H.E. NO. 98-31

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

In the Matter of

MORRIS BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-97-258;
CO-H-97-356; CO-H-98-5

MORRIS EDUCATION ASSOCIATION,

Charging Party.

MORRIS BOARD OF EDUCATION,

Charging Party,

-and-

Docket No. CE-H-96-17

MORRIS EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

A Hearing Examiner grants in part and denies in part Respondent Association's motion for summary judgment on charges that it violated the duty to negotiate in good faith. The Hearing Examiner finds that a legal challenge to a portion of a factfinders report as being illegal and unenforceable cannot as a matter of law constitute a violation of the duty to bargain in good faith. The Hearing Examiner denies the balance of the Association's motion finding that a genuine issue of material fact exists.

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Appearances:

For the Board of Education,
Cassetta, Taylor, Whalen & Hybbeneth, consultants
(Bruce Taylor, consultant)

For the Education Association,
Balk, Oxfeld, Mandell & Cohen, attorneys
(Gail Kanef, of counsel)

HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT

On June 26 and August 14, 1996, and January 27, 1997, the Morris Board of Education filed an unfair practice charge (CE-H-96-17) and amendments against the Morris Education Association alleging that the Association violated 34:13A-5.4b(3) of the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1.1 et seq.[1/] by engaging in a series of actions which the Board alleges amounts to failing to negotiate a collective negotiations agreement in good faith.

The Association filed unfair practices against the Board on February 9, 1997 (CO-97-258) and April 21, 1997 (CO-97-356) alleging that the Board violated 5.4a(1) and (5) of the Act[2/] by failing to negotiate in good faith through a series of alleged acts.

In CE-H-96-17, the Board asserts in Count 1 that the Association violated the Act by engaging in a pattern of conduct designed to impede negotiations, namely, by reneging on an agreement for a joint declaration of impasse, by stating that the Association was in no hurry to get to impasse because it might jeopardize payment of an increment, by unilaterally cancelling the first mediation session, by refusing to meet with the mediator until after the summer when the increment had been paid, by

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1/ This provision prohibits employee organizations, their representatives or agents from: (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

2/ These provisions 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."

refusing to meet with the factfinder for eight weeks, by insisting on a neutral site for factfinding which might delay the scheduling of sessions, by picketing the neutral site during negotiations which resulted in permission to use the site being withdrawn, by unilaterally cancelling the second factfinding session and by releasing a memorandum which indicated that negotiations had a lower priority than other matters thereby implying there would be no progress in negotiations until September.

Count 2 alleges that the Association violated the Act when during negotiations its president sent an anonymous e-mail message to the Superintendent of Schools indicating that he was in big trouble if he continued to play both sides of the fence since the teaching staff would still be around when the Board's president was gone. The Board, specifically, alleges that the Association failed to negotiate in good faith.

Count 3 asserts that the Association violated the Act when, at the close of factfinding, the Association accepted the factfinder's report sight unseen but then, after the report was released, challenged in Superior Court, Chancery Division a provision of the report relating to the payment of unused sick leave benefits as being void and unenforceable because the

provision unconstitutionally deprived members of vested benefits and discriminated against older members.3/

Finally, Count 4 alleges that the Association violated the Act when following the release of the factfinder's report the parties entered into negotiations over the distribution of salary increases to members of the bargaining unit including support staff. It is alleged that the parties entered into a Memorandum of Agreement for support staff salary increases including salary ranges for four specific categories of support staff. After execution of the memorandum, the Board asserts that negotiations continued with regard to salary ranges for other categories of support staff. It is alleged that after three weeks of negotiations on this issue, the Association reversed its position on salary ranges for a large group of support staff.

On June 18, 1997, a Consolidated Complaint issued on these charges, together with a Notice of Hearing.

3/ On April 22, 1998 the Appellate Division affirmed the Commission's ruling that barred the portion of the factfinder's report divesting accumulated sick leave compensation absent a knowing and intentional waiver by the persons adversely affected. Morris School District Bd. of Ed., P.E.R.C. No. 97-142, 23 NJPER 437 (¶28200 1997), aff'd __ N.J. Super __, 24 NJPER 249 (¶29119 App. Div. 1998). The Court agreed with the Commission that the Association's negotiators and the employees they represented entered into the factfinding proceeding with the reasonable expectation that whatever the new proposal the factfinder recommended the right to earned deferred compensation would not be impacted.

