

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

In the Matter of

NEWARK BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-76-231-76

NEWARK TEACHERS UNION,  
LOCAL 481, AFT, AFL-CIO

Charging Party.

SYNOPSIS

A Hearing Examiner orders dismissal of an unfair practice charge filed against the Newark Board of Education by the Newark Teachers Union, which alleges that the Board had refused to reduce certain negotiated agreements to writing and to sign such agreements in violation of N.J.S.A. 34:13A-5.4(a)(6).

The Union had claimed the agreements had been concluded during round-the-clock negotiations held with the assistance of Commission Mediators in early February, 1976, after an earlier collective negotiations agreement between the parties had expired at the end of January. The parties concluded negotiations and entered agreement on many outstanding issues by February 8, 1976. However, the Union charged that certain items in dispute had been resolved when, while the parties were separately caucusing, the Union had submitted to the Board through the mediators counterproposals on (1) an Aide's salary guide; (2) the inclusion of Learning Disability Teacher Consultants on the Psychologist and Social Workers' salary guide; and (3) an increase of 8% in salary for certain job duties which were not otherwise the subject of negotiating proposals.

The Union had relied, in part, upon a claim that the Board had signaled agreement on the three disputed issues to the Commission Mediators. Hearing, which commenced in May, 1976, had been delayed for two years while the Board had opposed production of its negotiators' notes and related materials sought by the Union under subpoenas authorized by the Examiner. The interlocutory litigation tested the Commission's authority to issue subpoenas in unfair practice proceedings and requiring the production of negotiation notes prepared by the Board's counsel during the parties' meetings and proposals transmitted by mediators during separate caucusing of the parties. The Commission and the Appellate Division of the Superior Court had both affirmed the Examiner's ruling refusing to quash the subpoenas, concluding that the Commission does have such authority and that the production of the materials would not compromise the mediator's confidentiality in the negotiations process, specifically protected by Commission Rule, nor violate the attorney-client privilege. When the hearing resumed the subpoenaed documents were produced for the Union's inspection after a preliminary examination by the Examiner - a procedure affirmed by the Commission and the Court - but the Examiner, in reliance upon the mediator's privilege as well as the Court's determination, rejected the Union's offers of evidence relating conversations of a private meeting between the Board and the mediators.

The Examiner granted the motion for dismissal made by the Board at the conclusion of the Union's case, finding that under the applicable standard the Union had failed to adduce sufficient evidence, viewing it in a light most favorable to the Union, which could sustain an order in its favor.

The Hearing Examiner's Decision and Order granting a motion to dismiss the complaint in its entirety may become a final administrative determination of the Public Employment Relations Commission. Absent a request for review by the Charging Party filed within 10 days from the date of the order of dismissal, the case shall be closed.

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Appearances:

For the Respondent, Cecil J. Banks, Esq.  
(Marvin W. Wyche, Jr., Esq. Of Counsel)

For the Charging Party, Liss and Meisenbacher, Esqs.  
(Raymond Meisenbacher, Esq., Of Counsel)

DECISION AND ORDER GRANTING MOTION TO DISMISS  
THE COMPLAINT IN ITS ENTIRETY

Prior History and Status of the Proceeding

This proceeding has a lengthy history. An Unfair Practice Charge filed by the Newark Teachers Union, Local 481, AFT, AFL-CIO ("Union") on March 3, 1976, alleged that the Newark Board of Education ("Board") had failed and refused to reduce certain negotiated agreements to writing and to sign those agreements, in violation of N.J.S.A. 34:13A-5.4(a)(6).<sup>1/</sup> In the charge, the agreements were alleged to have been negotiated on various dates in early February, 1976, during the course of negotiations between the parties seeking a successor to their 1973-76 contract held at the Gateway Downtowner in Newark with the assistance of Commission mediators, Robert Glasson and James Mastriani. The Respondent's answer denied the allegations of unfair practice.

