P.E.R.C. NO. 94-79

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEPTUNE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-92-359

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Neptune Township Board of Education violated the New Jersey Employer-Employee Relations Act by entering into a settlement agreement with the Neptune Township Education Association guaranteeing that the parties would act only through appropriate channels and then publicly releasing proposed salary guides during negotiations that had not previously been released to the Association.

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NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Hundley, Parry & Hopkins, attorneys (James T. Hundley, of counsel)

For the Charging Party, Klausner Hunter Cige & Seid, attorneys (Stephen B. Hunter, of counsel)

DECISION AND ORDER

On May 6, 1992, the Neptune Township Education Association filed an unfair practice charge against the Neptune Township 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) and (5),[1/] when, during collective negotiations, it attempted to deal directly with unit members by publicly releasing proposed salary guides that had never been disseminated to the Association. This dissemination allegedly

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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. (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...."

violated an agreement not to discuss ongoing negotiations outside established negotiations channels.

On July 29, 1992, a Complaint and Notice of Hearing issued. On August 13, the Board filed its Answer claiming that at the time the salary guides were disseminated, negotiations had been completed; the distribution of guides different from those previously given to the Association and a factfinder resulted from a clerical error; and the successful completion of negotiations renders this matter moot.

On October 2, 8 and 9, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. On October 9, the Hearing Examiner dismissed the Complaint as moot. Following a request for review, we determined that based on the allegations and the evidence presented thus far, we could not find the matter moot. We therefore remanded the case to the Hearing Examiner. P.E.R.C. No. 93-74, 19 NJPER 156 (¶24079 1993).

On April 19, 1993, the Hearing Examiner conducted a final day of hearing. The parties waived oral argument, but filed post-hearing briefs.

On November 1, 1993, the Hearing Examiner issued his report and recommendations. H.E. No. 94-8, 20 NJPER 9 (¶25007 1993). He found that the Board's public dissemination of its proposed salary guides on January 15, 1992 breached the principle of exclusivity per se since it undermined the charging party's position during successor contract negotiations.

On November 17, 1993, the Board filed exceptions. It argues that the Hearing Examiner's conclusion that negotiations were ongoing on January 15, 1992 is unsupported by the evidence. It claims that a December 17, 1991 post-factfinding conciliation award was binding on the parties and ended negotiations. It further argues that since, by virtue of the award, all negotiations had come to an end, this matter is moot. Finally, it argues that the Hearing Examiner erred by dismissing its good faith reliance on the opinion of its professional negotiator that its actions complied with the conciliation award.

On December 7, 1993, the Association filed a reply urging adoption of the Hearing Examiner's recommendations and responding to the Board's exceptions. It also attached its post-hearing brief and brief opposing the Hearing Examiner's earlier mootness finding.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-11). We summarize the most pertinent ones.

The parties began successor contract negotiations in January 1991. Unable to reach agreement, they invoked our impasse resolution procedures. Mediation efforts failed and the parties requested the appointment of a factfinder.

On October 17, 1991, the factfinder issued his report and recommendations. Among other things, he recommended that all salary

guides be mutually developed by the parties and that if salary guides could not be mutually developed, then "same shall be referred back to the fact-finder for a final determination."

On October 17, 1991, the parties executed a memorandum of agreement accepting the factfinder's recommendations in total. The parties agreed that the factfinder would retain jurisdiction pending ratification, preparation and agreement on all salary guides, and execution of the formal contract.

On November 25, 1991, the parties settled another unfair practice charge alleging that the Board had tried to circumvent the negotiations process. The parties agreed in writing that they would communicate their negotiations positions through proper channels.

That same day, the parties met with the factfinder and settled all salary guides except for the teachers' guides. The parties agreed to submit to the factfinder their proposals for the teachers' guides. The Association and the Board submitted their proposals on November 27 and December 3, respectively.

On December 17, 1991, the factfinder issued a "Post Fact-Finding Conciliation Award. He determined:

> 1. That the 1991/92 salary schedules shall be as proposed...by the... Association.
>
> 2. That the NTEA shall have the option of accepting instead the 1991/92 schedules as proposed by the...Board.
>
> 3. That the salary guide format for 1992/94 shall be as proposed by the...Board.

> 4. That the parties can endeavor to agree upon a slightly different dollar distribution for 1992/93 or 1993/94, but within the Board proposed format.
>
> That if agreement cannot be had as to a different distribution but within the same Board proposed format within ten school days after the Christmas recess, then the 1992/94 guides as proposed by the Board on December 3, 1991 be implemented.

