

P.E.R.C. NO. 91-113

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-163

ELIZABETH EDUCATION ASSOCIATION

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Elizabeth Board of Education. The Complaint was based on an unfair practice charge filed by the Elizabeth Education Association alleging that the Board violated the New Jersey Employer-Employee Relations Act when it required bus drivers to perform custodial duties when they were not driving buses. The Commission concludes that the parties' collective negotiations agreement and the employees' job classification authorized the Board to assign the disputed duties.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-163

ELIZABETH EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Murray, Murray & Corrigan, attorneys
(David F. Corrigan, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
attorneys (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On December 14, 1988, the Elizabeth Education Association filed an unfair practice charge against the Elizabeth Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} by requiring bus drivers to perform custodial duties when they are not driving buses.

^{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....

On November 2, 1989, a Complaint and Notice of Hearing issued. On November 16, the Board filed its Answer asserting that the job classification for bus drivers/utilitypersons states that they shall perform custodial and laborer work and that the matter should be dismissed or deferred to arbitration. The Answer further asserts that the Board had a managerial right to assign the duties. On July 20, 1990, we denied a Board motion to dismiss or defer to arbitration. P.E.R.C. No. 91-10, 16 NJPER 445 (¶21191 1990).

On September 12, 1990, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. The Association argued orally. The Board waived oral argument but filed a post-hearing brief on November 14, 1990.

On February 28, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-26, 17 NJPER 164 (¶22068 1991). He found that the Board has assigned laborer or custodial duties to bus driver/utilitypersons since the mid-1960s and that the job classification provision of the parties' collective negotiations agreement constitutes a waiver of the Association's right to negotiate over this issue.

On April 11, 1991, after an extension of time, the Association filed exceptions. It claims that before 1988, no ten-month bus drivers performed laborers' duties on days they drove buses. It argues, therefore, that the Hearing Examiner erred in not finding a unilateral change in a term and condition

of employment. On April 24, the Board filed a reply urging adoption of the Hearing Examiner's report.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-8) are accurate. We incorporate them here.

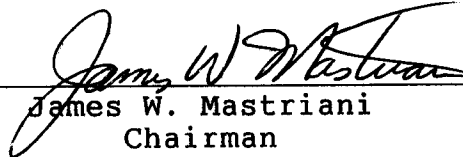
The parties' agreement provides that the employer will prepare job classification sheets defining the principal functions of each job classification and make these sheets available to the union. It further provides that the employer shall give job classification sheets to the union for discussion and negotiation of rates. The union may recommend changes, but the employer need not accept these recommendations.

The job classification sheet for bus drivers-utilitypersons provides that, when not driving a bus, they will perform custodial and laborer work duties as assigned. Assuming that ten month bus drivers/utilitypersons never performed laborers' duties on days they drove buses, we nevertheless find that the collective negotiations agreement, in conjunction with the job classification referenced in that agreement, authorized the Board to assign those duties. Accordingly, the Board did not violate the Act. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: June 20, 1991
Trenton, New Jersey
ISSUED: June 21, 1991

H.E. NO. 91-26

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

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-163

ELIZABETH EDUCATION ASSOCIATION

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Sections 5.4(a)(1) or (5) of the New Jersey Employer-Employee Relations Act since it engaged in no conduct constituting a unilateral change in the terms and conditions of employment of its Bus Driver-Utilitypersons. The Association had alleged that the Respondent unilaterally changed the duties of its Bus Driver-Utilitypersons by assigning them additional laborer and custodial duties, beginning in September 1988. However, no proof of any change was adduced. The job description permitting the assignment of such duties has been in effect since the early 1970's and was negotiated with the majority representative at that time, the predecessor of the Charging Party.

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. 91-26

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

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-163

ELIZABETH EDUCATION ASSOCIATION

Charging Party.

Appearances:

For the Respondent, Murray, Murray & Corrigan, Attorneys
(David F. Corrigan, of Counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
Attorneys (Sanford R. Oxfeld, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on December 14, 1988, by the Elizabeth Education Association ("Charging Party" or "Association") alleging that the Elizabeth Board of Education ("Respondent" or "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. ("Act"), in that on September 26, 1988, the Board began to require both 12-month and 10-month bus drivers to perform custodial duties when they were not driving their buses; this was a unilateral change which was not negotiated with the Association nor was additional compensation provided to the

drivers; 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, may constitute a violation of the Act, a Complaint and Notice of Hearing was issued on November 2, 1989. Pursuant to the Complaint and Notice of Hearing, hearing dates were originally scheduled for January 3 and January 4, 1990, in Newark, New Jersey. The Respondent filed its answer on November 16, 1989, and the hearing was rescheduled to January 29, 1990.

