that under the circumstances in the instant matter the Board was required to enter into a joint request to the AAA for arbitration. The Association submits that the record reflects that the AAA, the tribunal named in the negotiations agreement between the parties to handle arbitration requests, had by its actions determined that the arbitration clause in the contract in question was not self-executing. Furthermore, the Association alleges that it was essentially uncontroverted that a dispute existed between the parties concerning the meaning and interpretation of the phrase contained within Article X, subsection B that "personnel shall be notified of their assignments...not later than August 15." The Association

5/ The Association does not allege that an independent "(a)(1)" violation has been committed by the Board. The Association does contend that any unfair labor practice committed by an employer e.g., a refusal to process grievances, gives rise to a co-existent "(a)(1)" violation in accord with well established National Labor Relations Board precedent and Commission precedent. See e.g., In re Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, motion for reconsideration granted, P.E.R.C. No. 77-8, 2 NJPER 295 (1976), appeal pending App. Div. No. A-483-76.

asserts that the decision of the Executive Director, now the Chairman, of the Commission in the matter entitled In re Englewood Board of Education and In re Tenafly Board of Education, E.D. No. 76-34, 2 NJPER 175 (1976) clearly states in apposite part, that when a public employer's conduct, by virtue of specific contractual language, renders a procedure for the invocation of arbitration non-self-executing,a violation of the Act under subsection (a)(5) may be implied. The Association concludes that in light of this particular decision, under the circumstances in the instant case, it is axiomatic that the Board in the instant matter has refused to process the Basaman grievance in violation of the Act.

POSITION OF THE BOARD

The Board's first contention is that the Commission lacks jurisdiction with respect to the matters at issue inasmuch as the Commission would have to make a threshold determination concerning the interpretation of the agreement between the parties in attempting to adjudicate the matters in dispute. The Board contends that the Commission has heretofore refused to construe or interpret the negotiations agreements of parties at issue, leaving the determination of arbitrability under the contract to the "appropriate forum," i.e., the judiciary or the arbitrator as the case may be. In accordance with past Commission precedent, the Board feels that the Commission should not entertain jurisdiction over the instant matter since it would be acting in violation of its previously announced mandate with regard to its lack of authority to interpret collective negotiations agreements.

The Board next asserts, that assuming arguendo that the Commission has jurisdiction to interpret the agreement under the facts in this case, the history of the negotiations between the parties, as enunciated in the record, demonstrates that the Board and the Association must affirmatively agree that there is a dispute as to the interpretation of the agreement, before a request for arbitration shall be jointly made to the AAA. The Board submits that the language of the arbitration clause in question is not mandatory, as suggested by the Association but, in fact, is conditional. In support of this contention the Board refers to several efforts made by the Association to have

Article III, section D. 1. amended so as to provide for arbitration as a fifth and final level in all grievance proceedings, without the need for Board agreement and/or without the need to establish that the matter at issue concerned an interpretative problem. The Board concludes that the Association in this charge is merely seeking to obtain from the Commission that which it could not secure through negotiations with the Board, i.e., an arbitration clause that is much broader than the existing clause.

The Board also contends that even if the arbitration clause, despite its plain language, is construed by the Commission not to require an affirmative agreement between the parties, the Association cannot prevail. The Board submits that the dispute in this matter involving Susan Basaman is merely one of fact, not of contract interpretation. The Board sets forth that the record clearly establishes that there was merely disagreement as to whether the words and conduct of the school principal on a specific occasion prior to August 15, 1975, when school personnel pursuant to the contract had to be informed of what their jobs were to be for the coming school year, were sufficient to inform Ms. Basaman of her assignment for the coming year.

The Board lastly contends that even assuming: (1) that the Commission in a departure from its past practices has taken jurisdiction of the matter and has undertaken to interpret the agreement; (2) the initial phrase of Article III, section D. 1. has been nullified and arbitration has been made contingent upon a third party determination of whether the dispute in question is one of interpretation or fact; and (3) the Commission has decided that the dispute between the parties is one of interpretation and not fact, a finding in favor of the Association would still entail the extraordinary determination that the Board's action in taking a good faith position with the AAA, later deemed to be in error, was an unfair practice. The Board asserts that N.J.S.A. 34:13A-5.4(a) contemplated many potential abuses of unfair practices by public employers but that misclassification of a grievance matter as one of fact, rather than one of interpretation, surely was not one among them.

