P.E.R.C. NO. 77-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRIELLE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-77-88-92

BRIELLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

On the basis of a stipulated record and briefs in an unfair practice proceeding, the Commission finds that the Board violated the New Jersey Employer-Employee Relations Act by refusing to negotiate with the Association unless such negotiations were conducted in open public session. The Commission determines that the Board's insistence on conducting collective negotiations with the Association in open public session established an illegal condition precedent to negotiations, inconsistent with the Board's duty to negotiate in good faith within the meaning of N.J.S.A. 34:13A-5.4(a)(5). The Commission further concludes that the Board's demand does not relate to terms and conditions of employment, is not mandated by the Open Public Meetings Act [N.J.S.A. 10:4-6 et seq., popularly known as the "Sunshine Law"], contrary to the Board's contentions, and is therefore not a required subject for collective negotiations.

The Commission orders the Board to cease and desist from refusing to negotiate in good faith with the Association concerning terms and conditions of employment and from interfering with, restraining or coercing employees in that unit from exercising rights guaranteed by the Act by insisting upon or imposing as a precondition to collective negotiations that negotiations sessions be conducted at open public meetings, and affirmatively orders the Board to begin negotiating with the Association concerning grievances and terms and conditions of employment of the employees in the unit represented by the Association in a manner consistent with the terms of its Decision and Order; to post notices whereby its employees will be notified of the Board's corrective actions; and to notify the Chairman of the steps taken to comply with the Order.

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In the Matter of	:	
	:	
BRIELLE BOARD OF EDUCATION,	:	
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Respondent,	:	
	:	
- and -	:	Docket No. CO-77-88-92
	:	
BRIELLE EDUCATION ASSOCIATION,	:	
	:	
Charging Party.	:	

Appearances:
For the Respondent, Frederick E. Lombard, Esq.

For the Charging Party, Chamlin, Schottland, Rosen & Cavanagh, Esqs.
(Mr. Michael D. Schottland and Mr. William L. O'Reilly on the brief)

DECISION AND ORDER

On October 7, 1976, the Brielle Education Association (hereinafter the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission (hereinafter the "Commission") alleging that the Brielle Board of Education 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. (hereinafter the "Act") and in particular alleged unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (5). 1/

1/ The cited subsections prohibit employers, their representatives, and agents from: "(1) Interfering with, restraining, or coercing employees in the exercise of 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 to the Commission's Director of Unfair Practices that the allegations of the charge, if true, may constitute unfair practices within the Act, a Complaint was issued on February 11, 1977.

The parties to this matter have waived an evidentiary hearing and an intermediate Hearing Examiner's Recommended Report and Decision, and have submitted this matter to the Commission for decision on stipulated facts and legal briefs, all of which were filed by April 21, 1977. The parties' Stipulation of Fact provided as follows:

> 1. The Brielle Board of Education (hereinafter the "Board"), is a Public Employer, the employer of the employees in question, and is subject to the provisions of the New Jersey Employer-Employee Relations Act, as amended (hereinafter the "Act").
>
> 2. The Brielle Education Association (hereinafter the "Association"), is an employee representative within the meaning of the Act, is subject to its provisions, and is the exclusive negotiations representative of an appropriate unit of public employees, employed by the Board.
>
> 3. The Board and the Association waive any right to a formal hearing in this matter and hereby agree to submit the above captioned matter to the Commission for a decision based upon the within stipulations of fact and legal briefs, pursuant to N.J.A.C. 19:14-6.7. The Board and the Association stipulate that the within stipulations of fact contain all facts which may be pertinent to a decision in this matter.
>
> 4. Legal briefs, proposed findings and conclusions concerning this matter must be received by the Commission no later than thirty (30) days after the Commission mails to the parties conformed, executed copies of the within stipulations.
>
> 5. On June 8, 1976, at a regular meeting of the Brielle Board of Education, the Board passed a Resolution, a copy of which is attached hereto and made a part hereof /attachment omitted/ requiring that all future negotiations with the Association, which did not include personnel matters, be conducted in public session.