On January 22, 1990, the Respondent filed a Motion to Dismiss or, in the alternative, to Defer to Arbitration accompanied by a supporting Brief (C-3 & C-4). Thereafter the Hearing Examiner prematurely cancelled the hearing date of January 29th, in order to allow the Association to respond to the Board's Motion to Dismiss or to Defer to Arbitration and, following the Association's strenuous objection to the Board's Motion, on the ground of untimeliness, the Hearing Examiner by written Order of January 31, 1990, denied the Board's Motions without prejudice and peremptorily rescheduled the hearing for February 20, 1990, at the same time and place (C-5).

^{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 Board on February 5, 1990, filed with the Chairman a Motion for Special Permission to Appeal the Hearing Examiner's Order of January 31st, supra, and on February 16, 1990, the Chairman granted the Board's motion to appeal. On July 20, 1990, the Commission denied the Respondent's Motion to Dismiss or Defer and referred the matter back to the Hearing Examiner for determination: P.E.R.C. No. 91-10, 16 NJPER 445 (¶21191 1990)[C-6]. Pursuant to this decision of the Commission, the Hearing Examiner rescheduled the matter for a hearing which was held on September 12, 1990, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Counsel for the Association argued orally (Tr 78-89). Counsel for the Board waived oral argument but filed a post-hearing brief on November 14, 1990.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument of the Charging Party and the post-hearing brief of the Respondent, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record in this proceeding, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Elizabeth Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Elizabeth Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Two successive collective negotiations agreement between the parties are relevant to the instant proceeding and span the periods July 1, 1985 through June 30, 1988 [J-2, pp. 1, 56] and July 1, 1987 through June 30, 1990 [J-1, pp. 1, 55]. In each of these agreements, the Association is recognized as the negotiations representative for a unit covering a number of job classifications, which the parties refer to generically as "Custodians" [see cover page of J-1 and J-2 and Article I, Recognition, p. 2]. The specific classification in dispute is that of "Bus Drivers-Utilitypersons," which appears in the Recognition article of J-1 and J-2, supra.

4. Article XX of each agreement provides identically as, follows, with respect to "Job Classification Sheets":

- A. The Employer will prepare and make available to the Union Job Classification Sheets defining the principal functions of each job classification covered by this Agreement and any classifications coming under this Agreement.
- B. At least thirty (30) days before putting a new classification into effect, the Employer shall give the Union a job classification sheet for discussion and for the purpose of negotiating a rate. The Union may recommend changes in the classification sheet but the Employer in no way is obligated to accept these recommendations.

(J-1, J-2 at p. 32).

5. Prior to November 1984, the "Custodians" had been represented by the Teamsters. However, following a Commission-conducted election in November 1984, the Association replaced

the Teamsters as the collective negotiations representative. [Tr 48-50].^{2/}

6. Following the 1984 representation election, Theodore E. Farra, the Board's Director of Plant, Property & Equipment ("Buildings and Grounds") met and discussed with the Association's new President, Michael Scarpato, "...job descriptions and other labor problems within the unit..." (Tr 48). In response to Scarpato's request, and consistent with the Board's obligation under Article XX of the collective negotiations agreement then in effect, Farra on April 18, 1985, sent Scarpato a complete set of the 12 job descriptions then within the custodial unit (R-1; Tr 47-50).

7. The disputed job description, "Bus Driver-Utilityperson," was among those included in the attachments to R-1 and provided, in pertinent part, as follows:

General Responsibilities:

...Prepare reports, forms, and other work including the maintenance of their vehicles as assigned. When not driving a bus, perform custodial and labor work assigned.

Specific Responsibilities:

...Perform custodial, labor or other duties as assigned by Supervisor, when not driving a school bus or other designated vehicles. Perform work as assigned in performance of their duties.

(R-1, p. 6)(Emphasis supplied).

^{2/} The Association thereafter assumed the Teamsters' collective negotiations agreement, which at that time contained a provision either identical to or similar to Article XX, supra (Tr 49, 50).

This job description makes no distinction between 12 and 10-month bus drivers/utilitypersons.