Hearing commenced before the undersigned on May 4, 1976, and continued on May 21, 1976. Early in the hearing a dispute arose as to the validity of two subpoenas duces tecum issued before the hearing by the undersigned at the request of Union counsel calling for the production by the Board's then special labor counsel, Gerald L. Dorf, Esq., and by Robert T. Pickett, Esq. of Pickett & Jennings, Esqs., the Board's general counsel, of certain documents relating to the early

<sup>1/</sup> This subsection prohibits employers, their representatives or agents from: "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

February, 1976 negotiations. Union counsel sought any Union counterproposals to the Board's money offers transmitted to the Board by the Union through the mediators, Glasson and Mastriani, transcripts of all minutes and notes taken by the Board including those by Thomas Savage <sup>2/</sup> at all meetings between the parties from February 2, 1976 through February 8, 1976, and, additionally, in the subpoena directed to Dorf, the entire file and contents therefore of notes and writings made during the negotiations between the parties between February 2 and 8, 1976 now in the possession of Gerald Dorf. The production of these materials was opposed by the Board's special and general counsels and timely motions to quash the subpoenas were filed.

On June 2, 1976, the undersigned issued a Ruling Denying Motions to Quash Subpoenas (H.E. No. 76-11, 2 NJPER 195). The Board filed motion with the Commission for special permission to appeal that Ruling which was granted by Order of the Commission dated June 22 and issued June 24, 1976 (P.E.R.C. No. 76-48, 2 NJPER 221). Pending ruling on that motion, central to the presentation of the Union's case, no further hearings were scheduled. On September 22, 1976, the Commission issued its Interlocutory Decision (P.E.R.C. No. 77-16, 2 NJPER 330), affirming in all respects the Ruling Denying Motions to Quash Subpoenas. In its Decision, the Commission affirmed its own authority to issue subpoenas in unfair practice proceedings which had been attacked in the motions. It also affirmed the conclusions of the undersigned that Commission Rule 19:12-3.4(N.J.A.C. 19:12-3.4) <sup>3/</sup> protecting the Mediator's confidentiality does not preclude production of documents transmitted from one party to the other by a mediator, and that the notes of face-to-face negotiations made by an attorney for one of the parties, are not precluded from discovery as confidential lawyer-client communications. In each instance the Commission specifically affirmed and noted the undersigned's intended procedure of providing for a preliminary in camera inspection of any documents produced under the subpoenas in order to insure that only material untainted by the principle of mediator's con-

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<sup>2/</sup> Then an associate of the firm of Gerald L. Dorf, P.A. who participated in the negotiations on behalf of the Board.

<sup>3/</sup> That regulation reads as follows:

"19:12-3.4 Mediator's confidentiality

Information disclosed by a party to a mediator in the performance of mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a mediator while serving in such capacity shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him or her, on behalf of any party to any party to any cause pending in any type of proceeding, including but not limited to unfair practice proceedings under Ch. 14 of these rules."

fidentiality or the lawyer-client privilege be divulged to the Union.

The Board sought judicial review of the Commission's Interlocutory Decision. By order dated December 21, 1976, the Superior Court, Appellate Division, by John F. Lynch, P.J.A.D., granted the Board leave to appeal as well as its motion for stay of administrative decision pending disposition of the appeal. On the same date, the Court also granted the Commission's motion for leave to intervene and stayed enforcement of the subpoenas.

In a decision dated July 25, 1977, Newark Board of Education v. Newark Teachers Union, 152 N.J. Super 12 (App. Div. 1977), the Court affirmed, in all respects, the interlocutory decision of the Commission and directed Dorf and Pickett to comply fully with the subpoenas in accordance with the rulings of the Hearing Examiner affirmed by the Commission. In its per curiam opinion the Court noted with approval <sup>4/</sup> that the Examiner proposed an in camera preliminary inspection with respect to both the Union counterproposals and negotiator's minutes, notes and writings sought by the subpoenas for the purpose of assuring that only non-privileged matter be produced for the charging party's inspection.

