D.U.P. NO. 86-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

ROSELLE BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CO-85-171

ROSELLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint in an unfair practice charge brought by the Roselle Education Association against the Roselle Board of Education. The charge alleged that the Board unilaterally altered a term and condition of employment when it refused to implement a contract provision in accordance with the Association's interpretation of that provision. The Director determined that the Board has not repudiated the terms of the contract and its interpretation of the provision is supportable and more importantly, the Association's interpretation unlawfully interfers with the Board's managerial right to assign staff.

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Appearances:

For the Respondent
Green & Dzwilewski
(Allan P. Dzwilewski of counsel)

For the Charging Party
Oxfeld, Cohen & Blunda
(Nancy Iris Oxfeld of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 16, 1985, an Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") by the Roselle Education Association ("Association") alleging that the Roselle Board of Education ("Board") was engaging in unfair practices within the meaning of the New Jersey Public

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically, §§ 5.4(a)(1) and (5).[1/]

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint incorporating the unfair practice charge.[2/] The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint maybe issued. The standard provides that a complaint shall issue if it appears that the allegations of a charging party, if true, may constitute an unfair practice within the meaning of the

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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."

2/ N.J.S.A. 34:13A-5.4(c) states:

> The Commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice ... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the Commission or any designated agent thereof....

Act.[3/] The Commission's rules provide that I may decline to issue a complaint.[4/]

On August 20, 1985, I sent the parties a letter setting forth the reasons why I was not inclined to issue a complaint. I provided the parties with an opportunity to respond to my letter. On September 12, 1985, the Association filed a letter memorandum setting forth additional argument in support of its position that the complaint issuance standard has been met. On October 28, 1985, in response to the Association's letter memorandum, the Board filed a letter urging that a complaint not issue.

For the reasons set forth below, I have determined that the Commission's complaint issuance standard has not been met.

The facts in this case are as follows: In the elementary schools,[5/] two teachers are regularly assigned to cafeteria duty. In the event that one of the employees assigned to the cafeteria is unavailable for such duty, the Board has always chosen one of two

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3/ N.J.A.C. 19:14-2.1

4/ N.J.A.C. 19:14-2.3

5/ A dispute exists between the parties concerning whether Article X.E. applies to the high school. The Association takes the position that the language applies to high school teachers. The Board takes the position that the lunch period circumstance extant in the high school is different from that found at the grammar schools. Consequently, the Board asserts that the parties knew at the time the language was negotiated, that Article X.E. was not applicable in the high school. In any event, for the purpose of rendering this determination, the resolution of this dispute is unnecessary.

alternatives: (1) have only one employee on duty during the lunch period (hereinafter "alternative #1"), or (2) cancel a supplemental class (for example, speech therapy) and reassign the supplemental instruction teacher to perform cafeteria duty (hereinafter "alternative #2").

The Board and the Association have entered into a successor agreement covering school years 1984 through 1986. As part of the agreement, the following language was added to Article X, Employee Assignment:

> E. Any certificated employee required to supervise students during a lunch period, shall be paid at a rate of $12.50 for each lunch period or fraction thereof, supervised. Employees with prior experience in lunch period supervision who volunteer will be granted preference in assignment.

The Association maintains this new contract provision has eliminated the Boards ability to use old alternatives #1 and #2 and it must now always follow this new procedure.

The Board contends that the inclusion of Article X.E. in the contract has simply provided it with a third alternative: The Board may invoke Article X.E. and use off-duty teachers, preferably volunteers, to supervise students during their lunch period and pay the agreed-upon rate for such service whenever the regularly assigned employee is absent.

Since the inclusion of Article X.E. into the agreement, the Board has never chosen to make a cafeteria duty assignment under the terms of this provision. Consequently, when one of the employees

regularly assigned to cafeteria duty is unavailable for such duty, the Board has continued to opt for either alternative #1 or #2.

The Association contends that the Board's conduct constitutes a repudiation of the agreement. It maintains that the Board has willfully failed to implement Article X.E. Under the Association's interpretation of the agreement, Article X.E. prohibits the Board from using at least "alternative 2" (the reassignment of a teacher from a duty period to cafeteria duty).[6/] The Association also argues that Article X.E. has established through negotiations how a teacher may qualify for cafeteria duty and may be selected from among a class of eligible, qualified teachers for a cafeteria duty assignment. The Association asserts that negotiations on this subject do not interfere with the Board's exercise of its inherent managerial right to maintain student supervision during the lunch period. The Association concludes that the Board's refusal to administer the agreement in the manner it describes as appropriate constitutes a repudiation of the agreement in violation of §(a)(5) and, derivatively, §(a)(1).

6/ In its September 12, 1985 memorandum, the Association states:

> Even if one assumes that the Board of Education has a right to determine what teachers will perform cafeteria duty, and the number of teachers to perform such duty, one can see that those decisions of the Board will not be significantly interfered with if the Board is required to take volunteers with experience at cafeteria duty to perform cafeteria duty before it assigns other teachers to such duty. (emphasis added)

The Board states that it has not repudiated the agreement and Article X.E. is only intended to cover circumstances where the Board seeks teachers to give up duty free time in order to perform cafeteria duty. The Board readily admits it has agreed to the language of Article X.E., but contends it has never agreed with the Association's interpretation of that provision.