8. Farra, who has held his present position since 1973, testified without significant contradiction that the job description for the "Bus Driver/Utilityperson" has remained unchanged since 1974 (Tr 50-52).^{3/} Farra's testimony was essentially substantiated by Douglas McDaniels, a witness for the Association and a bus driver for the district since 1965 (Tr 16). When McDaniels began bus driving in 1965 there was no "utility" component to his job classification. This was changed "...verbally in 1967," in conjunction with the Board's requesting that bus drivers work 12 months instead of 10 months, the gist of which, according to McDaniels, was: "...we'll make you bus driver/utility and we'll utilize you during July and August..." (Tr 38, 40, 41, 44, 45).^{4/} McDaniels acknowledged that with the change from 10-month to 12-month status, the bus drivers were "...given utility jobs during bus days..." and, thus, beginning in the summer of 1967, he

^{3/} In fact, the "Bus Driver/Utilityperson" job description resulted from negotiations between the Teamsters and the Board prior to 1981 (Tr 57).

^{4/} The term "bus driver," which survives to this date, was used by both the Association and Board witnesses at the hearing. For example, see the testimony of the Board's witness, William McGinnity, its Supervisor of Transportation since 1981, who stated that he always used the term "bus driver" and did not use the term "utilityperson" (Tr 66, 67). See also the Board's use of the term "bus driver" in its documents (CP-5, CP-6; Tr 58-61). See also, J-2, "Salary Guide," pp. 3, 4 -- "Bus Driver."

performed "custodial" or "laborer duties," in addition to his driving duties (Tr 39, 45).

9. McDaniels testified that the only difference between a 10-month bus driver and a 12-month bus driver occurs during July and August when the 12-month drivers continue to work. The 10-month drivers, unlike the 12-month drivers, have never had any responsibility for custodial or laborer duties. [Tr 17-19]. On the occasions when there were no school children to transport, particularly in July and August, the 12-month drivers cleaned their buses, "gunked" their engines, scrubbed the floors and washed the walls of their buses, changed tires, etc. With the hiring of additional drivers, the scope of assigned duties was expanded to include working around the schools or athletic fields, providing assistance to the masons, painters, plumbers, etc. [Tr 19, 20].

10. Prior to becoming Supervisor of Transportation in 1981, McGinnity had been a "bus driver" from 1972 to 1981 (Tr 67). He stated that when the driving duties were finished for the day, the drivers were instructed to park their buses and were told "...to clean up the glass, to pull weeds, to keep our area clean around the buses..." and then to transport pupils at the end of the day (Tr 67, 68).

11. Beginning with the 1988 school year, the 10-month bus drivers, including McDaniels, began receiving laborer assignments such as raking leaves, washing windows in the school hallways, picking up paper, etc., which had never been done previously (Tr

20-25).^{5/} Also, in the fall of 1988, the Board adopted a practice of giving its drivers brief handwritten notices of their assignments, which were to be performed when they were not operating their buses (CP-1 to CP-4; Tr 25-38).

12. The increase in the number of bus drivers from nine in 1981, to the current complement of 22 or 23 is due to an increase in the number of bus routes (Tr 52-54). Although McDaniels testified that he did more bus driving at the present time than in the past, the Hearing Examiner credits Farra, who testified that the bus drivers now have more free time than they did in 1981. This was one of the reasons cited by the Board when it decided to assign "other duties" to the drivers during their non-driving time. This practice also eliminated the need to hire part-time employees. [Tr 43, 54, 55].^{6/}

The Respondent Board Did Not Violate Sections 5.4(a)(1) Or (5) Of The Act Since No Unilateral Change In The Terms And Conditions Of Employment Of Its Bus Driver-Utilitypersons Occurred Contrary To The Allegations By The Association.