By application dated October 21, 1977, the Board moved before the Supreme Court for leave to appeal as within time, following a notice of petition for certification previously filed by it on August 14, 1977, after notice from the clerk of the Court that because of the interlocutory nature of the appeal, leave to appeal was required to be sought. The Board accompanied its application with a request for stay of all proceedings. Because of this request no further hearings were scheduled pending final judicial review. By orders dated March 14, 1978, the Supreme Court finally denied the motions for leave to appeal nunc pro tunc and for stay of administrative action. Hearing was thereupon reconvened and held on May 8, 9 and 10, 1978.

At the hearing held on May 8, the subpoenaed witnesses appeared, the subpoenaed documents were produced for the Examiner's in camera inspection and a recess was taken to the following day to permit a review and inspection by the Union of the materials.

Hearing continued on May 9, 1978 with examination of Messrs. Dorf and Pickett by Union counsel with reference to the subpoenaed documents and included offers and receipt in evidence of certain of them, at the conclusion of which the Union rested its case (Tr. 331). At that point, the Board's newly substituted

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<sup>4/</sup> A dissent filed by Judge Antel dealt only with the Commission's asserted lack of statutory authority to issue subpoenas.

counsel moved orally for dismissal of the complaint for failure of the Charging Party to prove a prima facie case. After hearing counsel, the undersigned initially reserved decision on the motion. Further delay of hearing ensued following a refusal the following day, May 10, 1978, by Thomas Savage, Esq., a witness subpoenaed and called by the Board, to testify, generally, as to the merits of the charge because of a concern that his testimony, even if compelled, might constitute a violation by him of the Canons of Professional Ethics (Tr. 345). The undersigned, noting on the record he would take this opportunity to reexamine his ruling reserving decision on the motion (Tr. 370), following adjournment of the hearing, advised the parties that in view of these developments, he was prepared to rule on the Board's motion. Pursuant to a briefing schedule thereupon established, Respondent filed a brief in support of the motion on July 5, 1978, and the Union filed a memorandum in response on July 14, 1978.

Consideration of the Board's  
Motion on Its Merits

The Board urges that a review of the evidence adduced by the Union against a reading of the specific charges of unfair practice alleged, clearly leads to the conclusion that the Charging Party has not sustained its burden of at least proving a prima facie case. The Board thus postulates that the Charging Party has not proven its case as a matter of law, as it is required to do both by N.J.S.A. 34:13A-5.4(c) and the Commission's Rules, N.J.A.C. 19:14-6.8. As the Commission determined in the Matter of Township of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (para. 4008, 1978), the Respondent's motion to dismiss is the equivalent of a motion for involuntary dismissal at the close of plaintiff's case in a civil action pursuant to New Jersey Court Rule 4:37-2(b). The standard to be applied in such circumstances, is that the motion must be denied if there is any evidence including any favorable inferences to be drawn therefrom which could sustain a judgment in plaintiff's favor. See Pressler, Current N.J. Court Rules Annotated, Comments R. 4:37-2(b), revised to September 6, 1977 and R. 4:40-1, Motion for Judgment at Trial. "The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

Turning to a more detailed examination of the Union's allegations, it charges that three agreements were reached as follows:

1. An agreement covering the Aide's salary schedule, in the early morning of February 3, 1976, after the negotiators for the Union, caucusing separately, had made and submitted to the Board through the mediators a money counterproposal to

the Board's money offer.

2. An agreement to include the Learning Disabilities Teacher Consultants ("LDTC's") on the Psychologist and Social Workers' salary schedule, also made early on February 3, 1976, after the Union negotiators had submitted to the Board through the mediators a counterproposal to the Board's offer of a Psychologist and Social Worker's salary schedule.

3. An agreement to increase by 3% in 1976-1977 and by 5.5% in 1977-1978, the salaries of unit employees performing such functions as teaching summer school, summer recreation, outdoor education, driver education and the like, not specifically mentioned or changed in negotiating proposals made during the course of the 1976 negotiations. Acceptance is claimed to have followed submission of the Union's proposal to the Board early on February 3, 1976, written on the same document on which it had transmitted to the Board its Aide's counterproposal.

