P.E.R.C. NO. 86-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONTVILLE TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-85-95-95

MONTVILLE TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Montville Township Education Association had filed against the Montville Township Board of Education. The charge had alleged that the Board violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it unilaterally required teachers at the Central School to attend the annual promotion dance and promotion exercises without additional compensation. The charge further alleges that past attendance at the dance and exercises had been voluntary. The Commission holds that the Association did not prove its allegations by a preponderance of the evidence.

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Appearances:

For the Respondent, Rand & Algeier, Esqs.
(Robert M. Tosti, of Counsel)

For the Charging Party, Bucceri & Pincus, Esqs.
(Sheldon H. Pincus, of Counsel)

DECISION AND ORDER

On October 15, 1984, the Montville Education Association ("Association") filed an unfair practice charge against the Montville Township Board of Education ("Board") with the Public Employment Relations Commission. The charge alleges that the Board violated subsections 5.4(a)(1) and (5)[1/] of the New Jersey

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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; and (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."

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally required teachers at the Central School to attend the annual promotion dance and promotion exercises without additional compensation. The charge further alleges that past attendance at the dance and exercises had been voluntary.

On February 26, 1985, a Complaint and Notice of Hearing issued. The Board then filed an Answer asserting that there had been no change in the past practice or increase in workload since teachers at the Central School had been required in the past to attend the promotion dance and exercises.

On April 18, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but submitted briefs by May 28.

On June 5, the Hearing Examiner recommended dismissal of the Complaint. H.E. No. 85-47, __ NJPER ___ (¶_____ 1985) (copy attached). He found that the Board's longstanding past practice was to require eighth grade staff to attend the promotion dance and exercises without additional compensation and that the Association had accepted this past practice by not challenging it earlier.

On June 17, the Association filed exceptions. It asserts that the Hearing Examiner erred in finding that the past practice favored compulsory attendance; the Association waived its right to contest that practice; and the Board's documentary evidence concerning involuntary attendance outweighed the Association's

evidence of voluntary attendance, especially the testimony of two teachers that they had failed to attend the events, but had not been disciplined. The Association concludes that the Board unilaterally changed a past practice of voluntary attendance and therefore violated subsections 5.4(a)(1) and (5).

On June 21, the Board filed a response incorporating its post-hearing brief and supporting the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-7) are accurate. We adopt and incorporate them here. We add the following facts.

Article XIII of the parties' collective negotiations agreement, effective during the 1983-1984 and 1984-1985 school years, is entitled "Fully Bargained Provisions." It provides:

> This Agreement represents and incorporates the complete and final understanding and settlement by the parties of all bargainable issues which were or could have been the subject of negotiations. During the term of this Agreement neither party will be required to negotiate with respect to any such matter, whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.
>
> THIS AGREEMENT shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties.

Also, the principal of the Central School has assigned extracurricular activities, including attendance at the promotion

dance and exercises, at the opening faculty meeting each year. At that meeting, a memorandum containing mandatory assignments and voluntary activities is given each staff member and discussed. In the past, assignments of the eighth grade staff to the promotion dance and exercises have been involuntary, while certain other activities have been voluntary.

Under all the circumstances of this case, we agree with the Hearing Examiner that the Association has not proved by a preponderance of the evidence that the Board has contravened a past practice of voluntary attendance at the Central School promotion dance and exercises. To the contrary, based on this record, the practice since 1976 has been compulsory and uncompensated attendance of eighth grade staff at the promotion dance and exercises.[2/] The Association's reliance on negotiations leading to the 1978-1979 contract is negated by the fully-bargained clause in the 1983-1985 contract together with the continued mandatory attendance during the next six years. Accordingly, we dismiss the Complaint.[3/]

2/ We agree with the Association that the fact that two teachers did not attend the promotion dance and exercises without punishment is relevant to its assertion that attendance was voluntary. This fact, however, carries only slight weight since attendance was not taken and there is no evidence that the principal or the Board knew these teachers failed to attend.

3/ We do not consider whether the doctrines of waiver and laches apply. We hold only that the Association has failed to prove by a preponderance of the evidence that a past practice of voluntary attendance existed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissiioners Johnson, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioner Hipp abstained. Commissioner Graves was not present.

DATED: Trenton, New Jersey
October 17, 1985
ISSUED: October 18, 1985

H. E. No. 85-47

STATE OF NEW JERSEY
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Respondent,

-and-

Docket No. CO-85-95-95

MONTVILLE TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respndent Board did not violate Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it refused to negotiate additional compensation for teachers whose attendance was required at the promotion dance and promotion exercise at the Central School in June 1984. The Hearing Examiner found that the Board had proven overwhelmingly that a past practice existed since 1976 for involuntary attendance at these extracurricular functions. The Association should have known for many years that such a practice existed and its failure to have acted barred it from seeking additional compensation for the Central School teachers under either the doctrine of laches or waiver. The Hearing Examiner concluded that the case was governed by Barrington Board of Education, P.E.R.C. No. 81-122, 7 NJPER 240 (1981) where the Commission found that the Board had not altered terms and conditions of employment when it refused a demand for additional compensation for teachers who were required to attend a camp outing. There had been a longstanding past practice of past attendance without additional compensation being paid. Thus, there was no illegal alteration of terms and conditions of employment when the Board required attendance without payment of additional compensation.

