

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,
Respondent,

Docket No. CO-76-25-27

-and-

EAST BRUNSWICK ADMINISTRATORS ASSO-
CIATION,

Charging Party.

EAST BRUNSWICK BOARD OF EDUCATION,
Petitioner,

Docket No. SN-76-19

-and-

EAST BRUNSWICK ADMINISTRATORS ASSO-
CIATION,

Respondent.

SYNOPSIS

In a decision and order on motion the Commission denies the Board's motion for reconsideration of the Commission's earlier decision and order in a consolidated unfair practice and scope of negotiations proceeding. The Board, while acknowledging that its motion had been filed well out of time, urged that its motion be granted nevertheless because of alleged extraordinary circumstances. The Board contended that the Commission's Hearing Examiner lacked the impartiality to preside over a fair and impartial evidentiary hearing. The Commission rules that not only is the Board's motion almost three months late, but it offers no newly discovered evidence nor does it raise arguments not previously available. The Commission notes that at least one of the Board's main arguments in support of its motion is based on factual inaccuracies regarding the Hearing Examiner's involvement in this matter prior to the issuance of a formal Complaint and Notice of Hearing.

P.E.R.C. NO. 77-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,
Respondent,

-and-

Docket No. CO-76-25-27

EAST BRUNSWICK ADMINISTRATORS ASSO-
CIATION,

Charging Party.

EAST BRUNSWICK BOARD OF EDUCATION,
Petitioner,

-and-

Docket No. SN-76-19

EAST BRUNSWICK ADMINISTRATORS ASSO-
CIATION,

Respondent.

Appearances:

For the Board of Education, Rubin and Lerner, Esqs.
(Mr. Frank J. Rubin, of Counsel)

For the Administrators Association, Mandel, Wysoker,
Sherman, Glassner, Weingartner & Feingold, Esqs.
(Mr. Jack Wysoker, of Counsel).

DECISION AND ORDER ON MOTION

On August 25, 1976 the Public Employment Relations Commission issued its Decision and Order in the above-captioned consolidated unfair practice and scope of negotiations proceeding. In re East Brunswick Board of Education, P.E.R.C. No. 77-6, 2 NJPER 279. In that decision, the Commission, after carefully considering the entire record including the transcript, exhibits, Hearing Examiner's Recommended Report and Decision, and the Board's exceptions, adopted the findings and recommendations of the Hearing Examiner and concluded that the Board has created a circumstance which indicated to

the Association that the Board's negotiating team had the authority to conclude an agreement and that, in this situation and absent express qualifying conditions, the Association was justified in presuming that the Board's negotiators possessed the apparent authority to conclude a binding agreement. Additionally, the Commission concluded that salary increments are mandatorily negotiable terms and conditions of employment especially where, as here, the parties' agreement relating to salary increments is consistent with the Board's statutory authority under Title 18A to withhold an increment for cause. The Commission, therefore, ordered the Board to execute and give retroactive effect to the agreement.

Thereafter, on September 22, 1976, the Board filed a Notice of Appeal, Docket No. A-250-76, with the Superior Court of New Jersey, Appellate Division, from the Commission's August 25, 1976 Decision and Order. On or about October 15, 1976, the Commission served on the Court and the parties hereto the Statement of Items Comprising the Record on Appeal.

On December 6, 1976, the Board filed with the Commission a Motion for Reconsideration pursuant to N.J.A.C. 19:15-4.1 with a supporting affidavit and brief. Additionally, the Board requested oral argument before the Commission or its designated representative. On that same date, the Commission received a letter from the Association urging that the Board's Motion for Reconsideration as well as the request for oral argument be denied.

N.J.A.C. 19:15-4.1, Motion for Commission reconsideration,

provides as follows:

"A party to a proceeding before the Commission may, because of extraordinary circumstances, move for reconsideration after the Commission decision has been rendered. The movant shall state with particularity the material error claimed and, where applicable, shall specify the page of the record relied upon. Any motion pursuant to this section shall be filed within 15 days after service of the Commission decision. Any such motion shall be printed or otherwise legibly duplicated. Copies shall be served on the parties of record, and a statement of service shall be filed with the motion papers. The filing and pendency of a motion for reconsideration shall not operate to stay the effectiveness of the Commission decision unless otherwise ordered by the Commission. A motion for reconsideration need not be filed to exhaust administrative remedies."

The Board, while acknowledging that the motion has been filed well out of time, nevertheless urges that it be granted because of extraordinary circumstances. Essentially, the Board contends that the Commission's Hearing Examiner, Stephen B. Hunter, lacked the impartiality to preside over a fair and impartial hearing. The basis of this assertion is that Mr. Hunter attended an exploratory conference on September 26, 1975 prior to the issuance of a complaint or the designation of a Hearing Examiner by the Commission and that Mr. Hunter, while attempting to "mediate" the dispute between the parties, allegedly advocated a position similar to that taken by the Association. This, the Board asserts, went beyond the encouragement of settlement and involved advocacy of a particular position.