In each case, it is claimed that the Board reneged on reducing these agreements to writing and signing them at a final negotiating session held on February 7 which continued to February 8, 1978, when certain other agreements were initialed by representatives of the parties and the negotiations concluded.

The proofs submitted by the Union to show acceptance of these agreements by the Board on February 3, 1976 fail for inadequacy.

Mr. Joseph J. Visotski, the Union's sole witness, other than the subpoenaed Board negotiators who testified toward the conclusion of its case with respect to the subpoenaed materials, supplied the details of the setting and events of the negotiations during which the agreements are alleged to have been concluded. The present agreement was due to expire January 31, 1976. The Union had submitted 61 separate negotiating demands at the commencement of negotiations in October, 1975. These demands were in three areas - working conditions, fringe benefits and salary. By January 30, 1976, agreement had been reached on half of the 28 working condition demands, but no discussion had yet been held on fringes and salary. On Saturday, January 31, 1976, the expiration date of the agreement, a lengthy negotiating session was held at the Downtowner. An impasse developed but no meeting was held on Sunday, February 1. Negotiations resumed in the presence of Mediators Glasson and Mastriani on the evening of Monday, February 2 at the Downtowner. At some point late in the evening, a face to face meeting concluded and the parties retired to separate caucus rooms, with the mediators moving between them. The Union negotiators, led by Mr. Visotski, received during this period from the mediators a document prepared by Mr. Dorf, containing certain specific proposals regarding language changes in the parties' 1973-76 agreement, proposing an expiration date of June 30,

1978 for the new agreement and withdrawing all other items. This submission broke the impasse which had developed. The Union accepted these proposals, formally withdrew all working condition demands not mutually agreed to (Tr. 65), and the parties at a face to face meeting between 3:00 and 4:00 o'clock in the morning exchanged financial demands (Tr. 50). At this time, Mr. Dorf presented Visotski with a package of Board financial counterproposals to original Union demands Nos. 29 to 61. The parties then separately retired while the Union reviewed the package. After a cursory review, Visotski immediately accepted a number of the proposals and forwarded them to the Board via the mediator, noting their acceptance. He also sent the Board a note indicating he wished to have some time to prepare counterproposals to the Board's counterproposals which he found unacceptable.

The Union had accepted salary guide proposals for long term substitutes on a Bachelor's guide, Masters' guide, Master's plus 30 credits guide, and two pages of extracurricular compensation. These agreed-to schedules all contained a 3% increase in the first year and 5.5% in the second. Copies of these contained Visotski's initialed "O.K." which he retained; another set of copies were also initialed and transmitted to the Board. (On February 8, 1976, Visotski and Dorf signed copies of these guides, evidencing the parties' agreements).

Visotski then prepared in consultation with the Union Treasurer and Financial Secretary counters to the Board's counterproposals covering regular teachers' Bachelor's guide, Master's guide, PH. D. guide, Psychologists and Social Workers guide and Aide's guide. When received by the Board, all but the last described were handwritten and included salaries at each step of the guide for both years, 1976-77 and 1977-78. The Union's newly proposed Psychologist and Social Workers guide also noted at the top that LDTC's were also to be included in that guide. In the previous contracts, LDTC's were not included on the Psychologist and Social Workers guide. For its Aides counterproposals, the Union took the Board's typed counterproposal and for each title, year and step crossed out the Board's figure and substituted its own by hand. This document also contained another Union financial counterproposal added by hand by Visotski that "All items wherein a rate is set in K. and not set forth in a guide not specifically changed (for example including Driver Ed.) + 8% when 7/1/76 & Second Year - no offer." This referred to the Union's proposal described in its charge covering all monetary terms not specifically mentioned and changed in negotiating proposals but which were found in the 1973-76 contract. It was a modification of the Union's original proposal No. 61 which called for a 30%



increase for any area of salary or compensation that is not specified in any demand. 5/

These last described set of Union counterproposals were submitted to Mediator Glasson between 5:30 and 6:00 AM on February 3, 1976 but apparently not transmitted to the Board negotiating team until the following day. 6/

