P.E.R.C. NO. 94-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-93-178

ENGLEWOOD TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission grants the Englewood Board of Education's Motion for Summary Judgment and dismisses the Complaint. The Complaint was based on an unfair practice charge filed by the Englewood Teachers Association alleging that the Board violated the Act by sending an opinion survey to teachers and distributing a sample school calendar to the public, both of which were the subject of ongoing collective negotiations. The Chairman finds, in agreement with a Hearing Examiner and in the absence of exceptions, that the Board did not violate the Act.

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Appearances:

For the Respondent, Gutfleish & Davis, attorneys
(Suzanne E. Raymond, of counsel)

For the Charging Party, Springstead & Maurice, attorneys
(Alfred F. Maurice, of counsel)

DECISION AND ORDER

On November 12, 20 and 23, 1992, the Englewood Teacher's Association filed an unfair practice charge and amended charges against the Englewood Board of Education. The Association 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), (2), and (5),[1/] by sending an opinion survey to teachers and

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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 them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

distributing a sample school calendar to the public, both of which concerned issues that were the subject of ongoing collective negotiations.

On March 3, 1993, a Complaint and Notice of Hearing issued. On March 9, an amended Complaint and Notice of Hearing issued. On March 18, the Board moved for summary judgment. On April 6, the Association filed a letter brief with accompanying certification opposing summary judgment. I referred the motion to Hearing Examiner Stuart Reichman.

The Hearing Examiner recommended that the Board's motion for summary judgment be granted. H.E. No. 93-24, 19 NJPER 260 (¶24130 1993). Relying on Rumson-Fair Haven Reg. High School Bd. of Ed., H.E. No. 87-4, 12 NJPER 673 (¶17255 1986), he concluded that sending a survey to teachers was not an attempt to negotiate directly with them and issuing a sample school calendar was for informational purposes and in response to an Association request.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due May 19, 1993. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's undisputed findings of fact (H.E. at 3-4) are accurate. I incorporate them here.

Pursuant to authority granted to me by the full Commission in the absence of exceptions, I find that the Board did not violate subsections 5.4(a)(1), (2) and (5) when it sent an opinion survey to the teachers and issued a sample school calendar.

ORDER

The Board's motion for summary judgment is granted. The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: July 6, 1993
Trenton, New Jersey

H.E. NO. 93-24

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

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ENGLEWOOD TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission grant the Englewood Board of Education's Motion for Summary Judgment. The Hearing Examiner finds that the Board's attempt to conduct an opinion survey among teachers did not constitute "direct dealing" with employees in violation of the Act. The Hearing Examiner also finds that the Board's issuance of sample year-round school calendars to the public and the Association did not violate the Act.

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.

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Appearances:

For the Respondent, Gutfleish & Davis, attorneys
(Suzanne E. Raymond, of counsel)

For the Charging Party, Springstead & Maurice, attorneys
(Alfred F. Maurice, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION ON MOTION FOR SUMMARY JUDGMENT

On November 12, 1992, the Englewood Teachers Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) against the Englewood Board of Education (Board) alleging that the Board violated sections 5.4(a)(1), (2), and (5) of New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act")[1/] On November 20 and

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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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

November 23, 1992, the Association filed amended unfair practice charges. The Association alleged that the Board directly contacted negotiations unit members to solicit their positions on issues which were the subject of on-going collective negotiations for a successor agreement. The Association also alleged that the Board violated the Act by issuing a school calendar to the public for an extended school year without concluding negotiations on that issue with the Association. The Association contends that such acts have circumvented and undermined the Association as the exclusive representative of unit employees.

On March 3, 1993, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On March 9, 1993, the Director issued an amended Complaint and Notice of Hearing. On March 18, 1993, the Board filed an Answer denying its actions regarding the issues raised in the unfair practice charge constitute a violation of the Act. On March 18, 1993 the Board filed a Motion for Summary Judgment pursuant to N.J.A.C. 19:14-4.8. On March 19, 1993, the Chairman of the Commission referred the Respondent's motion to me for disposition. On April 6, 1993, the Association filed a letter brief with accompanying certification in opposition to the Motion filed by the Board.