DISCUSSION AND ANALYSIS

The undersigned concludes, on the basis of a careful review of the record and apposite federal private sector precedent [6/], that the Board's refusal to enter into a joint request for a panel of arbitrators from the AAA, given the language of the relevant arbitration clause [Article III, section D. 1. of the 1974-76 negotiations agreement], did not constitute a refusal to process a grievance presented by the Association within the intendment of the Act's unfair practice section and was not violative of N.J.S.A. 34:13A-5.4(a)(1) and (a) (5).

Preliminarily, the undersigned rejects the Board's first contention that the Commission in the instant matter lacks jurisdiction to hear this matter, inasmuch as it is necessary to interpret the agreement between the parties in attempting to adjudicate the matter in dispute between the Board and the Association. The Board has argued that the Commission has consistently in the past refused to construe or interpret negotiations agreements between parties in recognition of the fact that arbitrators and the judiciary are the proper agents to interpret contractual agreements.

The undersigned, however, notes that in the private sector the courts have held that the National Labor Relations Board should, in appropriate circumstances, interpret the contract of the parties. One Federal Circuit Court of Appeals affirmed the following in a recent decision:

> "Admittedly, the Board has no plenary authority to administer and enforce collective bargaining contracts. Those agreements are normally enforced as agreed upon by the parties, usually through grievance and arbitration procedures, and ultimately by the courts. But the business of the Board, among other things, is to adjudicate and remedy unfair labor practices...Hence, it has been made clear that in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the

6/ The Courts of our State have specifically recognized that the New Jersey Employer-Employee Relations Act was patterned after the National Labor Relations Act, as amended, and that the latter may be utilized as a guide in resolving disputes arising under our Act [See Lullo v. Intern. Assoc. of Fire Fighters, 44 N.J. 409 (1970)].

> other...Arbitrators and the courts are still the principal sources of contract interpretation, but the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts...It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of collective bargaining contract..." (Citations Omitted) Chase Mfg. Co. 492 F. 2d 130, CA 7 (1974), 85 LRRM 2603 citing NLRB v. Strong, 393 U.S. 357, 360-361, 70 LRRM 2100, 2101 (1969).

Similarly, the Public Employment Relations Board in New York followed this particular line of reasoning in Town of Orangetown, 8 PERB 3069 (1975). The Commission itself in a recent decision entitled In re Piscataway Township Board of Education, P.E.R.C. No. 77-54, 3 NJPER ___ (1977), affirming H.E. No. 77-7, 2 NJPER 347 (1976) adopted the findings of fact and conclusions of law of a Hearing Examiner who interpreted the parties' contract in that particular matter, substantially for the reasons advanced by that Hearing Examiner.

The Hearing Examiner further notes that the Executive Director, now the Chairman, of the Commission in In re Englewood Board of Education and In re Tenafly Board of Education, supra, viewed the "refusing to process grievances" language of N.J.S.A. 34:13A-5.4(a)(3) as intended to cover circumstances such as when public employer conduct, by virtue of specific contractual language, rendered a grievance/arbitration procedure non-self-executing. The Association in the instant matter, citing the Englewood and Tenafly decision, supra, specifically contends that the Board's conduct has rendered the grievance/arbitration procedure non-self-executing. To force the parties, in the case before the undersigned, into the courts for a resolution of their dispute at this juncture, when it is apparent that the Association relied at least in part on the above-cited dicta of the Commission's chief executive officer and administrator in the Englewood and Tenafly decision, supra, in support of its charge, would run counter to the Act's stated declaration of policy that "the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes..." 7/

In light of the above-cited factors, to best effectuate the policies

7/ N.J.S.A. 34:13A-2

of this Act, the undersigned has determined in this Recommended Report and Decision to interpret the parties' contract.

It is the undersigned's determination that the language of the relevant arbitration clause is conditional and does not require the mandatory arbitration of all contractual disputes relating to the interpretation of the agreement between the parties. The undersigned finds that the plain and clear language of Article III, section D. 1. requires that the Board and the Association must affirmatively agree that there is a dispute as to the interpretation of the pertinent contractual agreement before the parties are thereafter obligated to jointly request arbitration. In the absence of joint agreement that there is an interpretative dispute relating to the contract - even if it is arguable that one party was arbitrarily or capriciously withholding its agreement - there is no legal obligation for the parties to enter into a joint request for a panel of arbitrators. 8/

As pointed out by the Association, the United States Supreme Court has continually affirmed its strong preference for the arbitration of labor disputes 9/ in furtherance of the clearly expressly national policy favoring the resolution of labor disputes in private extra-judicial forums. 10/ The federal judiciary has generally construed arbitration clauses broadly,unless it may be discerned with positive assurance that an arbitration clause is not susceptible to an interpretation that covers the asserted dispute. All doubts concerning coverage under an arbitration clause are normally resolved in favor of the arbitration process. The courts have uniformly determined that where a contract contains a broad arbitration clause, in order to remove a specific dispute from arbitration the language of the agreement purporting to do so must be "clear and unambiguous" or "unmistakenly clear". 11/

8/ In the instant matter it is clear that the Board does not agree that there is a dispute as to the interpretation of the agreement. See, e.g., Exhibit JT - 10.

