P.E.R.C. No. 77-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON CITY BOARD OF EDUCATION,

Respondent,

- and - Docket No. CO-76-53-18

BURLINGTON CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In the absence of exceptions to the Hearing Examiner's decision the Commission adopts the Hearing Examiner's findings of fact and conclusions of law in an unfair practice proceeding. The Hearing Examiner found that the unilateral cancellation of one week of extra work for guidance counselors, including the compensation earned therefor, by the Board of Education constituted a modification of a pre-existing term and condition of employment during the course of negotiations for a successor agreement and was thus a refusal to negotiate in violation of the Act. The Commission orders the public employer to cease and desist such conduct; and affirmatively orders that it negotiate in good faith, upon request, with the majority representatative of the employees concerning the performance of extra summer work for guidance counselors, and during the course of these negotiations restore the prior practice. The Commission also orders the Board to provide the guidance counselors an opportunity to earn compensation equivalent to what they would have earned had the board not unilaterally cancelled the week of work. The parties are to negotiate when this compensatory employment is to take place.

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Appearances

For the Respondent, John E. Queenan, Jr., Esq.

For the Charging Party, Goldberg, Simon & Selikoff, Esqs. (Mr. Theodore M. Simon, of Counsel).

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on August 22, 1975 by the Burlington City Education Association (the "Association") alleging that the Burlington City Board of Education (the "Board") engaged in certain unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"). Specifically the Association alleged that the Board unilaterally cancelled one week of extra work for guidance counselors prior to the beginning of the 1975-76 school year. It was alleged that this additional week of work, and the compensation earned therefor, was an established practice between the parties and its termination without any negotiations with the Association, as the majority representative of the employees, including the guidance counselors, was a

violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).[1/] Additionally the Association alleged that the Board took this unilateral action as a reprisal for the inability of the Association and the Board to reach a collectively negotiated agreement for the 1975-76 school year, thus violating N.J.S.A. 34:13A-5.4(a)(3)[2/]

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Commission's Executive Director, acting as the named designee of the Commission, 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 October 2, 1975. In accordance with the said Notice of Hearing a hearing was held before Edmund G. Gerber, Hearing Examiner of the Commission, on November 19, 1975 and January 6, 1976, at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Subsequent to the close of the hearing the parties submitted memoranda of law, the final reply memoranda being received on March 29, 1976. On June 16, 1976 the Hearing Examiner issued

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1/ N.J.S.A. 34:13A-5.4(a)(1) and (5) prohibit employers 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."

2/ N.J.S.A. 34:13A-5.4(a)(3) prohibits employers from:
"Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

his Recommended Report and Decision, which included findings of fact, conclusions of law, and a recommended order. The original of the said Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part of it.

Neither party has filed exceptions to the Hearing Examiner's Recommended Report and Decision, and the time for such submission has now passed.[3/]

Upon careful consideration of the entire record herein, and in the absence of exceptions to the Hearing Examiner's Recommended Report and Decision, the Commission hereby adopts the findings of fact and conclusions of law as stated by the Hearing Examiner substantially for the reasons set forth by him.[4/] The Commission therefore finds and determines that the Board's unilateral cancellation of the guidance counselors' one week of work prior to the commencement of the 1975-76 school year, which cancellation included the loss of the additional compensation which would have been earned from such work, constituted an unlawful refusal to negotiate in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). In agreement

3/ N.J.A.C. 19:14-7.3(a) provides ten days, from the date of service of the Hearing Examiner's Report for the filing of exceptions. The rule also provides for requests for extensions of time in which to file such exceptions.

On June 28, 1976 the Board, by way of a telephone communication from its attorney requested an extension of time to file exceptions. This extension was granted and confirmed by letter dated June 28, 1976, extending the Board's time to file exceptions until July 2, 1976. To date no exceptions have been received from either party.

