P.E.R.C. NO. 2011-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WASHINGTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2009-175

WASHINGTON TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Washington Township Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it sought to enforce a final collective negotiations agreement with the Washington Township Education Association that includes changes in a seniority provision that was not included in the parties' memorandum of agreement.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Adams, Stern, Gutierrez and Lattiboudere, LLC, attorneys (Philip E. Stern, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys (Gail Oxfeld Kanef, of counsel)

DECISION

On April 5, 2010, the Washington Township Education Association filed exceptions to a Hearing Examiner's report and recommendations. The Hearing Examiner recommended dismissal of a complaint alleging that the Washington Township Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),[1/]

1/ These provisions 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 (continued...)

when it drafted a successor collective negotiations agreement that omitted language from the prior agreement without the Association's knowledge and consent. Given the limited authority of the parties' negotiators to enter into an agreement omitting contract language without the consent of their principals, we reach a different conclusion.

The unfair practice charge was filed by the Association on November 17, 2008. On June 8, 2009, a Complaint and Notice of Hearing issued. On July 20, the Board filed an Answer, asserting that during collective negotiations, the Association agreed to eliminate the disputed language.

On September 30, 2009, Hearing Examiner Susan L. Stahl conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On March 12, 2010, the Hearing Examiner issued her report and recommendations. H.E. No. 2010-7, 36 NJPER 84 (¶38 2010). The Hearing Examiner concluded that an oral agreement between Association and Board representatives that was not referenced in the Memorandum of Agreement (MOA) reached and ratified by the parties, coupled with the Association representatives' execution

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1/ (...continued)
representative."

of a final contract that omitted the disputed seniority language, bound the Association to that change.

On April 5, 2010, the Association filed its exceptions. On April 14, the Board filed an answering brief urging adoption of the Hearing Examiner's recommendation to dismiss the Complaint.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact, including her credibility determinations (H.E. at 3-12), with some modifications and additions that we will address later in this decision.

We summarize the key events and address the Association's exceptions and the Board's response.

We add to the findings of fact that Article II of the parties' 2004-2007 agreement, entitled Negotiation Procedure, provides, in relevant part:

> D. When Agreement is reached and approved by the Association and the Board, it shall be reduced to writing and signed by the parties.
>
> * * *
>
> F. This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing approved and duly executed by the parties.

Article XVII lists extra-curricular positions with paid stipends, shows the applicable compensation, and directs that vacant posts be advertised within the district. Section 2 is the seniority provision the Board is alleged to have improperly removed from the final successor contract. It provides:

> 2. All newly created or newly vacated positions listed below will be filled according to the following procedures:
>
> a. Preference will be given to the certified staff who have the most years experience in the position.
>
> b. Next, preference will be given to the certified staff who have seniority in the district.

Paragraphs c and d cover the procedures to fill vacant positions when no qualified staff are available.

From 2007 through early 2008, Board and Association representatives engaged in collective negotiations. On March 19, 2008, the parties entered into a six-page MOA signed by three Board representatives and five Association representatives.

The MOA specifies that the agreement is subject to approval by the Board and ratification by the Association. Section 1 provides that there will be two successor agreements: a one-year agreement effective from 2007 through 2008; and a three-year agreement to run from 2008 through 2011. Section 14 addresses Article XVII, Stipend Positions, and provides:

> Freeze stipends for 2007-2008;
>
> Under Level 1 eliminate "off guide increases."
>
> Under Level 4 “ski chaperones” should be treated the same as “Weekend Activities.”

The remaining sections detail other changes from the 2004-2007 agreement to be incorporated into the two successor agreements. The last section of the MOA, Section 26, states that:

> All proposals not referenced herein are withdrawn. All aspects of the prior agreement not changed by the Memorandum of Agreement continue into the new contract. All prior written agreements are included by reference into this memorandum.

The last page contains the signatures of Board and Association representatives.

At the February 21, 2008 negotiations session, the parties discussed freezing all stipends for the 2007-2008 school year, eliminating off-guide increases in stipends, and converting the ski chaperones compensation to that for weekend activities. These discussions were recorded in the minutes kept by the secretary to the Board's business administrator. There is no reference in those minutes to any discussion concerning elimination of the disputed Article XVII seniority provision. The February 21 minutes mirror Section 14 of the MOA.

One or two weeks before the February 21, 2008 negotiations session, a meeting took place among the Association's chief negotiator, Phillip Kinney, its then President, Linda Divietro, Board President M. Skurchak and Board chief negotiator C. Compoli. Kinney, who was called as a Board witness,[2/] testified

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2/ Late in the 2007-2008 school year, Kinney was named Dean of (continued...)

that aside from DiVietro, he did not invite the other members of the Association's negotiations team to the meeting, nor did he inform them of what transpired. Kinney, who was called as a Board witness was the only person present at that meeting who testified. Kinney stated that the representatives discussed the article concerning positions with stipends. He testified that the elimination of the appointment by seniority language had been part of the Board's initial negotiations proposals. We add that Association negotiator Mary Ellen Summers testified that the February 21, 2008 meeting between the full negotiations teams was the first time she recalled Article XVII being brought up.

Kinney testified that the Association sought an increase in the stipend for ski trip chaperones because the job involved six hours of work. He testified that an oral agreement was reached with the Board president and chief negotiator to change Article XVII starting with the 2008-2011 agreement by increasing the ski chaperone stipend in exchange for deleting the seniority language regarding vacancies.