During the week of January 6, 1992, the Association sent new salary guides to the Board that it maintained were consistent with the Board's guides for 1992-93 and 1993-94. On January 13, the Board's labor consultant advised the Board's negotiations team that the post-factfinding award, if literally implemented, would result in total increases $41,468 less than that provided for in the factfinder's initial report and recommendation. The consultant told the team that he would develop modified guides that would add back the $41,468 and accommodate some of the Association's other concerns.

A copy of the modified guides was faxed to the Board's superintendent. He testified that he thought the guides were identical to those submitted to the factfinder in December.

At a public Board meeting held on January 15, 1992, the superintendent distributed a negotiations status report on behalf of the Board which included the consultant's modified salary guides. Those guides had not previously been transmitted to the Association. The Association's president testified that a Board negotiator and the superintendent had separately told her that the

Board intended to release salary guides if the parties could not reach agreement.

During the week of January 20, 1992, the Board requested a negotiations session to resolve outstanding matters. A final session was held on January 31 which resulted in an agreement on the teachers' guides. Only slight changes were made to the Board's modified guides. Association witnesses explained that once the Board publicly disseminated its modified guides, it became almost impossible to make changes.

N.J.S.A. 34:13A-5.4 makes it an unfair practice for either party to refuse to negotiate in good faith. Under all the circumstances of this case, we find that Board's public release of proposed salary guides not previously transmitted to the Association violated its obligation to negotiate in good faith. On this record, we cannot accept the Board's assertion that at the time the guides were disseminated publicly, negotiations had been completed.

The factfinder's initial report indicated that if the parties could not come to agreement on salary guides, he would make a final determination. His post-factfinding conciliation award gave the Association the right to accept either party's guides for the first year. The award then accepted the format of the Board's guides for the next two years and permitted the parties to endeavor to agree upon slightly different numbers within that format.

Even if we accept the Board's position that the post-factfinding conciliation award was binding, we cannot accept

its position that the release of its modified guides was proper. After the factfinder issued his second award, the Association sent the Board proposed guides, presumably accepting the factfinder's invitation that the parties still endeavor to reach agreement. Rather than respond, the Board released to the public and unit members proposed guides that did not reflect what had previously been submitted to either the Association or the factfinder.

There may have been some misunderstandings on the part of Board representatives. The superintendent may not have understood that the November 25 settlement agreement applied beyond the facts of the unfair practice charge it resolved, and he may not have known that the guides he released to the public on January 15 had not previously been released to the Association. The consultant may not have been aware of the settlement agreement setting some of the ground rules for negotiations. Nevertheless, the Board had an obligation to coordinate the actions of its agents in negotiations and ultimately must take responsibility for their actions.

Resolution of a contract often makes moot disputes over alleged misconduct during negotiations, particularly where there is no evidence that the successful completion of negotiations was affected by the alleged misconduct. See, e.g., Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 91-38, 16 NJPER 581 (¶21255 1990). Here, the parties entered into a settlement agreement

to remedy an allegation of direct dealing. That settlement guaranteed that the parties would act only through appropriate channels. Before a final agreement over salary guides was reached, the Board disseminated its proposed guides to the public and unit members. That act may have effectively locked-in the Association to the Board's position, since any adjustments giving some teachers more could have been resisted by other teachers who would have gotten less. These circumstances interfered with the parties' ability to reach reasonable accommodations through the collective negotiations process. Because there is no indication that similar circumstances will not recur, we exercise our discretion not to find this dispute moot and we issue a cease and desist order. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). We do so not to prolong a past dispute, but in the interest of preventing future ones. Under these circumstances, no further remedial order is required.

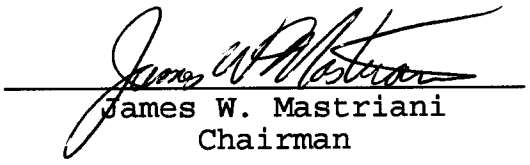
ORDER

The Neptune Township Board of Education is ordered to cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by entering into a settlement agreement with the Neptune Township Education Association guaranteeing that the parties would act only through appropriate channels and then publicly releasing proposed salary guides during negotiations that had not previously been released to the Association.

