P.E.R.C. NO. 91-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION AND PACE, PROFESSIONAL AND CLERICAL EMPLOYEES, ILGWU,

Respondents,

-and- Docket No. CO-H-90-33

MATAWAN REGIONAL TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Matawan Regional Teachers Association against the Matawan-Aberdeen Regional School District Board of Education. The charge alleged that the Board violated the Act by refusing to negotiate in good faith for clerical employees pursuant to a prior Commission decision. The Commission finds that the Association failed to prove that the Board breached its negotiations obligation.

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Respondents,

-and-

Docket No. CO-H-90-33

MATAWAN REGIONAL TEACHERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent Board of Education, Kenney, Kenney, Gross & McDonough, attorneys (Michael J. Gross, of counsel)

For the Respondent PACE, Ira J. Katz, attorney

For the Charging Party, Mark J. Blunda, attorney

DECISION AND ORDER

On August 2, 1989, the Matawan Regional Teachers Association ("MRTA") filed an unfair practice charge against the Matawan-Aberdeen Regional School District Board of Education. The charge 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), (3), (5) and (7),[1/] by

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

refusing to negotiate in good faith for clerical employees pursuant to our order in P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989). In that decision, we found that the Board violated the Act by negotiating directly with certain clerical employees rather than with the MRTA. We rescinded a memorandum of understanding between the Board and the employees; pended, for 30 days, the processing of a representation petition for the clerical unit filed by PACE, Professional and Clerical Employees, ILGWU; and ordered the Board to negotiate with the MRTA for the clerical unit retroactive to July 1, 1986.

The charge was accompanied by a request for an interim order compelling negotiations and staying the processing of PACE's representation petition. At the interim relief hearing, the charge was amended to include PACE as a second respondent. On August 22, 1989, a Commission designee denied interim relief. I.R. 90-7, 15 NJPER 531 (¶20219 1989).

1/ Footnote Continued From Previous Page

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. (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. (7) Violating any of the rules and regulations established by the commission."

On August 30, 1989, a Complaint and Notice of Hearing issued. On September 7, the Board filed an Answer denying that it had negotiated in bad faith and claiming that the Complaint would be moot following the representation election scheduled for September 15. On September 21, PACE filed an Answer asserting that since it had no part in the negotiations, the Complaint should be dismissed as to PACE and that the election rendered the relief sought moot.

On September 15, 1989, PACE won the representation election. No election objections were filed. On September 25, 1989, PACE was certified as the majority representative of the clerical unit.

On December 6 and 11, 1989, Hearing Examiner Joyce Klein conducted a hearing. PACE did not appear. The Board and the Association stipulated certain facts, examined witnesses and introduced exhibits. Before the filing of post-hearing briefs, the Hearing Examiner denied the MRTA's motion to reopen the record to admit evidence of a memorandum of understanding for a three year agreement between the Board and PACE. On May 4, 1990, the Hearing Examiner resigned from our staff. Pursuant to N.J.A.C. 19:14-6.4, the case was transferred to Hearing Examiner Edmund G. Gerber.

On September 12, 1990, Hearing Examiner Gerber recommended dismissing the Complaint. H.E. No. 91-8, 16 NJPER ___ (¶_____ 1990). He found that the MRTA had failed to prove that the Board breached its obligation to negotiate in good faith.

On September 26, 1990, the MRTA filed exceptions. It asserts that: (1) Hearing Examiner Klein erroneously refused to allow it to introduce evidence of the Board's settlement with PACE; (2) the fact that the Board's negotiator lacked authority to vary from the terms of the voided memorandum of understanding and would only "redo" the voided memorandum proves that the Board was engaging in "sham" rather than good faith negotiations; and (3) the Board had no intention of negotiating an agreement with the MRTA.[2/]

On October 3, 1990, the Board filed a reply and cross-exceptions. It supports the decision not to reopen the record and the finding that the Board acted in good faith. It asserts, however, that the issues and relief sought are moot because PACE is now the certified representative of the clerical employees.

On October 9, 1990, PACE filed cross-exceptions asserting that the MRTA's failure to file objections to the election precludes any remedy affecting PACE's representation rights.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-11) are generally accurate. We incorporate them here with these modifications.