ANALYSIS

There are in effect two disputes: One involves the Board's managerial right to make assignments and the other is a dispute as to contract interpretation.

I decline to issue a complaint here concerning either issue.

> It is well settled that a Board decision to require teachers to supervise students while at lunch, on the playground, or getting on or off buses is not mandatorily negotiable provided that the duty does not displace an employee's agreed-upon preparation period or other time free of pupil contact 7/ and provided the employer negotiates over compensation for that duty.8/

7/ The issue of negotiating on the subject of whether a lunch duty assignment "displaces an employee's agreed-upon preparation period or other time free of pupil contact" is not present in this case, since it is clear from a facial reading of Article X.E. that the issue had to be negotiated by the parties in order to arrive at the language contained in contract provision.

8/ While the issue of compensation for a lunch duty assignment is clearly negotiable, (See, Woodstown-Pilesgrove Reg. School Dist. Bd/Ed, 81 N.J. 582 (1980); Bd/Ed of Englewood v. Englewood Teachers Assn., 64 N.J. 1 (1973); Burlington Cty. College Faculty Assn. v. Bd. of Trustees, 64 N.J. 10 (1973);

Footnote Continued on Next Page

South Brunswick Tp. Bd/Ed, P.E.R.C. No. 85-60, 11 NJPER 22, 23 (¶ 16011 1984). See also, In re Byram Tp. Bd/Ed, 152 N.J. Super 12 (App. Div. 1977);9/ In re Perth Amboy Bd/Ed, see n.8, supra; In re Salem City Bd/Ed, P.E.R.C. No. 82-115, 8 NJPER 355 (¶13163 1982); In re Jamesburg Bd/Ed., P.E.R.C. No. 81-75, 7 NJPER 26 (¶12011 1980); In re Bd/Ed. of the Borough/Spotswood, P.E.R.C. No. 81-109, 7 NJPER 159 (¶12070 1981); In re Monroe Tp. Bd/Ed, P.E.R.C. No. 80-146, 6 NJPER 301 (¶11143 1980); and In re Weehawken Bd/Ed, P.E.R.C. No. 80-112, 6 NJPER 160 (¶11077 1980).

The Association's argument does not distinguish between the negotiatable aspects of Article X.E., i.e. the procedure for choosing among a pool of qualified teachers for lunch room duty, and the nonnegotiable aspect, i.e. the right of the Board to make a managerial determination to eliminate a supplemental class to more effectively deploy its work force. The Board has the managerial right to decide how to assign its work force and any unfair practice charge attempting to restrict such right must be dismissed.

8/ Footnote Continued From Previous Page

Ramapo Indian Hills Ed. Assn. v. Ramapo-Indian Hills H.S. Dist. Bd/Ed, 176 N.J. Super 35 (App. Div. 1980); In re Bridgewater Raritan Reg. Bd/Ed, P.E.R.C. No. 83-102, 9 NJPER 104 (¶14057 1983); In re Wanaque Borough Dist. Bd/Ed, P.E.R.C. No. 82-54, 8 NJPER 26 (¶13011 1981); and Perth Amboy Bd/Ed, P.E.R.C. No. 83-36, 8 NJPER 573 (¶13264 1982), it is clear from the language of Article X.E. that the unfair practice charge raises no issue concerning negotiations over the level of compensation for the lunch duty assignment.

9/ The Association argues that In re Byram Twp. Bd/Ed, supra, has been misinterpreted. I cite Byram Twp. Bd/Ed, for the general proposition that in appropriate situations the employer has a managerial right to act in order to maintain the safety and well-being of the student body.

The Association has argued that the Board agrees with the Association interpretation of Article X.E. but is now reneging on that interpretation. Therefore, it is repudiating that interpretation. (This allegation was never part of the charge and no facts are alleged in the charge which support this contention.)

In fact, the language of Article X.E. is capable of both the Board's and the Association's interpretation. The Board cannot be said to have repudiated the contract when it can make a colorable argument in support of its position and yet the Association's interpretation is, on its face, illegal. Where an unfair practice charge merely alleges a good faith dispute over the interpretation of contract language, the Commission has upheld the refusal to issue a complaint. In re State of New Jersey (Dept. of Human Services), D.U.P. No. 84-11, 9 NJPER 682 (¶14299 1983), and In re State of New Jersey (Office of Employee Relations), D.U.P. No. 84-12, 10 NJPER 3 (¶14002 1983), consolidated and aff'd, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). This aspect of the dispute concerns contract interpretation. Such matters are best resolved in accordance with the terms of the parties' grievance procedure and not through the unfair practice process.

Accordingly, I determine the Commission's complaint issuance standard has not been met and I decline to issue a complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: February 27, 1986
Trenton, New Jersey