2. Refusing to negotiate in good faith with the Association, particularly by entering into a settlement agreement with the Association guaranteeing that the parties would act only through appropriate channels and then publicly releasing proposed salary guides during negotiations that had not previously been released to the Association.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: January 24, 1994
Trenton, New Jersey
ISSUED: January 25, 1994

H.E. NO. 94-8

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

In the Matter of

NEPTUNE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-92-359

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

Upon remand by the Commission (P.E.R.C. No. 93-74, 19 NJPER 156 [¶24079 1993]), which concluded that the Hearing Examiner's prior dismissal of the Unfair Practice Charge during the hearing was premature as to mootness, the Hearing Examiner now recommends that the Commission find that the Respondent Board violated Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act.

This change of heart derived from an analysis of the total record, which demonstrated clearly that the Respondent violated the "exclusivity" principle of Lullo when on January 15, 1992 it unilaterally disseminated its salary guides as if agreed upon by the Association at a public meeting where members of the negotiations unit were present. There were no extenuating circumstances and thus a per se violation of the Act was clear and the Hearing Examiner so found.

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. 94-8

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

In the Matter of

NEPTUNE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-92-359

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Hillman, Hundley, Parry & Fallon, Attorneys (James T. Hundley, of counsel)

For the Charging Party, Klausner, Hunter, Cige & Seid, Attorneys (Stephen B. Hunter, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on May 6, 1992, by the Neptune Township Education Association ("Charging Party" or "Association") alleging that the Neptune Township Board of Education ("Respondent" or "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. ("Act"), in that on November 25, 1991, representatives of the Board entered into a settlement agreement resolving a separate Unfair Practice Charge then pending before the Commission; this occurred during negotiations for a successor collective negotiations agreement to the one which had

expired on June 30, 1991; the parties had earlier agreed to fact-finding under the auspices of the Commission; as part of the fact-finding process, salary schedules were exchanged between the parties and the Fact-Finder; the Board, on January 15, 1992, disseminated a status report to the public at a Board meeting, following the issuance of the Fact-Finder's award of December 17, 1991, in which salary guides, that had never been disseminated to any representative(s) of the Association, were included among the matters made public; this public disclosure of salary guides by the Board on January 15th, represented an effort to negotiate directly with members of the Association; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

A Complaint and Notice of Hearing was issued on July 29, 1992. An Answer was filed by the Respondent on August 13, 1992, claiming that its dissemination of negotiations materials was permissible under the Act. Hearings were held in Trenton, New Jersey on October 2, October 8 and October 9, 1992.

On October 9th, I dismissed the Complaint on the record sua sponte as "moot" under the authority of Ramapo-Indian Hills

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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. (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.

Education Association, Inc., P.E.R.C. No. 91-38, 16 NJPER 581 (¶21255 1990). [3Tr66-73]. However, following Commission review at the instance of the Charging Party, this matter was remanded to me under date of February 23, 1993 in order to reopen the record in this proceeding: P.E.R.C. No. 93-74, 19 NJPER 156 (¶24079 1993).2/

Thereafter, a fourth and final day of hearing was held on April 19, 1993, in Trenton, New Jersey. At each hearing the parties had been given an opportunity to examine witnesses, present relevant evidence and, at the final day of hearing, to argue orally. Oral argument was waived (4Tr88, 89). Simultaneous post-hearing briefs were filed by the parties by June 30, 1993.

* * * *

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Neptune Township Board of Education is a public employer within the meaning of the Act, as amended, and the Neptune Township Education Association is a public employee representative within the meaning of the same Act.

2. The parties were governed by a collective negotiations agreement, effective during the term July 1, 1988 through June 30, 1991 (J-1, p.2).

2/ The Commission noted in a brief holding that the Association had presented evidence concerning its allegations; that it was making no comment on the weight of that evidence or the Board's defense; and that given the Association's allegations and the evidence so far presented, it could not find that the dispute was moot.

3. Beginning in January 1991, the parties conducted negotiations for a successor agreement. When they were unable to reach an agreement, they submitted to the impasse resolution procedures available under the Act. Following the declaration of a negotiations impasse, several negotiations sessions were held with the parties and a Commission mediator. When these efforts failed, the parties requested a Fact-Finder from the Commission and it appointed Lawrence I. Hammer as Fact-Finder on August 27, 1991. [1Tr44-47; J-1 p. 1].