We modify finding no. 3 to state that the Board's July 19, 1989 letter was postmarked on July 20.

We add to finding no. 4 that Panos testified that the Board placed a seven-minute deadline on its 4.1 percent offer (1T53-1T54). She also testified that the mediator told the MRTA that the Board would not increase its offer beyond 4.1 percent

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2/ The MRTA requested oral argument. We deny that request.

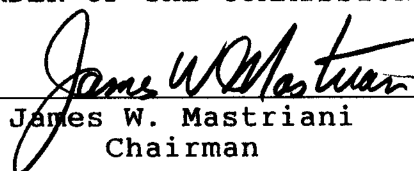
(1T919; 1T56).

Under all the circumstances, we agree with the Hearing Examiner that the MRTA has failed to prove that the Board breached its negotiations obligation. The Board initially opposed negotiating for a fourth year. But when the MRTA reduced its proposal for a fourth year below double digits, the Board offered 3.5 percent for that year. The MRTA reduced its proposal to 8.3 percent but set a brief time limit for acceptance. The Board countered with 4.1 percent and also set a brief time limit for acceptance. Both sides testified that the other would not move further. Neither side presented another proposal before the 30 day negotiations period expired. Even considering the evidence of the Board's subsequent settlement with PACE, we are not convinced that the MRTA proved that the Board breached its negotiations obligation. See State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd sub nom. State v. Coun. of N.J. State Coll. Locs., 141 N.J. Super. 470 (App. Div. 1976). Accordingly, we dismiss the Complaint in its entirety.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Smith, Wenzler, Johnson and Goetting voted in favor of this decision. None opposed. Commissioner Bertolino abstained from consideration. Commissioner Reid was not present.

DATED: November 26, 1990
Trenton, New Jersey
ISSUED: November 27, 1990

H.E. NO. 91-8

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

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION and
PACE, PROFESSIONAL AND CLERICAL
EMPLOYEES, ILGWU,

Respondents,

Docket No. CO-H-90-33

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends a dismissal of the unfair practice charge brought by the Matawan Regional Teachers Association against the Matawan-Aberdeen Regional School District Board of Education. In an earlier decision, the Commission found that the Board failed to negotiate in good faith and ordered the parties here negotiate for a period of 30 days. The Association charged that the Board failed to negotiate in good faith during this 30-day period. The Hearing Examiner finds that the Board demonstrated that it was willing to reach an agreement within the confines of the Commission order and recommends that the Commission dismiss the unfair practice charge.

H.E. NO. 91-8

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Appearances:

For the Respondent Board of Education
Kenney, Kenney, Gross & McDonough, Esqs.
(Michael J. Gross, of counsel)

For the Respondent PACE
Ira J. Katz, Esq.

For the Charging Party
Mark J. Blunda, Esq.

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On August 2, 1989, the Matawan Regional Teachers Association ("MRTA" or "Association") filed an unfair practice charge against the Matawan-Aberdeen Regional School District Board of Education ("Board"). The charge alleged that the Board refused to negotiate in good faith with the Association pursuant to the Commission order in Matawan-Aberdeen Reg. School Dist., P.E.R.C. No. 89-130, 15 NJPER 111 (¶20168 1989). The Board's actions allegedly

violate subsections 5.4(a)(1),(2),(3),(5) and (7)[1/] The charge was accompanied by a demand for interim relief.[2/]

A Complaint and Notice of Hearing was issued on August 30, 1989. On September 7, 1989, the Board filed an Answer denying it negotiated in bad faith. On September 21, 1989, PACE filed an Answer asserting that it did not participate in negotiations between the Board and the Association and that the charge is moot.

On December 6, and 11, 1989, Hearing Examiner Joyce Klein took stipulations as to certain facts and conducted a hearing to complete the record. PACE chose not to appear at the hearing, but remains a party to the case. The parties argued orally, examined

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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. (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. (7) Violating any of the rules and regulations established by the commission."

2/ On August 22, 1989, acting as Commission designee, I denied the Association's application for interim relief through which it sought an order compelling additional negotiations and staying the processing of an outstanding representation petition filed by PACE, Professional and Clerical Employees, ILGWU ("PACE") during this additional negotiations period. See Matawan-Aberdeen Regional School District Board of Education, I.R. No. 90-7, 16 NJPER ___ (¶_____ 1989).

witnesses and presented exhibits.[3/] On May 4, 1989, Joyce Klein resigned from the Commission staff. Accordingly, I have retained this matter as Hearing Examiner to render a recommended decision.