9/ See, e.g., United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 46 LRRM 2416 (1960).

10/ See Sections 201(a) and 203(d) of the Labor Management Relations Act, 1947, 29 U.S.C. 171(a), 173(d).

11/ See, e.g., International Ass'n of Machines & A. Workers v. General Electric Co., 406 F. 2d 1046, 70 LRRM 2477 (2nd Cir. 1969).

Within this particular legal framework the undersigned must interpret the disputed arbitration clause, which provides in pertinent part that "[i]n the event that the Board and the Association agree that there is a dispute as to the interpretation of this agreement then a request shall be made, jointly, to the American Arbitration Association." This particular agreement does not contain the "broad" or "standard" mandatory arbitration clause common to many collective bargaining agreements in the private sector 12/ and certain collective negotiations agreements in the public sector. 13/ It is evident to the undersigned that the parties have "clearly and unambiguously" conditioned utilization of the arbitration mechanism on the joint agreement of the parties that a dispute existed as to the interpretation of the agreement between the parties. Given the language of the arbitration clause at issue the agreement provided for only voluntary or permissive arbitration of an "interpretative dispute" between the parties. 14/ Since the Board has maintained that there is no dispute as to the interpretation of the agreement relative to the Basaman grievance, the undersigned cannot find that the Board's actions in refusing to enter into a joint request for a panel of arbitrators from the AAA constituted a refusal to process a grievance within the intendment of N.J.S.A. 34:13A-5.4(a)(5).

12/ A sample broad arbitration clause recommended by the AAA for use in the private sector is as follows:

"Any dispute, claim or grievance arising out of or relating to this agreement shall be submitted to arbitration under the Voluntary Labor Arbitration Rules,then obtaining, of the American Arbitration Association. The parties agree that the award shall be final and binding. The parties further agree that there shall be no suspension of work when such dispute arises and while it is in process of adjustment or arbitration."

M. Beatty, Labor-Management Arbitration Manual, E. Eppler and Son, (1960) at page 100.

13/ The undersigned takes administrative notice of the fact that "standard" or "broad" arbitration clauses are more prevalent in the private sector than in the public sector.

14/ If both parties agreed that there was a dispute as to the interpretation of the agreement they then would be required to jointly request the AAA's arbitration services. An arbitrator's decision thereafter would be binding on the parties.

Although the undersigned holds that the language of the agreement itself clearly did not bind the Board to arbitrate the instant dispute, there is still a need to examine the extrinsic evidence submitted by the Board relating to (1) the negotiations that resulted in the agreement of the parties upon the arbitration clause now set forth in Article III, paragraph D. 1. and (2) subsequent negotiations relating to this arbitration clause, despite the existence of the parol evidence rule. 15/ The undersigned is cognizant of the arbitration maxim that "unambiguity [relating to contract terminology] is never absolute". 16/ Inasmuch as the Association and the Board argue that the relevant contract arbitration language unambiguously supports their respective divergent claims, and given the possibility that the Commission may not affirm the undersigned's determination that the relevant arbitration clause clearly did not bind the Board to arbitrate the instant dispute, 17/ I believe it is necessary to consider the relevant negotiations history relating to the arbitration clause to aid in the interpretation of the language of that clause.

With reference to the relevant negotiations history, the record reveals the following:

1. The first collective negotiations agreement executed by the Board and the Association after the passage of <u>Chapter</u> 303, <u>Public Laws</u> of 1968 became effective July 1, 1969 and continued in full force and effect until June 30, 1970. The parties agreed upon a four step grievance procedure that

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15/ This frequently invoked rule provides generally that where two parties have entered into a contract and have expressed it in writing which they intend as the final and complete statement of the contract, no evidence, oral or written, of prior understandings or negotiations is admissible to contradict or vary the written contract. If the terms of the contract are ambiguous or clearly susceptible to more than one meaning then parol evidence is admissible to show what the parties meant at the time of making the contract and how they intended it to apply.