4. On September 12, 1991, representatives of the parties met with Hammer and at this meeting he advised them that as a result of their failure to have reached a successor agreement, he was moving the posture of negotiations to fact-finding under the impasse procedures (J-1, p. 1).

5. On October 17, 1991, Hammer rendered his Fact-Finding Report and Recommendations (J-1). He recommended the following salary increases: the years 1991-92 -- 8.1%; the years 1992-93 -- 7.6%; and the years 1993-94 -- 7.5%. [J-1, p. 35]. He also recommended that all salary guides be mutually developed by the parties and that if guides could not be mutually developed, then "...same shall be referred back to the fact-finder for a final determination." [J-1, p. 35]. Hammer acknowledged in his fourth recommendation that the salary guides had not as yet been mutually developed (see J-1, p. 35).

6. A Memorandum of Agreement, was executed by the parties on October 17, 1991, in which each accepted in toto the recommendations set forth in Hammer's October 17th Report. (J-2; J-1). The parties acknowledged that Hammer had retained jurisdiction of the subject of the impasse "... pending ratification of the terms of this Memorandum, preparation and agreement on all salary guides and until execution of the formal contract." [J-2, p. 2].

7. The parties next met with Hammer on November 25th and at that meeting all salary guides were settled between the parties with the exception of the teachers' salary guides (1Tr60, 61). At the conclusion of this meeting, the parties agreed that they would submit to him, in writing, specific salary guides that each felt represented the most equitable means of distributing the agreed upon monetary settlement (1Tr64-66, 69). The Board submitted its proposed salary guides to Hammer under date of December 3, 1991 (J-7; 2Tr84). The Association had submitted its proposed salary guides previously to Hammer under date of November 27, 1991 (CP-4; 2Tr82-84, 106). [See also, 1Tr58-64 and 4Tr35-37].

8. On November 25, 1991, the Board executed a document entitled "Agreement for Resolution of Dispute" before the Commission, which resolved a prior Unfair Practice Charge filed by the Association against the Board in Docket No. CO-92-82 (J-3). The Association had alleged that the Board had violated the Act by attempting to circumvent the negotiations process. The key

provision in this "Agreement," by which the Association sought to restrain the Board and its representatives from departing from certain protocols in the negotiations process, is found in paragraph 7 of J-3:

> The parties further agree that positions taken in negotiations and documents exchanged by negotiators should not and shall not be discussed or interpreted by the negotiators outside the established negotiations forum to any members of the other party; e.g., members of the Board's negotiations team should not communicate with individual association members concerning matters in negotiations.
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> [J-3, p. 2; J-5a-c; 1Tr37, 38, 41; 3Tr41-46].

9. On December 17, 1991, Hammer issued his "Post Fact-Finding Conciliation Award" (J-4; 1Tr66-69; 4Tr38), in which he determined that the 1991-94 salary schedules (guides) should be implemented as follows:

> a. The 1991-92 salary schedules shall be as proposed by the Association.
>
> b. The Association shall have the option of accepting, instead, the 1991-92 salary schedules as proposed by the Board.
>
> c. The salary guide format for 1992-94 shall be as proposed by the Board.
>
> d. The parties can endeavor to agree upon a slightly different dollar distribution for 1992-93 and/or 1993-94 but within the Board's proposed format.
>
> e. If agreement cannot be reached as to a different distribution but within the same Board proposed format within ten (10) school days after the Christmas recess, then the 1991-94 salary

guides as proposed by the Board on December 3, 1991 shall be implemented.3/

10. It is undisputed that although Hammer had accepted the Board's proposed "salary guide format" for 1992-94, the Association had never acquiesced in this finding of Hammer. To the contrary, the Association considered these salary guides as a matter still in dispute (2Tr93-95).

11. During the week of January 6, 1992, the Association distributed new salary guides to the Board, which it maintained were consistent with the Board's salary guides for 1992-94 (1Tr70).

12. On January 13th, James Rigassio, the Board's labor consultant, advised the Board's Negotiating Team that Hammer's award of December 17, 1991, if literally implemented, would result in a three-year series of salary schedules, which would, in part, provide $41,468 less to then teaching staff members than that provided by Hammer in his Report and Recommendations contained in J-4 (4Tr37-41, 71).