4/ N.J.A.C. 19:14-7.3(b) provides in part: "Any exception which is not specifically urged shall be deemed to have been waived."

with the Hearing Examiner at page 9 of his Report, we find it unnecessary to determine whether a violation of N.J.S.A. 34:13A-5.4(a)(3) has occurred and dismiss that portion of the complaint alleging an (a)(3) violation without prejudice.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(c) the Public Employment Relations Commission hereby orders the Burlington City Board of Education to:

1. Cease and desist from:

(a) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the Act;

(b) Refusing to negotiate in good faith with the Burlington City Education Association as the majority representative of its employees in the appropriate unit concerning the terms and conditions of employment of the employees in that unit; and

(c) Unilaterally altering the terms and conditions of employment of its employees in the unit represented by the Burlington City Education Association during the course of collective negotiations.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, negotiate collectively in good faith with the Burlington City Education Association, as the majority representative of the guidance counselors, concerning the performance of any summer work.

(b) During the course of collective negotiations concerning the performance of any summer work, restore the past practice as it existed prior to the unilateral cancellation of one week of such summer work in August of 1975, that is two weeks immediately following the end of the school year and one week immediately preceding the commencement of the school year.[5/]

(c) Provide an opportunity for all guidance counselors employed by the Board in August 1975 to earn compensation equivalent to what they would have earned had they been able to work the week of August 25, 1975. The parties will negotiate when this employment is to take place. The rate of compensation for this additional work shall be in conformity with the collective negotiations agreement in effect for the 1975-76 school year.

5/ With regard to the relief ordered in paragraphs 2(a) and (b) of this Order, we point out that to the extent that the parties may have already negotiated concerning such terms and conditions of employment subsequent to August 1975, compliance with these paragraphs might have been achieved. Similarly to the extent that subsequent negotiations may have resulted in terms and conditions of employment different from the parties' past practice, the new agreement would supersede the past practice ordered restored by paragraph 2(b). Stated differently, in ordering negotiations and restoration of pre-existing benefits, we are remedying the Board's August 1975 unilateral actions but we do not mean to imply that the parties may not have already resolved this term and condition of employment for future years.

(d) Notify the Commission, in writing, within twenty (20) days of receipt of this Order what steps are being taken to comply with this Order.

BY ORDER OF THE COMMISSION

By
Jeffrey B. Tener
Chairman

Chairman Tener and Commissioners Forst, Hartnett and Parcells voted for the Decision.
Commissioner Hipp did not participate in this matter.
Commissioner Hurwitz was not present.

DATED: Trenton, New Jersey
July 19, 1976

Issued: July 20, 1976

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-76-53-18

BURLINGTON CITY EDUCATION ASSOCIATION,

Charging Party.

For the Education Association
Goldberg, Simon & Selikoff, Esqs.
by Theodore M. Simon, Esq.

For the Board of Education
John E. Queenan, Jr., Esq.

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On August 22, 1975 an unfair practice charge was filed with the Public Employment Relations Commission ("Commission") by the Burlington City Education Association ("Association") against the Burlington City Board of Education ("Board") claiming the Board engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), specifically N.J.S.A. 34:13A-5.4 (a) (1), (3) and (5) [1/] by imposing a unilateral alteration of the work year of certain guidance counsellors. This action, it is alleged, constitutes a modification of a pre-existing term and condition of employment. It further alleged that this action constituted a reprisal for the inability of the Respondent and Charging Party to reach an agreement on the terms and conditions of employment for the 1975-76 school year.

1/ N.J.S.A. 34:13A-5.4 (a) (1), (3) and (5) 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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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.

It appearing that the allegations of this charge, if true, may constitute unfair practices within the meaning of the Act, a complaint and notice of hearing was issued on October 2, 1975.

Pursuant to the complaint and notice of hearing, a hearing was held on November 19, 1975 and January 6, 1976. Both parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs and answering briefs were submitted by the parties by March 29, 1976. Upon the entire record in the matter, the Hearing Examiner finds:

(1) The Burlington City Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

(2) The Burlington City Education Association is an employee representative within the meaning of the Act and is subject to its provisions.

(3) An unfair practice charge having been filed with the Commission alleging that the Burlington City Board of Education has engaged or is engaging in an unfair practice within the meaning of the Act, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

I

Factual Background

The Board over the past seven years has required all of its guidance counsellors to work during the summer for two weeks after the close of school and an additional week prior to the opening of school. The Board and the Association had commenced negotiations for a 1975-1976 contract on November 12, 1974; in August of 1975 a new contract had not yet been signed.