6. In September of 1976, the Association made a demand upon the Board that collective negotiations concerning the terms and conditions of employment of the employees represented by the Association commence on October 1, 1976, at a non-public meeting between representatives of the Board and the Association.

7. The Board responded to the aforementioned demand of the Association in September 1976, and agreed to the October 1, 1976 negotiations session proposed by the Association. However, the Board, referring to the above mentioned Resolution of June 8, 1976, reiterated its position that all negotiations with the Association, including those on October 1, 1976, would be conducted in public session.

8. The negotiation session between the Board and the Association, scheduled for October 1, 1976, was attended by representatives of the Board and the Association. However, negotiations did not proceed owing to the Board's insistence that negotiations proceed in public and the Association's refusal to participate in public session negotiations.

9. As a result of the aforementioned position of the Board with regard to public negotiations, the Association filed a charge of unfair practice with the Commission on October 7, 1976, alleging that the Board's insistence upon public negotiations constitutes an illegal pre-condition to negotiations, violative of N.J.S.A. 34:13A-5.4(a)(1) and (5).

10. The Board's position with regard to this matter is contained in its letter to the Commission, dated November 30, 1976, which is attached hereto and made a part hereof. /attachment omitted/

11. The Association's position with regard to this matter is contained in its statement attached to the Charge filed in this matter, which is attached hereto and made a part hereof. /attachment omitted/

12. Prior to the enactment of N.J.S.A. 10:4-6 et seq., collective negotaitions between the Board and the Association were conducted in closed session and only representatives of the Board and Association were allowed to attend and/or participate in those sessions.

13. The Board and the Association agree that the sole issue presented to the Commission for a decision by the instant matter, is whether the Board's insistence that collective negotiation sessions between the parties be open to the attendance of the public is an unlawful pre-condition to negotiations, violative of N.J.S.A. 34:13A-5.4(a)(1) and (5).

Pursuant to the Act and the Commission's Rules and based upon the parties' Stipulation of Fact, as aforesaid, the Commission makes the following determinations upon review of the entire record herein, including the Complaint, the stipulations, and the briefs.

The Association contends that the Board's insistence upon conducting collective negotiations with the Association in open public session is an illegal pre-condition to negotiations violative of the Constitution of this State and constituting a per se violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). The Board, on the other hand, argues that its insistence on negotiating in open public session is not a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). Quite to the contrary, the Board contends that its position regarding public view negotiations is a proper exercise of its discretionary authority under N.J.S.A. 10:4-6, et seq., popularly known as the "Sunshine Law."

Our task in this matter is to decide whether the Board's insistence that collective negotiations between it and the Association be conducted in open public session is an unlawful pre-condition to negotiations violative of N.J.S.A. 34:13A-5.4(a)(1) and (5). We must also address the question of the applicability of the "Sunshine Law" to collective negotiations. While this question is one of first impression we may look to the Act and the experience and adjudications under the copied National Labor Relations Act and other public sector labor relations statutes as a guide for the administration and adjudication of disputes under our jurisdiction. 2/

2/ See Lullo v. International Association of Fire Fighters, 55 N. J. 409 at 424 (1970).

The Act's declaration of policy declares that the public policy of this State is to promote the prompt settlement of public sector labor disputes in the interests of the people of this State through the provisions of the Act. However, the declaration of policy specifically recognizes that the people of this State are not direct parties to such disputes (N.J.S.A. 34:13A-2). In companion provisions the Act imposes a reciprocal duty on public employers and the exclusive majority representatives of public employees in appropriate units to meet at reasonable times and to negotiate with respect to grievances and terms and conditions of employment (N.J.S.A. 34:13A-5.3). It should be noted that the right of negotiations attaches only to the majority representative and that public employers are prohibited from negotiating terms and conditions of employment or processing grievances presented by a minority employee organization, when there is a majority representative (N.J.S.A. 34:13A-5.3).