13. Further, at this same meeting in January, Rigassio advised the Negotiating Team that there were legitimate concerns expressed by the Association, regarding the change in dollar differentials between the various columns on the salary guides (J-7; 4Tr42). Finally, Rigassio, with the concurrence of the Board's Negotiating Team, stated that he would prepare new salary guides

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3/ These five (5) paragraphs have been accurately paraphrased from the Hammer Award of December 17th (J-4, p.6)

with the same dollar differentials between the various columns of the salary guides as had existed in the expired collective negotiations agreement. It would appear that the Board would have then modified the salary guide proposals, which were previously submitted to Hammer in December 1991, so as to add back the $41,468 [4Tr42, 71, 72].

14. The Board's Superintendent, Michael T. Lake, received by FAX on either January 14th or January 15th, a copy of the salary guides, which were introduced in evidence as J-5(c). It was Lake's understanding that these salary guides were identical to those which the Board had submitted to Hammer in December 1991, prior to Hammer's issuance of his December 17th Award (3Tr25, 34, 35).

15. The Association's President, Lucille Alfano, testified without contradiction that Herbert Rogin, a Board Negotiator, and Superintendent Lake had stated in separate telephone conversations to her, prior to January 15, 1992, that the Board intended to release salary guides to the public in the absence of an agreement with the Association (1Tr68, 71).

16. Superintendent Lake acknowledged that he personally prepared the Negotiations Status Report on behalf of the Board, dated January 15, 1992 [3Tr36-39; J-5(a)]. In his Report, the Superintendent recited, in just over a page, that on October 17, 1991, a Memorandum of Agreement had been signed by the parties, stating that the recommendations of the Fact-Finder had been accepted totally by both parties and that the Fact-Finder would

retain jurisdiction until a contract was executed. He then referred to certain agreed-upon salary guides for units other than the teachers and that on November 25th, after sincere negotiations, the parties were unable to reach an agreement on salary guides for teachers. They then went back to the Fact-Finder. The parties next received the Fact-Finder's "Conciliation Report" on December 18th, and, following the Association's submission of revised salary guides to the Board on January 10, 1992, the Board rejected them as not conforming with the Fact-Finder's Report of December 1991. Finally, the Superintendent stated that the Board was awaiting a report from its consultants, concluding with the statement that the Board's Negotiations Team recommends that the full Board adopt the "Fact-Finder's Conciliation Report." [This was attached to the Superintendent's Status Report - see J-5(b)].

17. Alfano testified to various inaccuracies and misstatements in the Board's Negotiations Status Report [J-5(a); 2Tr48]. The changes between J-5(c) and J-7, based on Rigassio's testimony, indicated a decision by the Board to restore the previously negotiated differentials between the guides (see J-7, J-5(c) and 4Tr65, 66).[4/]

18. It is undisputed that the revised salary guides prepared by Rigassio on January 14, 1992, were disseminated to

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4/ Note that Rigassio stated that every salary for every level was changed as between J-7 and J-5(c), the latter as of January 15, 1992 (4Tr65).

members of the public, including individual Association members, on January 15th, without having first been transmitted to an agent or representative of the Association (4Tr75, 76).

19. During the week of January 20, 1992, Superintendent Lake telephoned Alfano, stating that the Board and its President wanted a negotiations meeting with the Association to resolve the matters outstanding. A date of January 31st was set. [1Tr86, 87; 3Tr64].[5/]

20. A final negotiations session was held between the parties on January 31st, which resulted in a mutual agreement on the salary guides for teachers (J-6). Alfano's testimony was that the only change made was to the salary guides, which were amended "from off-guide to steps." [1Tr107; 3Tr53, 54; 4Tr24-26].

21. The Association's ratification of the agreement by its members took place during the first week of February 1992. On February 15th, the Board ratified the agreement. [1Tr108].

22. John Molloy, an NJEA UniServe Representative, Alfano and others testified that as a direct result of the Board's action in disseminating its salary guides on January 15th, the bargaining position of the Association was materially undermined since the Association had been placed in the public position of appearing to

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5/ There was also a meeting of the Board on January 29th at which tapes were made by each of the parties (CP-5, CP-6). I find as a fact that what transpired at that meeting, and which was placed on tape, is totally irrelevant to the disposition of the instant proceeding.

have taken away salary increases from some teachers and bestowing them upon others (2Tr102, 103; 4Tr22, 23).