The stipulations between the Board and the Association are as follows:

1. Charging Party, Matawan Regional Teachers Association, is an employee representative organization which, prior to late September of 1989, was recognized by law as the exclusive representative for a bargaining unit consisting of non-confidential clerical employees employed by the Respondent Matawan-Aberdeen Regional School District Board of Education.

2. Respondent Matawan-Aberdeen School District Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-1 et seq.

3. The Association and the Board were parties to a written collective bargaining agreement setting forth terms and conditions of employment for the clerical bargaining unit through June 30, 1986.

3/ On February 7, 1990 the Association filed a motion to reopen the hearing to allow evidence of a Memorandum of Understanding for a three year agreement between the Board and PACE. Hearing Examiner Klein denied the motion and closed the record. The Hearing Examiner was subsequently apprised that the Board had inadvertantly failed to serve its brief on the Association and she permitted the Association 10 additional days to file a reply. The Association's reply brief was received on April 20, 1990.

4. In March of 1988 the Respondent Board and its agents entered into a memorandum of agreement with three clerical employees over the written protest of the MRTA. Respondent Board implemented the terms of said memorandum of all employees of the clerical bargaining unit.

5. On June 23, 1989, the Public Employment Relations Commission entered a decision and order declaring the Board's conduct to be illegal and voiding the March memorandum with the clerical employees. That is Commission Docket No. 89-130, and CO-H-88-222.

6. The Commission's decision and order is entered into evidence in this matter as Joint Exhibit 5.

7. Pursuant to the decision and order of the Commission, the Association sought to negotiate with the Board of Education a collective bargaining agreement covering the clerical bargaining unit retroactive to July 1, 1986. To that end, after the receipt of the Commission's June 23, 1989 decision and order, the Association met with the Board of Education's representatives on July 11, 17 and 20, 1989. At the two latter sessions, the assistance of PERC Mediator Theodore Gerber was invoked.

8. At each of the bargaining sessions, the parties attempted to reach a resolution on terms and conditions of a new collective bargaining agreement for the clerical unit. To that end, the Association made various counterproposals including acceptance of the Board's three-year memorandum, plus a fourth year which would follow the settlement between the Board and the teachers unit.

The Board of Education rejected all Association proposals.

9A. At the July 11, 1989 negotiation session, the Board offered a memo which was consistent with the memorandum between it and the three unrecognized secretaries which the Public Employment Relations Commission had declared illegal. During the July 11, 1989 negotiation session, the Board made no other proposal for settlement.

9B. During the July 17, 1989 mediation session, the Board made no change in its position and advised that it was without authority to offer any settlement for a fourth year.

9C. With the 30-day bargaining order about to expire, on the evening of July 20, 1989, the Board's representative advised that the Board would offer 4.1 percent for the clerical employees for the fourth year, if the Association immediately agreed. However, if the Association did not immediately accept that proposal, the offer was 3.5 percent. The Board's representative made this proposal knowing full well that the Board of Education had already settled with the MRTA's teachers unit for a fourth year at 8.3 percent plus increase in dental cap.

9D. On July 21, 1989, before the Commission's bargaining order expired, the Board attorney authored a letter to the Commission's Representation Section, including [a] secretarial voter list.

Upon the entire record before me, I make these additional findings of fact.

A. After the Commission issued the 30-day bargaining order, the Board asked Marie Panos, president of the MRTA for a meeting date (1T42, J-6).[4/] At Panos' request, the parties met on July 11, 1989 at 2 pm (J-7). Panos, the Association's attorney and spokesperson Mark Blunda, Association vice president Carl Kosmyna, and other Association officers were at the session (1T42). No clerical unit members where on MRTA's negotiating committee (1T96) or attended the negotiations (1T97).

The Board was represented by Michael Gross, attorney and spokesperson, Bruce Quinn, Board Secretary/Assistant Superintendent for Personnel, Michael Klavon, Deputy Superintendent, Barbara Cholewa, Administrative Assistant for Personnel and Labor Relations and Board members Marilyn Brenner and Mary Fankhauser.