Based upon the documents filed by the parties in this proceeding to date, I make the following:

FINDINGS OF FACT

1. In October, 1992, Henry Oliver, Superintendent of Schools, sent an opinion survey (Exhibit 1 attached to amended unfair practice charge dated November 23, 1992) which inquired into how the teacher felt about teaching on year-round basis and whether the teacher had received adequate information concerning year-round schools. Additionally, the survey requested that the teacher give a statement concerning his/her opinion on the most positive and negative aspects of the year-round concept. Each teacher had the option of signing the survey or returning it anonymously.

2. Only a few opinion surveys were returned to Oliver, and those that were returned, were subsequently retrieved by the teachers who submitted them. Since the opinion survey sample received back from the teachers was so small, Oliver never used the survey results in the on-going negotiations or otherwise.

3. During October, 1992, the Board and the Association were involved in on-going collective negotiations for a successor agreement. One of the outstanding issues being negotiated concerned the length of the work year. The Board had proposed to the Association that the teacher's 183 day work year run from July 1 to June 30 in conformance with state law relating to a year-round school calendar. Thus, the Board sought to establish a year-round work year for teachers during the on-going negotiations for a successor agreement.

4. During the fall, 1992, the Board prepared several sample school calendars to illustrate and help explain the

year-round school concept. These calendars were used at meetings with parents and community members.

5. During a negotiations session conducted under the auspices of a Commission mediator in the Fall of 1992, an Association representative requested that the Board provide a sample calendar reflective of the year-round concept. The Board's labor negotiator relayed this request to superintendent Oliver who, thereafter, provided the Board's labor negotiator with a sample 1993-94 calendar (copy attached as Exhibit 3 to the amended unfair practice charge dated November 23, 1992). On or about October 27, 1992, during a negotiations session conducted by a Commission mediator, the Board, through the mediator, provided the sample calendar to the Association. The sample calendar was prepared by superintendent Oliver in response to the Association's request.

6. The Board has not yet adopted a school calendar for school year 1993-94.

ANALYSIS

It is well settled law in this state that in considering Motions for Summary Judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 75 (1954). Additionally, in considering a Motion for Summary Judgment, no credibility determinations maybe made. The Motion must be denied if material factual issues exist. Id. at 74. A Motion for Summary

Judgment must be granted with extreme caution, all doubts resolved against the movant, and the summary judgment procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182, 185 (App. Div. 1981); State of N.J., Dept. of Personnel, P.E.R.C. No. 89-67, 15 NJPER 76 (¶20031 1988), aff'd App. Div. Dkt. No. A-3465-88T5 (6/14/90), certif. den. 122 N.J. 395 (1990); AFT Local 481 (Jackson), H.E. No. 87-9, 12 NJPER 628 (¶17237 1986), adopted P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986); Essex Cty. Educ'l Services Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

However, the court in Judson also established that if the opposing party offers "no affidavits or matter in opposition", to the moving party, summary judgment maybe granted, taking the movant's uncontradicted facts and documents as true, provided those facts or documents did not raise a disputed material fact. Id. at 75. See also, City of Atlantic City, H.E. No. 86-36, 12 NJPER 160 (¶17064 1986), adopted P.E.R.C. No. 86-121, 12 NJPER 376 (¶17145 1986); CWA Loc. 1037, AFL-CIO, H.E. No. 86-10, 11 NJPER 621 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985). The court in Judson specifically held that:

> ...if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature ... he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. [17 N.J. at 75.]

The charging party filed a letter brief in opposition to the motion accompanied by an affidavit. Nothing contained therein contradicted any of the material facts alleged by the Board in its motion.

N.J.S.A. 34:13A-5.3 provides, in relevant part, the following:

> Representatives designated or selected by public employees for the purposes of collective negotiations by the majority of the employees in the unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the Commission as authorized by the Act shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit.

The Commission has consistently stressed that the exclusivity principle is a "corner stone of the Act's structure for regulating the relationship between public employers and public employees." N.J. Dept. of Law and Public Safety, I.R. No. 83-2, 8 NJPER 425, 427 (¶13197 1982). See also, Lullo v. Internat'l Assn. of Fire Fighters, 55 N.J. 409, 426 (1970); Rumson-Fair Haven Reg. High School Bd. of Ed., H.E. No. 87-4, 12 NJPER 673 (¶17255 1986), adopted P.E.R.C. No. 87-46, 12 NJPER 831 (¶17319 1986); Newark Bd. of Ed., P.E.R.C. No. 85-25, 10 NJPER 549 (¶15255 1984); Mount Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983).