On August 13, 1975 the following letter was sent to all the guidance cousellors employed by the Board: 2/

> To date there has not been an agreement between the Burlington City Board of Education and the Burlington City Teachers' Association.
>
> You will therefore, kindly report for duty on September 2, 1975 and not the week before the opening of school as in the past.

2/ Letters were sent to all employees at this time to the effect that their salary would be based on the 1974-75 contract. Only the guidance counsellors were told that their starting date would be changed.

The change in the language of the individual contracts coincides with the changes in the collective neogitations contract between the Board and the Association. Prior to the 1974-75 contract, the counsellors were paid in accordance with a contract schedule titled Extra Curricular Honorarium - which specifically provided for summertime work for guidance counsellors. For 1974-75, counsellors were paid in accordance with a new provision in the contract that "any teacher who is required to work beyond the regular teacher in-school work year shall be compensated at a rate consistent with their normal school year compensation". There is no specific reference in the 1974-75 contract to a salary for guidance counsellors' summer work.

In the summer of 1974 two guidance counsellors, Colofranson and Bowers worked beyond the two week period after the close of school and were paid under the 1974-75 agreement. When they returned to work in August, Colofranson and Bowers were notified by the Board of Education, their pay would be docked to conform with the 1973-74 agreement. The teachers protested this action and the matter went to a hearing before the Commissioner of Education.

Issues

The parties commenced negotiations for a 1975-76 contract in November of 1974. The Boards' original position in negotiations was that they would stand pat on all issues in negotiations with the exception of salary. Mr. Dotti, the Superintendent of Schools, testified that the Colofranson matter had been "so time consuming they wanted to eliminate such a thing" and the Board claimed they introduced into negotiations a demand for the elimination of summer work. The negotiators for the Association testified that the Board always talked in terms of eliminating the additional summer work that was the subject of the Colofranson matter, specifically work beyond the normal three week period. The Association never understood the Board to mean that they wished to eliminate all summer work. Mr. Dotti also testified that his notes reflected that there were at least four times when the Board made its position known that there would be no summer work for anyone, yet when asked to review his notes under cross-examination, his notes referred to going from a twelve month contract to a ten month contract and not specifically about the issue of summer work.

The parties filed a Notice of Impasse with the Public Employment Relations Commission in February, 1975. One of the items in dispute on the

notice was "Duration of Contract". Ultimately, the parties submitted to fact-finding. A hearing was held on May 28, 1975 and the Fact-Finder's Report and Recommendation was issued on June 15, 1975.

The Fact-Finder's Report covers ten items at impasse. 3/ The following two items are relevant to the instant issue.

> 3. Work Beyond the Regular School Year
>
> The thrust of the Association's proposal in Article VIII, C. is to continue with the present language of Article VIII, Section C which reads:
>
> > C. Any teacher who is required to work beyond the regular teacher in-school work year shall be compensated at a rate consistent with their normal school year compensation.
>
> The Association is further proposing the limitation of 182 work days for those teachers presently employed and 183 work days for newly-employed personnel. The Association agreed to drop its request for a Section D addition that would compensate teachers at the rate of $10 per hour for work beyond the regular school day.
>
> The Board cites a management right to limit the number of work days.
>
> Recommendations:
>
> From the evidence before us we find no need to proscribe a new limit of work days. We recommend Article VIII be maintained as is.

and,

> 9. Duration of the Agreement
>
> The Association proposed a one-year agreement with duration dates July 1, 1975 to June 30, 1976.
>
> The Board, lamenting some bad managerial practices, proposes a ten-month contract.
>
> Recommendations:
>
> We find no reason or evidence to alter the past practice of a full year agreement and recommend the regular duration dates of July 1, 1975 to June 30, 1976.

Both of these items are related to the issue of summer work for the counsellors but they do not deal with the issue directly. The Board's position on work beyond the regular school year is simply a claim of a broad legal right, and does not deal with a specific demand in negotiations. The Board's demand

3/ These items are similar to the items listed in the Notice of Impasse.

for a ten month contract was, they claim, a demand for the elimination of all summer work. Yet Dotti admits the duration of the agreement was not discussed specifically as to guidance counsellors in negotiations, mediation or fact-finding. Furthermore, the counsellors were already under individual ten month contracts for 1974-75 (see above). It should be noted that when Lenoire Reiner, Association President, heard of the August 13 letter she immediately called Dotti to protest the Boards' action. She testified and, I so find, that Dotti admitted to her that the letter was sent because the parties had not come to an agreement and they had no need for guidance counsellors.