16/ P. Prasow and E. Peters, Arbitration and Collective Bargaining, McGraw-Hill (1970).

17/ 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. [See <u>N.J.A.C</u>. 19:14-7.1 <u>et seq</u>. and <u>N.J.A.C.</u> 19:14-8.1]

terminated in all cases at the Board of Education level. There was no provision at all for the arbitration of any grievance.

2. During the course of negotiations for a successor agreement covering the 1970-71 school year the Association attempted to negotiate a broad binding arbitration provision. The Board consistently refused to agree upon the inclusion of any type of arbitration clause within the contract. A Commission-appointed mediator, James Crawford, suggested the inclusion of an arbitration clause that he had drafted, that was identical in language to the arbitration provision that is the subject of the instant charge proceeding. Crawford explained that arbitration would be utilized only on those rare occasions when the Board and the Association agreed that a particular grievance related to a dispute that was one of contractual interpretation and not of fact. Crawford specifically explained to the parties at a joint session the purpose and limited scope of the arbitration clause. The parties agreed upon the inclusion of the proposed language in the grievance procedure negotiated for the 1970-71 school year. 18/

3. The third agreement between the Board and the Association, covering the period July 1, 1971 to June 30, 1972, contained the same arbitration clause as in the prior agreement.

4. In the Association's proposals for a successor agreement to the 1971-72 contract, the Association sought to delete from the applicable arbitration clause the words "as to the interpretation of the agreement" in an apparent effort to expand the potential scope of the arbitration procedure. The Board refused to agree to this change in the arbitration process and the Association later withdrew this particular proposal. The successor agreement negotiated by the parties covering the period between July 1, 1972 and June 30, 1974 contained the same arbitration provision as had previously been agreed upon.

5. During the course of negotiations for a 1974-76 contract the Association submitted a proposal to change the aforementioned arbitration clause. The Association proposed the deletion of the words:

> "In the event that the Board and the Association agree that there is a dispute as to the interpretation of this agreement, then a request shall be made jointly to the American Arbitration Association for arbitration."

18/ This testimony was not challenged by the Association.

and sought to substitute the following language:

> "In the event that the aggrieved person is not satisfied with the disposition of his grievance at level four he may, within five (5) school days from receipt of a decision by the Board, request in writing that the Association submit his grievance to arbitration. If the Association determines that the grievance is meritorious, it may submit the grievance to the American Arbitration Association for arbitration."

The Board again refused to agree to an arbitration procedure that would provide for arbitration as a fifth and final level in all grievance proceedings, without the need for Board agreement and without the requirement that the grievance concerned a contract interpretation problem. The Association subsequently withdrew this proposal. The agreement between the parties covering the period from July 1, 1974 to June 30, 1976 was the agreement in effect at the time of the filing of the instant charge.

6. In its negotiations proposals for a 1976-78 agreement, the Association sought to delete from Article III, section D. 1. the words "In the event that the Board and the Association agree that" and "jointly" and sought to add the language "If there is a". The arbitration clause, in relevant part, would then have stated the following:

> "If there is a dispute as to the interpretation of this agreement, then a request shall be made to the American Arbitration Association for arbitration."

The Board refused to consider any change in Article III, section D.1. At the conclusion of negotiations, the same arbitration clause [in effect since 1970-71 school year] was agreed upon and included in the agreement now in effect between the Board and the Association.

7. There have been no arbitration hearings conducted, pursuant to Article III, section D. 1., since that provision was first negotiated and included within the 1970-71 agreement. There were no requests for arbitration made by the Association prior to the instant matter.

In summary, the undersigned concludes that all relevant evidence relating to negotiations concerning Article III, section D.1. serves to affirm the undersigned's determination that the language of the arbitration clause at issue provided for only voluntary or permissive arbitration of an interpretative dispute between the parties. The undersigned therefore concludes that the Association has not established by a preponderance of the evidence that the Board committed an unfair practice, as defined by N.J.S.A. 34:13A-5.4(a)(5), by refusing to enter into a joint request for arbitration of the Basaman grievance. [19]

RECOMMENDED ORDER

Accordingly, for the reasons hereinabove set forth, IT IS HEREBY ORDERED that the complaint in this instant matter be dismissed in its entirety.

Stephen B. Hunter
Hearing Examiner

Dated: Trenton, New Jersey
April 22, 1977

19/ As a result of the undersigned's determination in this matter it is not necessary to consider other defenses raised by the Board, e.g., the mootness of the matter.