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.

H. E. No. 85-47

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HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 15, 1984 by the Montville Township Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Montville Township Board of Education (hereinafter the "Respondent" or the "Board") has 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"), in that on June 15 and June 21, 1984 the Respondent did unilaterally and without negotiations with the Association implement modified terms and conditions of employment for teachers at the Central School when it required teacher attendance at the promotion dance and at the promotion exercise, contrary to past practice which had been voluntary and which resulted in an increase in workload without additional compensation; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 26, 1985. Pursuant to the Complaint and Notice of Hearing, a hearing was held on April 18, 1985 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by May 28, 1985.

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; (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."

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Montville Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Montville Township Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The district is comprised of the following schools: five elementary schools (K-6); Central School (7-8); and the High School (9-12). There are approximately 230 teachers in the district, 40 of whom are Central School and in excess of 80 are at the High School, and the balance are distributed among the five elementary schools. The only school involved in the instant proceeding is the Central School.

4. The most recent collective negotiations agreement between the parties is effective during the term July 1, 1983

through June 30, 1985 (J-1). The only provision in the agreement, or any prior agreement, pertaining to extracurricular activities of teachers is found in Art. X, Work Year and Teaching Hours, Sec. 4, which provides that teachers will be required to attend two evening parent conferences a year (J-1, p. 11).

5. Michael O'Brien, a teacher in the High School and the President of the Association for the past two years, testified credibly that he has participated in all contract negotiations since the early 1970's. In the negotiations for the 1978-79 school year the Board's negotiator was Elaine Ehrlich. O'Brien testified that one of the significant issues in the negotiations that year had to do with the practice of the then principal of the High School who had been telling teachers that they had to return to school in the evenings to chaperone students. The Association's position was that this should be voluntary. A clear understanding was reached between Ehrlich on behalf of the Board and the representatives of the Association that the practice would be discontinued but not included in the agreement. Thereafter the practice ceased. O'Brien testified that this verbal agreement applied to all schools but, as will be seen hereinafter, it was never applied to Central School.

6. Natalie Mallett, an elementary school teacher and the President of the Association in 1978-79, testified in corroboration of O'Brien that in the 1978-79 negotiations Ehrlich on behalf of the Board agreed that evening activities "at every level" would be

voluntary but not incorporated into the agreement. Mallett testified further that the problem had been with evening dances at the High School and at the Central School. On cross-examination counsel for the Board read to Mallett a list of the ten teachers on the Association's negotiating committee in 1978-79 and she testified credibly that none of them were from the Central School at that time.

7. On May 30, 1984, Richard G. Bozza, the Principal of the Central School, issued a memo to all staff members, which included notice of the fact that the promotion dance would take place on Friday, June 15, 1984 between 7:00 p.m. and 10:30 p.m., concluding: "All 8th grade staff are to attend on Friday evening" (CP-1). On June 19, 1984, Bozza sent a memo to all 8th grade homeroom teachers and 13 additional teachers by name, advising them to report for the promotion exercise at 6:00 p.m. on Thursday, June 21, 1984 (CP-2). The memo was in the form of a directive and clearly was not voluntary.

8. O'Brien testified that his first knowledge that teachers at the Central School were required to attend the promotion dance and the promotion exercise came in June 1984. He denied having been told that this practice had been going on since 1976 but agreed that it "may have."

9. On June 22, 1984 O'Brien filed a grievance, complaining that the contract had been violated since there was no negotiations with the Association before the involuntary assignment

of staff on June 15 and June 21 at the Central School (R-2). The grievance was denied at all levels and on July 6, 1984 the Board rejected the grievance on the basis of "precedent setting past practice" (R-2, p. 2). The grievance procedure was thereafter abandoned in favor of filing the instant Unfair Practice Charge.

10. Bozza has been the Principal of the Central School since January 12, 1981. He testified without contradiction that since at least 1976 assignments to promotion exercises have been on an involuntary basis, which derived from what he had learned from his predecessor and a search of school files on the subject (see R-1, R-8 and R-9 covering the years 1976 and 1979). Bozza has consistently followed the practice of assigning teachers at the Central School to the promotion exercise since June 1981 (see R-3 through R-7 and CP-3). The first evidence that the dance was added to the involuntary assignments was in a memo of September 9, 1982 where the dance was scheduled for June 10, 1983 (R-4). Thus, both the promotion dance and the promotion exercise have continued together from June 1983 through June 1985.