Furthermore, the Board contends, a dispute developed

between Mr. Hunter and the Board's key witness prior to the hearing. Mr. Hunter later discredited the testimony of this witness. The Board contends that dispute prior to the hearing between Mr. Hunter and the witness could not have left Mr. Hunter's impartiality unimpaired.

The Association opposes this Motion on the following grounds: (1) the Motion is clearly out of time and there is no evidence of extraordinary circumstances or material error (2) Mr. Hunter's role in the process is not newly discovered evidence and it could have been raised prior to the opening of the hearing or, at least, in the Board's exceptions (3) the allegations of partiality are mere speculation and conjecture (4) Mr. Hunter's recommended report was based on his assessment of all the evidence and the testimony of the witness discussed therein was only a small part of the entire record and (5) the Commission reviewed the entire record independently and issued its decision and it is the decision, not Mr. Hunter's Recommended Report and Decision, which is on appeal and prejudice is not alleged with regard to the holding of the hearing.

Prior to ruling on the instant motion, we would like to set forth our procedure for the processing of unfair practice charges with particular reference to the instant matter. The unfair practice charge in this matter was filed on August 1, 1975. N.J.A.C. 19:14-1.1, 1.2, 1.3, and 1.4. The case was assigned to a Commission staff member, Carl Kurtzman, for processing. N.J.A.C. 19:14-1.6(a). The parties were advised of this assignment by letter dated August 11, 1975. Pursuant to the Commission's Rules,

two exploratory conferences were conducted on September 26, 1975 by staff member Robert M. Glasson^{1/} and on October 20, 1975 by staff member Gerald Clendenny "...for the purpose of clarifying the issues and of exploring the possibility of voluntary resolution and settlement of the case." N.J.A.C. 19:14-1.6(c). The parties were notified of these conferences by letters dated September 8 and October 10, 1975 respectively. Both letters state that the conference was to be conducted by staff member Robert M. Glasson. However, the October 20, 1975 conference was actually conducted by staff member Clendenny due to the unavailability of Mr. Glasson.

Thereafter, it appearing to the Commission's named designee that the allegations of the charging party, if true, may constitute unfair practices on the part of the respondent, a formal Complaint and Notice of Hearing was issued on October 29, 1975. N.J.A.C. 19:14-2.1. At that time, Mr. Hunter was designated as the Hearing Examiner. N.J.A.C. 19:14-6.1. This was the first contact that Mr. Hunter had with this matter. On October 30, 1975, the Board filed the instant Petition for Scope of Negotiations Determination and, by order dated November 7, 1975, the Board's Petition and the Association's Charge were

^{1/} The Board's brief and the attached affidavit incorrectly state that Mr. Hunter attended this conference. The affidavit is inaccurate at least to the extent that it refers to any participation in this matter by Mr. Hunter prior to the issuance of a Complaint and Notice of Hearing by the Commission on October 29, 1975.

consolidated.

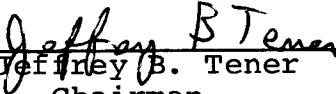
On November 10, 1975, Mr. Hunter held a pre-hearing conference with the parties. N.J.A.C. 19:14-6.2. Hearings were held before Mr. Hunter on January 20, February 23 and February 24, 1976. Additionally, it should be noted that the Commission assigned to these same parties a mediator, Nathan Cohen, by letter dated December 15, 1975, Docket No. I-76-321.

The Board's Motion for Reconsideration of the Commission's Decision and Order in this matter is denied. Not only is the Motion almost three months late, but it offers no newly discovered evidence nor does it raise arguments not previously available. Furthermore, an appeal on this matter is pending in the Appellate Division and the Commission has filed with the Appellate Division a cross-application for enforcement of its August 25, 1976 Order. This matter has been too long delayed already and to grant this motion absent a showing of compelling circumstances would only serve to further delay a final resolution of this dispute. Additionally, we note that at least one of the Board's main arguments is based on factual inaccuracies regarding Mr. Hunter's involvement in this matter prior to the issuance of a formal Complaint and Notice of Hearing, footnote 1), supra.

We are not satisfied that the Board's Motion for Reconsideration should be granted and it is hereby denied.

The Board's request for oral argument is similarly denied.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hartnett and Parcells voted for this decision.
Commissioners Hipp and Hurwitz did not participate in this matter.

DATED: Trenton, New Jersey
December 21, 1976

ISSUED: December 22, 1976