The Act's concept of exclusivity of representation has been held by the Supreme Court of this State to be analogous to the similar provisions of the National Labor Relations Act. Commenting upon this concept, the Court found it to be at the very core of our national labor relations policy and ruled that its inclusion in the Act was a valid legislative vehicle to discourage rivalries among individual employees and employee groups and to avoid the diffusion of negotiating strength which results from multiple representation.[3/]

3/ See Lullo v. International Association of Fire Fighters, supra, at 426-427, citing with approval NLRB v. Allis Chalmers Mfg. Co., 87 S. Ct. 2001 (1967).

As previously stated, the Board relies on the provisions of the "Sunshine Law" to vindicate its actions with regard to this matter. More specifically, the Board relies on N.J.S.A. 10:4-12 in support of its position. This section provides in pertinent part:

> b. A public body may exclude the public only from that portion of the meeting at which the public body discusses...
>
> (4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.
>
> (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

In considering our decision in this matter we have drawn upon our knowledge of public sector labor relations in this State. Based upon our analysis of this knowledge we find that the great majority of negotiation sessions conducted by public employers and representatives of public employees are not susceptible to coverage by the "Sunshine Law's" open meeting provisions. Typically, a negotiations session involves and is restricted to small groups or single individuals representing both the public employer and the majority representative. There are numerous, informal exchanges of ideas and written data and during a series of negotiations sessions many proposals and counter-proposals may be exchanged between the parties. It is difficult, if not impossible, to predict with any degree of certainty when or if any specific proposal will be accepted by both parties. Further, no individual proposal may usually

be considered as finally agreed to until an entire package of items, such as compensation, fringe benefits, vacations and grievance procedures, has been finalized and accepted by both parties.

It is our belief that the processes described above are clearly excluded from the purview of the "Sunshine Law", as they involve neither public bodies, meetings, nor public business as defined by that law. Our conclusion is buttressed by the similar conclusions reached by the Supreme Court of Florida and the Attorneys General of Massachusetts and Wisconsin. These authorities held the "Right to Know" or "Sunshine" Laws of their respective jurisidictions to be inapplicable to collective negotiations, even in the absence of any provision of those laws providing for such exceptions. Their conclusions were based on premises similar to those we have relied upon and their findings generally conform to our conclusion that negotiating sessions are not meetings or public business contemplated by the respective statutes.[4/]

It should be noted that the "Sunshine Law", by its very provisions, does not extend to informal or purely advisory bodies with no effective authority to bind the public body or to groupings composed of an individual public official and his subordinates who are not collectively empowered to act by vote. Furthermore, to be covered by the statute, a meeting must be open to all the public body's members, subject to the proviso contained in N.J.S.A.

4/ See Basset v. Braddock, et al, 202 So.2d 425 at 427-428 (1972); see also fn 9, citing the opinions of the Attorneys General of Massachusetts and Wisconsin. It should be noted that the Wisconsin "Right to Know" Law was later amended to specifically exclude public sector collective bargaining, Chapter 426, Laws of 1975. City of Sparta and AFSCME, WERC Decision No. 14520, April 7, 1976.

10:4-11, and the members present must intend to discuss and act on the public body's business.[5/] Thus, in order to be subject to the "Sunshine Law", the public body would have to open a negotiations session to all of its members, an effective majority of those members must be in attendance and be empowered to act by vote, and the body must intend to discuss or to act upon the public business.[6/]

Even assuming arguendo that a particular negotiations session between a public body and a majority representative was conducted so as to trigger the application of the "Sunshine Law" to the proceeding, it is our belief that such application could adversely affect the concept of collective negotiations mandated by our Act. This conclusion is supported by the fact that, should the "Sunshine Law" be applied in a vacuum, the public employer would be free, in an unfettered exercise of its statutory discretion, to unilaterally open the meeting to participation by the general public.[7/] Certainly that public could also include rank and file unit members and the leaders of minority organizations.[8/] Therefore the concept of exclusivity of representation and the right of public employers and public employees to negotiate through

5/ See Formal Opinion No. 19-1976, New Jersey Attorney General, explaining N.J.S.A. 10:4-6, et seq. and advising that the Legal Committee of the New Jersey State Department of Education was not subject to the provisions thereof.