11. Bozza testified that although involuntary assignments of teachers are made to the promotion dance and promotion exercise, attendance has never been taken and teachers, upon request, have been relieved from attending. This is not inconsistent with the testimony of two Association witnesses, Bernard Schultz and Helen L. Marinelli, teachers present and past at the Central School, who have

treated attendance at the promotion dance and the promotion exercise as voluntary and have never been disciplined. Finally, Bozza testified that between 1981 and 1984 he never had any complaints from the staff regarding assignment to the promotion dance and promotion exercise, notwithstanding that a vehicle for such complaints exist, namely, an Advisory Committee, which includes two Association building representatives.

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate Subsections (a)(1) And (5) Of The Act When It Refused To Negotiate Additional Compensation For Teachers At The Central School Who Have Been Required To Attend The Promotion Dance And The Promotion Exercise Over A Period Of Years.

The Unfair Practice Charge alleges that the Board in June 1984, contrary to past practice, required teachers at the Central School to attend the promotion dance and the promotion exercise without negotiating additional compensation. Note that the Unfair Practice Charge concerns itself solely with the teachers at the Central School and not at the High School. Note also that of the 230 teachers in the district, 40 teach at the Central School, which is a significant percentage of the overall teaching staff.

The contract not being determinative on the issue of extracurricular activities (see Finding of Fact No. 4, supra), it is appropriate to resort to past practice in resolving the instant

dispute: New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84, 85 (1978).

The Charging Party's proofs on past practice are found in Findings of Fact Nos. 5 & 6, supra, wherein two negotiators for the Association, O'Brien and Mallett, testified that in the 1978-79 negotiations the parties reached an unwritten agreement that the practice at the High School, involving teachers being required to return to school in the evening to chaperone students, would be discontinued in favor of voluntary participation. Thereafter the practice ceased at the High School and, according to O'Brien and Mallett, the verbal understanding was applied to all schools. Significantly, there were no teachers from the Central School on the Association's negotiating committee and thereafter, for whatever reason, a practice contrary to that reached in 1978-79 negotiations continued at the Central School, having originated in 1976 (see Finding of Fact No. 10, supra).

Thus, while a different result might obtain if the instant unfair practice charge involved the High School, it is clear to the Hearing Examiner that the Board has proven by a preponderance of the evidence that the longstanding practice at the Central School has been that attendance by teachers at the promotion dance and the promotion exercise has been involuntary and without additional compensation. The Hearing Examiner is persuaded that while the Association's proofs through O'Brien and Mallett might have

sustained an unfair practice at the High School involving the same subject matter, those proofs do not rebut the documentary evidence adduced by the Board at the Central School.

Recall that the Hearing Examiner noted that there are 40 teachers at the Central School, a significant number in relationship to the whole. It is inconceivable that the Association would not have had some knowledge over the years of the involuntary past practice at the Central School in the matter of attendance at the promotion dance and the promotion exercise. To have awakened to this fact only in June 1984 indicates to the Hearing Examiner that the Association was sleeping on its rights and that no sufficient excuse exists for it not having come forward with a grievance or unfair practice charge at a substantially earlier date.

Although the Commission has never expressly used the doctrine of laches in any of its decisions, the doctrine of contractual waiver from the private sector has been recognized: Red Bank Reg. High School Education Association v. Red Bank Reg. High School Board of Education, 78 N.J. 122, 140 (1978) and Dover Board of Education, H.E. No. 81-23, 7 NJPER 65, 68, 69 (1981), aff'd, P.E.R.C. No. 81-110, 7 NJPER 161 (1981). Thus, if laches is not applicable herein, then waiver by a course of conduct by the Association is applicable and bars the instant unfair practice charge.

Even if the doctrines of laches or waiver are not applicable, the instant case is clearly governed by the

Commission's decision in Barrington Board of Education, P.E.R.C. No. 81-122, 7 NJPER 240 (1981) where, by virtue of an established past practice, uncompensated attendance by teachers at a camp outing had become a term and condition of the teachers' employment. Thus, when the Association demanded compensation in exchange for attendance, the Board's response of requiring attendance could not be interpreted as a unilateral change but, rather, a preservation of the status quo of voluntary, non-compensated participation. Thus, there was no illegal alteration of terms and conditions of employment.

The Hearing Examiner has assigned no weight to the fact that two teachers at the Central School testified for the Association that they had in the past failed to attend the promotion dance and the promotion exercise and had never been disciplined (see Finding of Fact No. 11, supra). Bozza, the Principal, testified that although involuntary assignments are made, attendance has never been taken and teachers, upon request, have been relieved from attending. The Association's evidence on voluntariness clearly does not rebut the overwhelming documentary evidence of a longstanding past practice at the Central School that attendance was involuntary.

Based on all of the foregoing facts and the law, the Hearing Examiner will recommend that the alleged violations by the Board of Subsections (a)(1) and (5) of the Act be dismissed.

* * * *

Upon the entire record in this case the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when it refused to negotiate additional compensation with the Association regarding teacher attendance at the promotion dance and the promotion exercise at the Central School in June 1984.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: June 5, 1985
Trenton, New Jersey