I find that the case of Rumson-Fair Haven is controlling in this case. As the Board states in its brief, the facts in Rumson-Fair Haven are remarkably similar to those present in the instant matter. In October 1985, the Rumson-Fair Haven Board and

Association commenced negotiations for a successor agreement. One of the proposals submitted to the Board by the Association concerned the length of the teachers' work day and contractual work schedule for science teachers. Approximately one month after successor negotiations began, the superintendent had a memorandum issued to all science teachers requesting that they indicate whether they were interested in a "before school lab" or an "after school lab." Rumson-Fair Haven, 12 NJPER at 674. Two days after the memorandum was issued, the Association president sent a letter of protest to the superintendent alleging that the survey was an effort to deal individually with the science teachers regarding changes in their hours. Ibid. The results of the survey were never mentioned in the negotiations. Id. at 675.

The Commission found that the Rumson-Fair Haven Board did not engage in unlawful direct dealing when it surveyed the science teachers to determine their preference in scheduling the labs. The Commission's analysis in Rumson-Fair Haven is appropriate here. The Commission states the following:

> ...in Newark [10 NJPER 545], we found that the unilateral creation of a salary bonus incentive program and the solicitation of suggestions from individual employees about the nature of the award program violated the Act because the topics were mandatory subjects of negotiations and the Union's right to exclusive representation status was undermined by the solicitation. In that case, the employer bypassed the majority representative, unilaterally changed terms and conditions of employment and then solicited individual employee suggestions concerning the "nature of the reward." In N.J. Dept. of Law and Public Safety, the chairman found that an

> employer violates the exclusivity principle when it holds meetings with a minority representative, over the objection of the exclusive representative, to adjust grievances concerning terms and conditions of employment. In this case, however, we do not believe the exclusivity principle was violated because there is nothing in the record that shows the Board sought to negotiate with anyone other than the Association concerning any terms and conditions of employment, nor did the Board seek to undermine the Association's status as majority representative. No negotiations were conducted whatsoever. No individual's terms and conditions of employment were adjusted. No unilateral action was taken. Rather, the Board merely circulated a memorandum soliciting science teachers' advice on possible changes in the teaching of science labs.... We do not, under the circumstances of this case, believe that such actions constitute 'direct dealing'. Compare Hawthorne Bd. of Ed., P.E.R.C. No. 82-62, 8 NJPER 41 (¶13019 1982). The Board was seeking input to further the Board's awareness of facts so that a prudent management decision could be made. There is nothing in our Act under these circumstances which would prohibit the Board from making such inquiries. [Rumson-Fair Haven, 12 NJPER at 832.]

Similarly, in this case, the exclusivity principle was not violated. Nothing in the record shows that the Board sought to negotiate with anyone other than the Association concerning any terms and conditions of employment. There is no evidence that the Board sought to undermine the Association's status as majority representative. The response from the survey was so small as to render the survey itself meaningless. The survey was never used during the negotiations. A calendar for school year 1993-94 has not been adopted. No individual's terms and conditions of employment were adjusted. No unilateral action was taken. Thus, based upon the undisputed facts, and the law, I find that the Board did not

violate the Act when it attempted to conduct an opinion survey among the teachers.

The uncontraverted facts establish that several sample calendars were prepared and used at meetings with parents and community members for illustrative purposes to explain the year-round school concept. The facts also show that a calendar school year 1993-94, has not been adopted by the Board. A copy of a sample 1993-94 school calendar was provided to the Association by the Board in accordance with the Association's request made during a negotiations session. The Board's compliance with such Association request for information during negotiations, in the form of a sample 1993-94 year-round school calendar does not constitute a violation of the Act.

Accordingly, based upon the entire record and above analysis, I make the following:

CONCLUSIONS OF LAW

The Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (2) and (5) when it attempted to conduct an opinion survey of teachers regarding the year-round school concept and provided sample year-round school calendars to the public and the Association.

RECOMMENDATION

I recommend that the Motion be granted and the Complaint dismissed.

Stuart Reichman
Hearing Examiner

DATED: May 6, 1993
Trenton, New Jersey