Positions of the Parties

The Association in its oral argument (Tr 78-89) contends

-
- ^{5/} At the time of the hearing there were 22 or 23 bus drivers, eight of whom were 10-month drivers (Tr 52, 58). Farra testified credibly that in 1981, there were nine bus drivers who performed custodial duties, including work in the schools and on the athletic fields, the policing of grounds, etc. when they were not driving their buses (Tr 52, 53).
- ^{6/} The crediting of Farra is based upon the corroborative testimony of McGinnity that bus drivers have more free time today, during which they are assigned various tasks, including inspection work, maintenance, etc. (Tr 69, 70).

that the documentary exhibits and the testimony establish conclusively that the term "bus driver," used by the parties since the 1960's, has referred only to the driving of a bus and has not included laborer or custodial duties. The Association sees nothing inconsistent between this position and that of the job description for the "Bus Driver-Utilityperson," which includes the performance of "custodial and labor work" when "assigned" (Finding of Fact No. 7; Tr 85, 86). Additionally, the Association cites Section 5.3 of the Act and Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985) for the often-stated proposition that proposed new rules or modifications of existing rules governing working conditions must be negotiated before they are implemented (Tr 86). Finally, the Association does not acknowledge a contractual waiver by it, notwithstanding that the Board is granted the authority to prepare and issue job descriptions with or without the acceptance by the Association under Article XX of the Agreement (Finding of Fact No. 4; Tr 87, 88). The requested remedy is a cease and desist order barring the Board from assigning custodial or laborer duties to Bus Driver-Utilitypersons (Tr 88, 89).

To the contrary, the position of the Board is that the Association failed to prove that any unilateral change occurred in the duties of the Bus Driver-Utilitypersons as alleged and, thus, no violation of the Act has occurred. Further, the current job description for Bus Driver-Utilityperson has remained unchanged since the early 1970's and was in fact negotiated with the Teamsters

at that time. Finally, the Board contends that the Association has waived any right to negotiate the subject matter of its charge by the provisions of Article XX of the parties' agreement.

* * * *

It is clear beyond peradventure of doubt that the Association has failed to prove that the Board made any unilateral change in the duties of the Bus Driver-Utilityperson job classification, beginning September 26, 1988, as alleged in the Unfair Practice Charge. Findings of Fact Nos. 8-10 establish that "Bus Drivers" have been assigned laborer or custodial duties at least since the mid-1960's. The only change which occurred in the 1988-89 school year was that the Board adopted the practice of giving its drivers brief handwritten notices of their assignments when they were not operating their buses (Finding of Fact No. 11).

It also seems obvious to this Hearing Examiner that due to the number of Bus Drivers having increased from nine in 1981 to the current complement of 22 or 23, more time is now available for drivers to be assigned "other duties." The Board, by utilizing its drivers in this manner, has eliminated the necessity of hiring part-time employees. [Finding of Fact No. 12]. The Hearing Examiner perceives no significant distinction between the 10-month bus drivers or the 12-month drivers since each is currently performing laborer and custodial duties (Finding of Fact No. 11).

Additionally, there is no doubt but that the Bus Driver-Utilityperson job classification was negotiated with the

Association's predecessor, the Teamsters, probably sometime during the early 1970's. This fact, together with the provisions of Article XX, supra, which allow the Board to prepare and promulgate job classifications unilaterally, leads ineluctably to the conclusion that the Association has clearly and unmistakably waived its right to negotiate the subject matter of its Unfair Practice Charge: see Red Bank Reg. Ed. Ass'n v. Red Bank Bd. of Ed., 78 N.J. 122, 140 (1978); So. River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985); State of N.J., P.E.R.C. No. 86-64, 11 NJPER 723, 725 (¶16254 1985); State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980); No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 452 (¶4205 1978); Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 112 LRRM 3265, 3271 (1983); and Chesapeake & Potomac Telephone Co. v. NLRB, 687 F.2d 633, 636, 111 LRRM 2165, 2168 (2nd Cir. 1982).

There having been no unilateral change in a term and condition of employment, i.e., the alleged unilateral assigning of laborer and custodial duties to Bus Drivers,^{7/} coupled with a clear and unmistakable contractual waiver by the Association, the

^{7/} See State of New Jersey (Ramapo State College) and Willingboro Bd. of Ed., supra.

Hearing Examiner has no alternative but to recommend the dismissal of the Complaint.^{8/}

* * * *

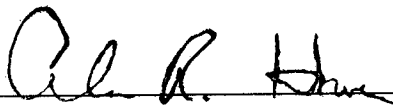
Upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) or (5) by its conduct herein since it made no unilateral change in the terms and conditions of employment of its Bus Driver-Utilitypersons.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: February 28, 1991
Trenton, New Jersey

^{8/} The Board has also briefed the point of a possible independent Section 5.4(a)(1) violation. The Hearing Examiner sees no need to pursue this issue since the record is devoid of any supporting evidence: New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 (n. 1)[¶10285 1989].