In light of all the testimony and evidence before me, including the credibility of witnesses, the wording of the August 13 notice, the confusion over the Colofranson matter and the language of the Notice of Impasse and Fact-Finder's Report, I find there never was a clear and unambiguous notice submitted to either the counsellors or the Association that the counsellors would not work the week before school was opened prior to the letter of August 13. In this regard it is interesting to note that Mr. Dotti testified the Board did not notify any of the administrative staff, including principals, of the decision in question as late as July, 1975 and Dotti could not give a date as to when in fact, the administrative staff was informed of this decision. More importantly, however, the Board does not argue that the parties negotiated to impasse over this change in summer work. In fact, the Superintendent of Schools, testified that the parties were still negotiating the contract on August 13, when the notices went out. 4/ The Board's position is simply that there was no contractual obligation between the parties and, absent an express contractual agreement, the Board was under no obligation to employ the counsellors in August. Mr. Dotti, testified that there was never a specific contractual agreement between the Burlington City Board of Education and the Education Association concerning summer work for guidance counsellors. Since there was no agreement, it is argued, there was no obligation of employment and the notice of August 13, 1975 was sent out as a courtesy informing the counsellors that there was no agreement.

4/ It is noted that the Board took no other action with regard to any of the items that were submitted to the fact-finder.

The Association argues that the contractual obligation was created through past practice. For the prior seven years all counsellors were obligated to work three weeks in the summer; and a pre-condition of employment as a counsellor was the willingness to work this three week period. All the testimony indicates this was the past practice. 5/ In fact, a principal in one of the schools said to one counsellor, in July of 1975, "I'll see you in August" indicating he expected the counsellor to return to work during the summer.

The existence or absence of an express contract provision is not controlling pursuant to § 5.3 of the Act. 6/ The Commission has held that,

> "It is immaterial whether a reduction in the work year and its effect on salary and fringe benefits is a change in past policies or contract provisions or a continuation of existing practices. The existing contract having come to an end, all its provisions, unless specifically agreed otherwise, terminate. All topics which are terms and conditions of employment, regardless of their inclusion in past contracts or policies, are subject to the duty to negotiate"...In re Fair Lawn Board of Education, P.E.R.C. No. 76-7 1 NJPER 47 (1975).

Since the contract in the instant case has terminated and the reduction of summer work for guidance counsellors is certainly a reduction of the work year, it follows that such a reduction is subject to the duty to negotiate as a term and condition of employment.

In Piscataway Township Board of Education and Piscataway Township Education Association, P.E.R.C. No. 91, 9 NJPER 49 (1975), where an old agreement had terminated before a new one was negotiated, the Commission held,

> It is the generally accepted view in both the public and private sectors than an employer is normally precluded from altering the status quo while engaged in collective negotiations, and that such an alteration constitutes an unlawful refusal to negotiate...

5/ In the private sector an employer can commit an 8 (a) (5) violation of the National Labor Relations Act by unilaterally altering a term or condition of employment that was a past practice never set forth in a contract, Granite City Steel Co., 167 NLRB No. 36, 66 LRRM 1070.

6/ N.J.S.A. 34:13A-5.3 in pertinent part provides that, "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representative of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment."

> The Commission requires the maintenance of those terms and conditions of employment in effect as of the commencement of the obligation to negotiate, which in this case relates to negotiations with respect to a successor agreement.

In Galloway Township Board of Education and Galloway Township Education Association, P.E.R.C. No. 76-32, 2 NJPER ___, currently pending appeal App. Div. Docket Number A-3016-75, the Commission points out that in Piscataway they were attempting to maintain "those terms and conditions of employment in effect regardless of whether those terms are derived from a contract or some other source. The status quo represents that situation which affords the least likelihood of disruption during the course of negotiation for the terms and conditions under which the parties have been operating. It presents an environment least likely to favor either party." The extent of the obligation includes the requirement to maintain terms and conditions of employment at least until the Commission's impasse procedures set forth in N.J.A.C. 19:12-1.1, et seq., have been exhausted. Piscataway, Supra.