At Panos' request (1T128), the Board's attorney sent the Association a copy of its proposal before the meeting.[5/] The substance of the Board's proposal mirrored the terms and conditions of the memorandum of understanding for the secretaries unit which was voided by the Commission's decision, Matawan-Aberdeen.

4/ Citations to the December 6, 1989 hearing are "1T"); citations to the December 11, 1989 are "2T". Joint exhibits are cited as "J"; Charging party's exhibits are cited as "CP"; Respondent Board's exhibits are cited as "R" and Commission exhibits are cited as "C".

5/ It distributed a corrected copy of the proposal at the beginning of the first session (1T129, J-8)

At the start of the meeting, the Board's spokesperson told the Association that they were "here to redo what they had done in March of '88" (1T44).[6/]

The Association rejected the Board's proposal, stating it was the same agreement the Commission found was unlawfully entered into and in any event, has already expired. It would, however, accept the proposal if the Board would also accept a fourth year with a 9.3 percent increase with distribution decided by the Association, as well as an increase in the dental cap and $35,500 for the teachers' unit (1T46).[7/]

The Board would not negotiate over teachers' benefits during the secretaries' negotiations and, was not obligated to negotiate for a fourth year (1T132-T133; 2T63). Accordingly, the Board rejected the proposal.

6/ When questioned about whether the Board's spokesperson told the Association it wanted to "redo" or "be consistent with" the prior agreement, Panos testified that the spokesperson clearly said the Board wanted to "redo" the voided agreement (1T79). Panos indicated that she wrote the statement in her notes. Kosmyna testified to the statement, "[w]ell, here is what we came for, lets just sign it. Kosmyna continued,"I think it was either we have to make right what we have done in May or we have to redo what was done back in March when this was signed..."(2T84, 2T91). Quinn testified that he did not recall the Board's spokesperson stating that they were there to "redo" the voided agreement. In the absence of testimony clearly to the contrary, I find that the Board's spokesperson indicated that the Board was there to "redo" or ratify the earlier memorandum.

7/ The Association's proposal of a 9.3 percent increase tracks the factfinder recommended 9.3 percent increase for the third year of the 1986-1989 agreement. The teachers agreement extends the fact finder's recommendation for 1989-90 to a fourth year.

The Association then stated it would accept the terms of the Board's proposal for three years if the Board would give $71,000 to the secretaries' unit and $35,500 to the teachers' unit as proposed in November 1987 (1T47, 1T136). The Board rejected this proposal and a second meeting was arranged.

3. On July 17, 1989, the parties met again, this time with a mediator. The Association dropped the $35,500 for the teachers' unit and indicated that it would accept the Board's proposal for the first three years if there were a 12 percent increase for the fourth year for the clerical unit and an increased dental cap (1T49; J-11). The Board did not have authority at this meeting to offer a salary proposal for a fourth year (1T49). Moreover, the Board took the position that it would not negotiate salaries in "double digits" with any unit, however, if the Association lowered its offer, the Board would propose a counteroffer for the fourth year. The Association stated it would lower its offer to single digits (2T14).

On July 19, 1989, the Board's attorney wrote to the Association's attorney indicating that he had received authorization to negotiate for the fourth year in 1989-90 (J-12). The letter was received on July 20, the day of the final negotiations session (1T112; CP-8).

4. On July 20, the Board was assured that the Association was no longer proposing "double digits" for the fourth year and the

Board offered 3.5 percent for that year[8/] (2T16-2T17). The Association countered this proposal by offering 8.3 percent for 1989-90 and an increase in the dental cap in addition to the Board's original proposal for the first three years (1T50).

Panos believed the unit would reject any amount less than 8.3 percent for a fourth year (1T53). Panos could not guarantee that the unit would ratify MRTA's proposal of 8.3 percent for 1989-90 and an increase in the dental cap (1T53). During negotiations for the 1986-89 agreement, the clerical unit instructed MRTA that it wanted significantly more than the factfinder's award of 9, 9 and 9.3 percent respectively for the three-years of the agreement (1T51-1T52). The clerical employees never indicated that they would accept less (2T52).

The Association placed a time limit of a few minutes on its proposal (2T18). If the Board did not accept the offer, the MRTA would revert back to its prior position (2T18, 2T19).