ANALYSIS

The Respondent Board Violated Sections 5.4(a)(1) and (5) of the Act When On January 15, 1992 It Unilaterally Disseminated Its Proposed Salary Guides At A Public Meeting

Preliminarily, note is taken of the fact that I have in this decision reached a conclusion contrary to that reached on the third day of hearing, October 9, 1992 (3Tr66-73), at which time I decided sua sponte to dismiss the Association's Unfair Practice Charge, based upon the Commission's decision in Ramapo-Indian Hills Education Association, Inc., P.E.R.C. No. 91-38, 16 NJPER 581 (¶21255 1990). The Commission there concluded, as follows:

> We have often held that the successful completion of contract negotiations may make moot disputes over alleged misconduct during negotiations... Continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future. [Citing cases]...Under all the circumstances, this case does not warrant an exception to our reluctance to resurrect pre-contract negotiations disputes. (16 NJPER at 581, 582).

In having decided that the instant case should not be dismissed on the ground of mootness, notwithstanding Ramapo, supra, I glean a significant distinction between the facts in the respective cases. Here the Respondent's breach of the "exclusivity" principle, the cornerstone of our Act, is overriding. In other

words, the factual setting in Ramapo was benign insofar as a violation of the Act compared to that in the case at bar. This will become crystal clear as early Commission decisions on mootness and those of the principle of exclusivity are discussed at some length.

* * * *

The Board herein contends, inter alia, that the subject matter of the Association's Unfair Practice Charge is moot since a successor collective negotiations agreement has been consummated and ratified by the parties and, further, it is in full force and effect: Ramapo.

I note that the first cases involving the issue of mootness under our Act were those involving the Galloway Township Board of Education[6/] and three prior Commission decisions. The Supreme Court in Galloway I and II rejected the argument that the disputes were moot on the ground that, "...there was a sufficient potential for recurrence of the Board's conduct in...future negotiations..." (78 N.J. at 46, 47; 78 N.J. at 24).

The Commission first had occasion to reject an employer's contention of mootness in Lower Tp. Bd. of Ed., P.E.R.C. No. 78-32, 4 NJPER 24 (¶4013 1977), which was decided prior to the Supreme Court's decisions in Galloway I and II. There, given a number of open issues following the expiration of an agreement, the Commission

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6/ Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secys., 78 N.J. 1 (1978) [Galloway I] and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978) [Galloway II].

concluded the questions before it were "...not deprived of practical significance..." nor were they "...purely academic and abstract in nature..." (4 NJPER at 27).

In a second pre-Galloway decision, the Commission in Tp. of Denville, P.E.R.C. No. 78-51, 4 NJPER 114 (¶4054 1978) found that execution and compliance with a successor agreement did "...not erase the continuing chilling effect..." resulting from the employer's having earlier posted a letter to unit employees cancelling health benefits under the prior contract (4 NJPER at 115). The Commission concluded that if it shirked its duty to "prevent and remedy unfair practices..." the same conduct might be repeated during the next round of negotiations.

The Commission in Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 78-91, 4 NJPER 262 (¶4134 1978) again followed its prior rationale in holding that an employer's dismissal of tenure charges, which had resulted from a teacher's authorship of protected letters, did not render the matter moot. A cease and desist order was deemed necessary to prevent "...other adverse action..." against the teacher or other employees in the future. [4 NJPER at 264].

In a 1981 decision, Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 82-56, 8 NJPER 31 (¶13013 1981), the Commission citing Galloway II for the first time, rejected the employer's contention that the case was moot. The Board had unilaterally created a job title and set the salary. It then placed the title outside of the collective negotiations unit. After a lapse of time, the Board

rescinded its action and placed the title into the unit. In each instance the Board bypassed the Association. Notwithstanding that the job title was currently within the collective unit where it belonged, the Commission concluded that the "...only appropriate remedy...is an order for the Board to cease and desist from the action found violative of the Act..." (8 NJPER at 32).

In the recent decisions of the Commission on mootness such as those cited in Ramapo (16 NJPER at 582), it has implicitly drawn upon the holding in the Galloway II opinion, which recognized that the Commission was invested with discretion in exercising its remedial authority under Section 5.4(c) of the Act. Specifically, the Supreme Court said that it discerned:

> ...a clear legislative intent that PERC's authority to adjudicate unfair practices should apply even where the offending conduct has ceased. We accordingly hold, as we effectively did in P.B.A. v. Montclair [70 N.J. 130, 135]...that PERC possesses the authority...to adjudicate and remedy past violations of the Act if, in its expert discretion, it determines that course of action to be appropriate under the circumstances of the particular case...(78 N.J. at 39) (Emphasis supplied).
>
> [See Tp. of Rockaway, 8 NJPER at 118].