Since I have found the parties never were at impasse over the specific changes in terms and conditions in question i.e., the elimination of one weeks' work, the Board did not satisfy their obligations to negotiate under the Act.

The Board argues, however, that "the determination of establishment of the calendar in school year is the exclusive responsibility of the Respondent." 7/ and they have no duty to negotiate the school year with the Association. In support of this position they cite Burlington County College Faculty Association v. Board of Trustees, 64 NJ 10.

There is no dispute that the Board has the right to fix the calendar but that is not the issue here. As the Court pointed out in Burlington at pg. 12, "While the calendar undoubtedly fixes when the college is open with courses available to students, it does not in itself fix the days and hours of work by individual faculty members or their work loads or their compensation. These matters...are mandatorily negotiable under the Act though the negotiations are to be conducted in the light of the calendar." The Commission's decision - impact test follows the thinking of the Court in Burlington. The decision of

7/ The Respondent also cites a decision by the Commissioner of Education Peter Marshall v. Board of Education of the Borough of North Arlington, Bergen County, S.L.D. September 4, 1975 in support of its position. It is noted that the State Board of Education remanded this decision with instructions. Further, under § 5.4 (c) of the Act the Commission shall have exclusive power to prevent anyone from engaging in any unfair practice listed in § (a). Hence, the Commissioner of Education cannot consider unfair practice charges in the cases before him. His decisions are not controlling as to allegations of unfair practices under the Act.

a school administration to establish or change the school calendar is their responsibility and creates no mandatory duty to negotiate. But, the impact of the implimentation of this decision on the wages and hours of teachers is mandatorily negotiable. In Rutgers, the State University and the Rutgers Council of American Association of University Professors, P.E.R.C. No. 76-13, 1 NJPER ___ the Commission held that "the public employer must notify the majority representative of any such proposed establishment or modification of the terms and conditions of employment and, upon demand, negotiate the same prior to their implementation." The employer is precluded from unilaterally establishing or modifying terms and conditions of employment. (emphasis supplied) Once the Board made its decision to eliminate summer work [which according to the Board's witnesses they did early in the year] they had a duty to notify the Association that the length of the counsellor's work year would be cut, early enough in the year so there could be meaningful negotiations. Here, there was no notice to the majority representative, the Association, and hence no negotiation and more importantly, no utilization of the impasse procedures as to this issue. I therefore find that the unilateral action of the Board constitutes a violation of N.J.S.A. 34:13A-5.4 (a) (1) and (5).

In view of my conclusion that the Board's conduct constitutes an unlawful refusal to negotiate I find it unnecessary to determine if the unilateral conduct herein also constituted a violation of N.J.S.A. 34:13A-5.4 (a) (3).

II

ORDER

Respondent, Burlington City Board of Education, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act.

(b) Refusing to negotiate collectively in good faith with the Burlington City Education Association as the majority representative of teachers, concerning terms and conditions of employment of such teachers.

(c) Unilaterally altering, or threatening to unilaterally alter, terms and conditions of employment of its teachers during the course of collective negotiations with the Burlington City Education Association.

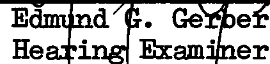
2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, negotiate collectively in good faith with the Curlington City Education Association concerning the terms and conditions of employment of its teachers and specifically, guidance counsellors.

(b) Provide an opportunity for all guidance counsellors employed by the Board in August 1975 to earn compensation equivalent to what they would have earned had they been able to work the week of August 25, 1975. The parties will negotiate when this employment is to take place. [8/] The rate of compensation for this additional work shall be in conformity with the collective negotiation agreement in effect the week of August 25, 1975.

(c) Notify the Executive Director, in writing, within twenty (20) days of receipt of this Order what steps the Respondent has taken to comply herewith.

BY ORDER OF THE HEARING EXAMINER



Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
June 16, 1976

8/ The parties could agree that the guidance counsellors will work additional hours during the work year or work an extra week in the summer.