According to Visotski, there were several occasions during the following days of that week when, during face to face meetings, the Union's counterproposals, particularly the Aide's salary schedule and the proposal to increase all other items by 8%, were discussed. At one off-the-record meeting held on February 7, 1976 to clarify some of the Union's counterproposals there was extensive questioning by the Board representative, Thomas Savage, as to what financial items in the contract would be increased by the Union proposed percentage figure (Tr. 104-105). At this meeting, Visotski mentioned the items which, by prior practice, he claimed had always been increased by the general percentage of agreement for wage increases and those items which had been excluded by prior practice. 7/ Visotski also stated the Union would accept the  $8\frac{1}{2}\%$  formula for application to the other monetary items. That ended the discussion on that topic.

According to Visotski, as to the Aide's schedule, the Board representatives indicated the full Board might not accept his counterproposals and they wanted to explore other possibilities. As to the LDTC counterproposal, Dr. Pheffer, then Deputy Superintendent for the Board, since deceased, at that time one of its spokesmen in the negotiations, along with Mr. Savage and Mr. Dorf, indicated that to the best of his knowledge there was no problem with the Board accepting the Union's demand. 8/

5/ In its charge, the Union claimed agreement for an increase of 3% in 1976-1977 and 5.5% in 1977-78. The Union failed to explain the discrepancy between its claim of 3% and 5.5% and its February 3, 1976 counterproposal for 8% the first year and no offer the second year. Visotski did testify that by February 7, 1976, he had modified this demand at a clarification meeting to be consistent with the agreement of  $8\frac{1}{2}\%$  for salary guides which was being reached by that time.

6/ These counterproposals were among subpoenaed documents produced by Mr. Dorf during the later 1978 stage of the hearing. All of them contain the notation, "NTU proposal, 2/4/76."

7/ At a later point in the hearing, Visotski enumerated the other financial items in the 1971-1973 and 1973-1976 contracts not specifically negotiated which were increased by the same rate of increase agreed to for negotiated wage and fringe items and those financial items excepted from this practice.

8/ Near the conclusion of its case, the Union sought to introduce into evidence a 3 page handwritten set of notes of a meeting held the evening of February 7, 1976, between Negotiator Dorf, the members of the Board and the Commission mediators. Its purpose as described by Dorf was to give the mediators a feel for how  
(cont'd. next page)

At no time following Union submission of its counters did the Board specifically reject or respond to them with its own counterproposals. Visotski testified that following the February 3 submission to the Mediators it was his belief that the Board and Union were in agreement on the 8<sup>1</sup>/<sub>2</sub>% financial package to cover a two year contract term. Several Board proposals had been accepted and the few remaining items were salary schedule counterproposals. The only remaining open matter in Visotski's view was the distribution of the agreed percentage increase within the salary guides. In Visotski's opinion, if there was any doubt about the Union's February 3 counterproposals, "one side or the other would have offered another proposal." (Tr. 133).

Finally, at a formal negotiating meeting late on February 7, after Dr. Pheffer's statement earlier that evening, Mr. Dorf for the Board advised that the Board was not going to agree to LDTC's being included on the Psychologist and Social Worker's guide. <sup>2/</sup> Mr. Pickett, of the Board's law firm, Pickett & Jennings, explained that it was the Board's intention to eliminate the psychologists and social workers guide in the future. At that time agreement was signed on the various teachers' salary guides not previously agreed to and the negotiations were concluded. No agreement was executed or initialed with respect to the Union's proposals as to the Aide's, the LDTC's inclusion on the psychologist, social worker guide or an 8 or 8<sup>1</sup>/<sub>2</sub>% increase for all financial items not specifically negotiated. Yet an agreement was executed