6/ See N.J.S.A. 10:4-7 and 10:4-8(a) and (b).

7/ N.J.S.A. 10:14-12 provides in pertinent part "...Nothing in this Act shall be construed to limit the discretion of the public body to permit, prohibit, or regulate the active participation of the public at any meeting."

8/ For a similar conclusion, see Town of Winchendon and International Brotherhood of Police Officers, Case No. MUP-2527, Massachusetts Labor Relations Commission (1976) at pg. 6, fn 4.

representatives of their own choosing, and the Constitutional right to organize as stated by the New Jersey Supreme Court in Lullo, supra, could be compromised. As the "Sunshine Law" does not require public view negotiations, we find that a public employer's refusal to negotiate with a majority representative unless such negotiations sessions are conducted in open public session is violative of the Act.

We note that our conclusion herein is in accord with the decisions of the public sector labor relations agencies of Connecticut, Maine, Massachusetts and Wisconsin. These agencies were construing the application of similar "Sunshine" legislation to their public sector negotiations statutes.[9/] These "Sunshine" statutes provided either no, or a discretionary, option for the public employer to exclude negotiations from open public meetings. Of particular interest is the decision of the Massachusetts Labor Relations Commission in the Zoll case, supra. The holding in that matter was based on an analogy to cases decided under the National Labor Relations Act (hereinafter the "NLRA"). The Supreme Judicial Court of Massachusetts, in like manner to the Supreme Court of New Jersey, has held that State's public sector labor

9/ See Town of Stratford and Local 998, Int'l Assoc. of Fire Fighters, Case No. MPP-2222, May 30, 1972, Connecticut State Board of Labor Relations; Quamphogan Teachers Association and Board of Directors School Administrative District No. 35, Case No. 73-05, April 20, 1973, State of Maine Public Employees Labor Relations Board; Zoll and the City of Salem and Local 1780, Int'l Assoc. of Fire Fighters, Case No. MUP-309, Massachusetts Labor Relations Commission, December 14, 1972; and City of Sparta v. AFSCME, Wisconsin Employment Relations Commission, Decision No. 14520, April 7, 1976.

relations statute to be based upon the NLRA and the case law derived from the federal statute.[10/]

We have also examined the pertinent federal sector adjucications. The National Labor Relations Board (hereinafter the "NLRB") has found that an employer's insistence that negotiations be conducted in the presence of a stenographer taking down a verbatim transcript to be inconsistent with the approach usually taken in good faith by a participant in order to reach agreement and is consistent with frustrating meaningful collective bargaining.[11/] In another case the NLRB determined that an employer's insistence on using a tape recorder throughout bargaining sessions was evidence of a bad faith negotiations posture.[12/] Also, an employer's insistence that negotiations be conducted in the presence of rank and file employees in the unit, to whom the employer had issued a general invitation to attend, was found by the NLRB to be interference with the employees' right to bargain through representatives of their own choosing.[13/]

Based upon the entire record in this matter and mindful of the preceding discussion we find that the Board's insistence on conducting collective negotiations with the Assocation in open public session does not relate to terms and conditions of employ-

10/ See Poirier v. Superior Court, 337 Mass. 522 at 526-527 (1958) and Jordan Marsh Co. v. Labor Relations Commission, 312 Mass. 597 at 601 (1942), and Lullo, supra, at pg. 424.