On July 14, 1997, the Association filed an Answer to the Board's charges, denying certain specific allegations in the Complaint, and not denying others, but asserting that the conduct alleged does not violate the Act.

On July 16, 1997, the Board filed an Answer to the Association's charges as set forth in the Complaint.

On August 1, 1997, the Director issued a Complaint with regard to an additional charge filed by the Association on July 7, 1997 (CO-98-5), and consolidated the additional charge with these matters. The Board filed an Answer to this additional allegation on August 21, 1997, admitting certain facts and denying others, but denying it committed an unfair practice.

On September 22, 1997, the Board filed an amendment to its charge, alleging a Count 4, further alleging Association failure to negotiate in good faith. Without objection from the Association, the Complaint was amended to include the additional count on October 27, 1997. The Association amended its Answer to include its response to Count 4 on November 7, 1997, denying certain allegations and admitting others, but generally denying that it failed to negotiate in good faith.

On September 3, 1997, the Association filed a Motion for Summary Judgment concerning the Board's charge, CE-H-96-17. On September 24, 1997, the Association supplemented its Motion with

an affidavit.[4/] On September 25, the Commission referred the Motion to Hearing Examiner Susan Osborn for a decision. N.J.A.C. 19:14-4.8. She granted the Association's request to postpone the scheduled hearing dates in order to consider the Motion.

On November 6, 1997, the Board filed a letter brief, opposing Summary Judgment.

On April 20, 1998, the consolidated matters under Docket Nos. CE-H-96-17, CO-H-97-258, CO-H-97-356, and CO-H-98-5 were assigned to me for determination. N.J.A.C. 19:14-6.4.

Summary judgment will be granted:

> if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant...is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material

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4/ The Association's Motion was first filed with Edmund G. Gerber as a Motion to Dismiss. This Motion was treated as a Motion for Summary Judgment and referred to the Commission pursuant to its Rules.

fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the briefs and supporting documents, I have reviewed the submissions of the parties. The Association asserts that the conduct alleged by the Board to constitute failure to negotiate a contract in good faith was mooted by a subsequent agreement entered into by the parties. However, in developing the findings of fact, I discovered that the submissions were inconsistent and that some of the Association's documentation presented contradictory assertions. It is not possible to determine from the record before me whether the parties reached an agreement. The record before me is incomplete.

Even if the parties had reached an agreement, it is unclear whether the subsequent Appellate Division decision which upheld PERC's ruling finding the unused sick leave provision of the factfinder's report unenforceable altered the binding effect of that agreement on the parties. Therefore, as to Counts 1, 2 and 4, I find that factual and legal issues exist that require me to deny the Motion for Summary Judgment.

As to Count 3, the facts are undisputed that after having committed to accept the factfinder's report sight unseen, the

Association filed a complaint and order to show cause in the Chancery Division seeking to have a portion of the factfinder's report declared illegal and unenforceable. The question remains as to whether, as a matter of law, these facts constitute a failure to negotiate in good faith. In other words, having agreed to be bound by the factfinder's report, does the Association's legal challenge to the enforceability of a portion of that report represent bad faith bargaining as a matter of law. I find it does not.

A party does not lose its right to challenge whether a matter at issue concerns an illegal subject of collective negotiations even after the parties have entered into a collective negotiations agreement containing the provision at issue. See generally, discussion in Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) at 154. Further, under New Jersey law, courts may refuse to enforce contracts that are contrary to public policy. Restatement (Second) of Contracts §§178 (1,2,3). See also, Saxon Const. & Management Corp. v. Masterclean of North Carolina, Inc., 273 N.J. Super. 231 (App. Div. 1994), cert. den. 137 N.J. 314. While research has disclosed no specific Commission decision where this particular issue was raised and decided, I find the challenge by the Association to a portion of the factfinder's report as being illegal and unenforceable cannot constitute a refusal to negotiate in good faith as a matter of law. In other words, it cannot be a violation for a party to do what it has a legal right to do, challenge the negotiability of a subject.

DECISION

Accordingly, the Association's Motion for Summary Judgment is granted as to Count III of the Board's amended charge. That Count is now dismissed. The balance of the Association's Motion is denied. A hearing on this matter will be held pursuant to the enclosed order.

Wendy L. Young
Hearing Examiner

DATED: June 16, 1998
Trenton, New Jersey