8/ (cont'd. from page 7)

the Board members felt about the status and progress of negotiations. (Tr. 307). No representatives of the Union were present. The substance of the meeting clearly falls within the scope of the mediator's confidentiality prohibiting from disclosure by compulsion in this proceeding information disclosed by a party to a mediator in the performance of mediation functions. Commission Rule 19:12-3.4 (N.J.A.C. 19:12-3.4) and Newark Board of Education v. Newark Teachers Union, 152 N.J. Super 12 (App. Div. 1977), the law of this case. Accordingly, the undersigned rejected the Union's proffer of these notes (Tr. 312-314), which relate, as did Dr. Pheffer, that the "Administrators indicated no problem" with the LDTC's inclusion on the Psychologist, Social Workers' guide. Union counsel's argument on the record that the mediator's confidentiality is a personal privilege which was waived by the Board when it produced the document in question was rejected. The privilege is not a personal one, but embodies a public policy specifically recognized by the Commission in its Rules and given specific judicial recognition in Newark Board of Education, supra, where the Court approved a process of the fact finder's scrutiny to protect the mediator's confidentiality from improper disclosure.

<sup>2/</sup> According to Visotski, during a conversation with Board President Bell in the Downtowner cocktail lounge also on the evening of February 7, Bell informed him that "...When he was told by some Board members that they were not going to agree on these monetary items, that they were not going to agree on the LDTC's, he said he warned the Board -- the members that were present in the room, that if they were to back out on these and not agree, that they would be guilty of an unfair labor practice charge." (Tr. 160-161).

by the parties on February 8 representing an Aide's salary guide. (Tr. 226).

Visotski agreed during cross-examination that one of the parties' agreed-to ground rules was that "when tentative agreement is reached on any material it will be so initialed by the spokesman, and each party to the negotiations will receive a copy of the said tentative agreement." No initialed or tentative agreement was ever entered with respect to the three disputed agreements. Indeed, at the time of the hearing held on May 21, 1976, the parties were still negotiating concerning certain other job titles still unsettled in the 1976-78 agreement, including teacher clerks, regular 12-month clerical employees, and editing of the agreements reached was still underway.

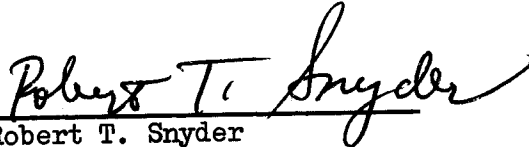
Given the foregoing state of the record, and viewing the evidence in a light most favorable to the Union, it has failed to sustain its burden of proving that the Board agreed to its Aide's guide, to the LTDC's inclusion in the Psychologist and Social Workers' guide, or to payment of an 8 or 8 $\frac{1}{2}$ % increase to certain employees for duties not specifically mentioned or changed in negotiating proposals. It is clear that a failure to respond to the Union's counterproposals was not conduct tantamount to agreement as Visotski implied. Neither does the Board President's statement constitute proof of commission of an unfair practice. As to the Aide's guide, by Visotski's own testimony the Union counterproposal was discussed following its submission and no agreement was ever reached. As to the LTDC's, the Board never approved the Union's proposal, and the parties never signed off on the item under their own ground rules. Thus, no agreement was ever concluded, even a tentative one between the negotiators, in spite of Dr. Pheffer's belief that the Board would approve. His opinion does not constitute an agreement. It was clear that the parties' procedures contemplated spokesmen initialing of tentative agreements and that final agreement required agreement by the Board itself and not its spokesman. As to the 8 $\frac{1}{2}$ % increase applying to all other financial items, as testified by Visotski, face to face discussion continued on this demand well after the Union's submission, and without resolution. Even assuming that the parties' past practice was consistent with the Union's demand, the item was made a subject of negotiation by the Union and required the Board's assent as a predicate for agreement, an assent which the Union failed to show was ever obtained.

For all the foregoing reasons, the Union has failed in its burden at the close of its case of proffering evidence susceptible of sustaining a judgment in its favor. Accordingly, I shall not require the Board to go forward in its defense and the Board's motion to dismiss the Complaint in its entirety is herein granted.

ORDER

Accordingly, IT IS HEREBY ORDERED that the Complaint be, and it hereby is, dismissed in its entirety.

Dated: Newark, New Jersey  
July 28, 1978

  
Robert T. Snyder  
Hearing Examiner