In response to the MRTA's offer, the Board increased its offer to 4.1 percent for 1989-90 (2T19). The Board placed a five-minute deadline on this proposal (1T53, 2T19). After five minutes, the Board's offer would revert to 3.5 percent (2T84). The MRTA stated it could not accept less than the teachers received for the 1989-90 school year (1T55). The mediator indicated that further

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8/ Only Gross, Quinn and Cholewa attended that session for the Board. Other Board negotiating committee members were out of town, but available by phone (2T17).

discussion would be fruitless and told the MRTA that the meeting was over (1T56, 1T99-1T100). The mediator told the Board that the MRTA would not go lower than 8.3 percent and that he felt the session was over (2T20). The Board and the Association did not negotiate further before the thirty-day order ended (2T73, 2T81).

5. As of July 20, 1989, the Board had settled with the cafeteria workers, represented by the Service Employees International Union, for 7.5 percent for 1989-90 (1T57, 2T21, CP-3). The Board and the administrators' unit settled for 7.45 percent for 1989-90 (2T21, CP-5). The clerical unit has never received a smaller percentage than the administrators' unit (1T64).

The unrepresented central office administrators received an average of five percent for 1989-90 (2T21). The superintendent received a $5,700 raise for 1989-90 (1T65).

At the time of the hearing, the Board and the MRTA were in factfinding over the bus drivers' unit. The Board's offer is approximately five percent for 1989-90 (1T67, 2T22). The custodians' unit was also in factfinding. There, the Board's last offer was a three-year proposal with an average increase of four percent. The Board's proposed salary guide offers increases from zero to 8.3 percent each year (2T22).[9/]

9/ At the hearing, the MRTA also presented comparative state-wide salary data from "NJEA Trendsetter" publications (CP-1, CP-2). Since not all of the data was available during the negotiations period and it was not shared with the Board, I do not find it probative.

6. The Board is currently facing financial difficulties due to decreasing State aid and budget defeats. It is noted, the Board's budget is usually defeated and it lost State aid in eight of the last ten years (2T45).

ANALYSIS

In State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd sub. nom. State v. Council of N.J. State College Locals, 141 N.J. Super 470 (App. Div. 1976), the Commission held:

> It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. "Hard bargaining" is not inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing levels in not necessarily a failure to negotiate in good faith." 401 The Commission drew upon "established principle of labor law universally accepted in both the private and public sector with respect to the evaluation of conduct in terms of the obligation to negotiate (or bargain) in good faith."

The Commission's standard is drawn from the private sector.

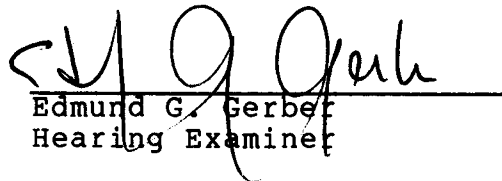
> [t]he [National Labor Relations] Act, it is true, does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible; and mere discussion with the representatives of employees, with a fixed resolve on the part of the employer not to enter into any agreement with them, even as to matters as to which there is no disagreement, does not satisfy its provisions. NLRB v. Highland Park Manufacturing Co., 110 F.2d 632, 6 LRRM 786 (CA 4, 1940). (footnote omitted)

To determine bad faith, one must look at the totality of the circumstance.

Here, the Board demonstrated a willingness to meet at regular times and it affirmatively altered its offers in negotiations. The Board moved on its position on the fourth year two times. Although the Board imposed a severe deadline for acceptance, it was the MRTA which first imposed such deadlines. Had the Association accepted the Board's proposal of 4.1 for the fourth year, there is every reason to believe the Board would have reached an agreement.

Given all of the circumstances in this case, the MRTA has failed to prove that the Board negotiated in bad faith.[10/].

Accordingly, I recommend the Commission dismiss the complaint in its entirety.



Edmund G. Gerber
Hearing Examiner

DATED: September 12, 1990
Trenton, New Jersey

10/ The Board has argued that since there is a new certified majority representative for the secretaries, the charge is moot. I do not agree, for if the Board did negotiate in bad faith and made it impossible for the MRTA to enter into a successor contract, then such a finding could affect any subsequent representation campaign brought by the MRTA