Before signing the March 19 MOA, Kinney realized that it did not contain any reference to elimination of the seniority language. He did not point this out to other members of the Association team or the Board.

2/ (...continued)
Students, a position not represented by the Association.

Kinney also did not list the elimination of the seniority language in the written summary he prepared for the Association ratification meeting or mention it in his presentation at the Association membership ratification meeting.[3/]

The disputed 2008-2011 agreement was signed by the Board president and chief negotiator and the Association president, chief negotiator and three negotiators. Kinney testified that before signing the final contract documents, he reviewed both the MOA and the fully drafted 2008-2011 agreement and found them to be consistent with what he believed to be the agreement between the Board and Association. Summers testified that she reviewed only the changes agreed upon and items that pertained to the secretaries whom she represented on the negotiations team. The disputed 2008-2011 contract lists the positions and their stipends for all three years. In place of the seniority language, the contract provides:

> All appointments to said positions and retention in any of the above positions, as well as any challenges, shall be in accordance with law.

There was no testimony about where that new contract language came from.

3/ We clarify the last sentence of finding No. 14 to reflect that Association members ratified the MOA, not the final contracts that were subsequently prepared.

N.J.S.A. 34:13A-5.3 requires that when an agreement is reached on terms and conditions of employment, it must be embodied in writing and signed. The Act prohibits either party from unilaterally inserting language into a final contract absent negotiations and agreement about that language.

The Association argues that because the MOA requires Board and Association ratification for its terms to be binding, any prior oral agreement not contained in the MOA is not binding.

The Board responds that the record supports the Hearing Examiner's conclusion that Kinney had the authority to bind the Association. It asserts that the procedure used by a majority representative to ratify an agreement is beyond the scope of the Commission's authority and emphasizes that the Board had no role in that process. The Board argues that the final contract executed by the parties represents the agreement made by the Association's negotiators and that therefore the Complaint should be dismissed.

Although the Act authorizes public employers and public employee organizations to negotiate through designated representatives, limits on the authority of those representatives are often established by the ground rules for negotiations. See Borough of Palmyra, P.E.R.C. No. 2008-5, 33 NJPER 207 (¶75 2007) (ratification by a governing body has become the norm). In this case, the parties specifically required ratification of all terms

of any agreement. The MOA indisputably provides that it is subject to approval by the Board and ratification by the Association. The MOA further provides that all proposals not referenced in the MOA are withdrawn, all aspects of the prior agreement not changed by the MOA continue into the new contract, and all prior written agreements are included by reference into this memorandum. Both parties ratified the MOA and not any prior oral agreements not memorialized in the MOA.

The only remaining question is whether the signing of the final contracts by Association representatives that included changes not agreed to in the MOA bound the Association to those changes. Under the particular facts of this case, we find that the Association representatives did not have that authority. There is nothing in the record to suggest that either party intended the final written contracts to represent anything other than what the parties had agreed to in their successor contract negotiations. Those negotiations culminated in an MOA that was subject to ratification by both principals and was ratified by both principals. We reject the conclusion that the MOA, standing alone, does not represent the entire intent of the parties. The MOA by its terms states that all aspects of the prior contract not changed by the MOA continue in the new contract except that all prior written agreements are included by reference into the MOA. There was no prior written agreement on the seniority issue

and a final contract intended to integrate the terms of the MOA cannot include any changes in contract language not reflected in the MOA signed by the negotiations teams and ratified by the Board and Association.

We recognize that representatives of both parties may have made mistakes. Board representatives signed an MOA that did not include changes to the seniority language that two of the Board's three negotiators had agreed upon with two of the Association's five-member negotiations team. Association representatives signed a final contract that included changes to the seniority language that were not agreed to by its full negotiations team or included in the ratified MOA. The better labor relations result would be for the parties to return to the table and reach a final agreement that fully incorporates everything they intended to have in that final agreement. We, however, are unable to order that result. In this unfair practice case filed by the Association, we are obligated to enforce the critical right of both parties to limit the authority of their negotiators by requiring approval and ratification of any final agreement. Under the unusual circumstances of this case, we must find that the Board did not have the right to add language to the final contract that did not appear in the ratified MOA. We further find that the signing of the draft final agreement by the Association's negotiations team did not bind the Association to

those changes because the Association specifically reserved to its membership the right to ratify the terms of any successor agreements.[4/][5/]

ORDER

The Washington Township Board of Education is ordered to cease and desist from seeking to enforce a final collective negotiations agreement with the Washington Township Education Association that includes changes in a seniority provision that was not included in the parties' Memorandum of Agreement. The Board is further ordered to make whole any employees who suffered losses in compensation due to the removal of that language and within twenty days of receipt of this decision, to notify the

4/ The Board's reliance on Parsipanny-Troy Hills Tp. Bd. of Ed., P.E.R.C. No. 78-68, 4 NJPER 187 (¶4093 1978), is misplaced. In that case, we found that the board did not violate the Act when it excluded from a new agreement two items that had appeared in the memorandum of understanding. First, the board had ratified the memorandum subject to clarification regarding one of the two disputed items. Second, representatives of the parties with the actual authority to conclude a final agreement engaged in bilateral negotiations and agreed to delete the two provisions. We specifically found that there was no evidence that their actions were subject to ratification. Here, the Board approved the MOA without qualification and there is no evidence to suggest that those who signed the final contract had the right to modify the MOA.

5/ Because of the mistakes made by the representatives of both parties, we will not order the Board to post a notice of the violation, a typical part of the remedy in an unfair practice case.

Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: October 28, 2010

Trenton, New Jersey