11/ Reed and Prince Mfg. Co., 28 LRRM 1608 (1951); enf. 32 LRRM 2225 (Ca 1 1953); cert. denied 33 LRRM 2133 (1953).

12/ Architectural Fiberglass Division of Architectural Pottery, 65 LRRM 1331 (1967).

13/ L. G. Everest, Inc., 31 LRRM 1553 (1953) and cases cited in fn 2, at pg. 309 (Cf. Administrative Ruling of the NLRB General Counsel, Case No. SR-213 (1959), 45 LRRM 1048).

ment, is not mandated by the Open Public Meetings Act, and is therefore not a mandatory subject of collective negotiations. Thus, the Board's refusal to negotiate unless such negotiations sessions are conducted in open public session establishes an illegal condition precedent to negotiations, inconsistent with its duty to negotiate in good faith within the meaning of N.J.S.A. 34:13A-5.4(a)(5). We find further that the Board's action necessarily interfers with employees in the exercise of their right derivatively violates N.J.S.A. 34:13A-5.4(a)(1) as well.

However, nothing in our Act, the Open Public Meetings Act, or any other statute that we are aware of would preclude the parties from agreeing to conduct their negotiations in open public session. Therefore, this is a permissive subject of negotiations. Either party may propose it and the parties would be free to agree to it but neither party can insist upon open public negotiations as a precondition to negotiations.[14/]

We firmly believe that our construction of the two statutes in question promotes the public policy underlying both enactments. In the first instance the rights guaranteed to public employees to

14/ We offer no opinion on the question of whether a public employer's insistence upon public session collective negotations violates the constitutional right of public employees to present their proposals and grievances through representatives of their own choosing. (Constitution of 1947, Art. I, Par. 19) But, see Basset v. Braddock, supra, in which the Supreme Court of Florida held that state's "Sunshine Law" to be inapplicable to collective negotiations owing to the constitutional provision guaranteeing the right of collective bargaining to public employees.

negotiate collectively through representatives of their own choosing is retained. Secondly, our construction also preserves the intent of the "Sunshine Law" that the public's business be conducted in full view of the body politic. Nothing in our opinion restricts the right of a public body to consider, receive public comment, debate, and vote upon any proposed collective negotiations agreement in open public session.

ORDER

The respondent, Brielle Board of Education, shall:

1. Cease and desist from:

Refusing to negotiate in good faith with the Brielle Education Association concerning terms and conditions of employment of employees in the unit represented by the Association and from interfering with, restraining, or coercing employees in that unit from exercising rights guaranteed by the Act, by insisting upon or imposing as a precondition to collective negotiations that negotiations sessions be conducted at open public meetings.

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

The Brielle Board of Education shall, forthwith, begin negotiating with the Brielle Education Association concerning grievances and terms and conditions of employment of the employees in the unit represented by the Association. Such negotiations are to be conducted in a manner consistent with the aforementioned terms of this decision and order.

3. Post at its central office building at the Board of Education in Brielle, New Jersey, copies of the attached notice. Copies of said notice on forms to be provided by the Chariman of the Public Employment Relations Commission, shall, after being duly signed by respondent's representative, be posted by respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by respondent to insure that such notice will not be altered, defaced or covered by any other material.

4. Notify the Chairman in writing, within twenty (20) days of receipt of this Order what steps the respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

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

DATED: Trenton, New Jersey
June 21, 1977
ISSUED: June 23, 1977

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with the Brielle Education Association concerning terms and conditions of employment of employees in the unit represented by the Association and will not interfere with, restrain or coerce employees in that unit from exercising rights guaranteed by the Act, by insisting upon or imposing as a precondition to collective negotiations that negotiations sessions be conducted at open public meetings.

WE WILL, forthwith, begin negotiating with the Brielle Education Association concerning grievances and terms and conditions of employment of the employees in the unit represented by the Association. Such negotiations will be conducted in a manner consistent with the terms of the Commission's decision and order.

BRIELLE BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780