In thus declining to adjudicate a dispute on the ground of "mootness," the Commission in 1987 said in Matawan, "...Continued litigation over this past dispute would only foment instability and hostility between the parties when labor stability and peace are most needed..." (14 NJPER at 59). Similarly, in State of N.J., the reason given for the exercise by the Commission of its discretion to dismiss on the ground of "mootness" was that "...the compelling fact

is that the parties have now settled their differences and we believe it would be contrary to our mandate to permit this academic dispute to be litigated..." (13 NJPER at 635).

Although I am well aware that I cannot ignore binding Commission precedent, I can, on the other hand, rely upon prior Commission precedent, such as the 1981 Matawan decision and prior cases, when the facts in a particular case dictate that the doctrine of "mootness" should not be applied.

My conclusion that this case is not moot derives from what I stated previously, namely, that the Respondent Board significantly breached the principle of "exclusivity" when it dealt directly with its employees at a public meeting on January 15th. The case is strengthened by the fact that the Board had entered into a settlement agreement with the Association on November 25, 1991, a part of which was that the parties agreed that positions taken in negotiations should not be discussed or interpreted outside the established negotiations forum (Finding of Fact No. 8; J-3, p. 2). Thus, such a breach distinguishes this case from the recent "mootness" decisions of the Commission and requires a finding that the Respondent Board violated Sections 5.4(a)(1) and (5) of the Act.

* * * *

It must now be plain that my decision is pegged upon the Respondent's breach of the principle of "exclusivity," which has always been the cornerstone of our Act, and has always regulated the relationship between public employers, public employees and the representatives.

Note, first, that N.J.S.A. 34:13A-5.3 provides, in relevant part, as follows:

> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the Commission as authorized by this act shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit.

The New Jersey Supreme Court in Lullo v. I.A.F.F., 55 N.J. 409 (1970), explained why the doctrine of "exclusivity" in the public sector was necessary:

> However, the major aim [the equitable balance of bargaining power] could not be accomplished if numerous individuals wished to represent themselves or groups of employees chose different unions or organizations for the purpose. Such absence of solidarity and diffusion of collective strength would promote rivalries, would serve disparate rather than uniform overall objectives, and in many situations would frustrate the employees' community interests....Obviously, parity of bargaining power between employers and employees could not be reached in such a framework. So the democratic principle of majority control was introduced on the national scene, and the representative freely chosen by a majority of the employees in an appropriate unit to represent their collective interests in bargaining with the employer was given the exclusive right to do so...Experience in the private employment sector has established that investment of the bargaining representative of the majority with the exclusive right to represent all the employees in the unit is a sound and salutary prerequisite to effective bargaining. Beyond doubt such exclusivity -- the majority rule concept -- is now at the core of our national labor policy. N.L.R.B v. Allis-Chalmers Mfg. Co., supra, 388 U.S. at 180...(emphasis supplied).

Subsequently, the Commission had occasion to apply the principle of exclusivity in Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983), a case where the question was whether or not a board of education had violated the Act when its superintendent twice met with bus drivers concerning their grievances. After quoting from §5.3 of the Act, supra, with respect to the principle of exclusivity, the Commission, citing Lullo and State of N.J.,[7/] held that there was no violation of the Act since the superintendent knew that union shop stewards were present at each meeting and, thus, reasonably believed that he was dealing with duly authorized representatives of the union. Accordingly, no violation was found.

However, in Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984) the Commission was presented with a case where the Board solicited employee suggestions concerning an attendance incentive program, the Board having distributed a pamphlet stating that it intended to offer direct and tangible rewards to those employees with outstanding attendance records. The Commission, in finding a violation, noted that the solicitation of suggestions from individual employees was a subject for mandatory negotiations with the union. Thus, the Board's solicitations undermined the union's right to exclusive representative status. See Lullo, State of N.J., and Mt. Olive, supra. Compare, Rumson-Fair Haven Reg. H.S. Bd. of Ed., P.E.R.C. No. 87-46, 12 NJPER 831, 832 (¶17319 1986).

7/ State Dept. of Law & Public Safety, I.R. No. 83-2, 8 NJPER 425 (¶13197 1982).

The Commission has consistently stressed that the "exclusivity" principle is a "cornerstone of the Act's structure in regulating the relationship between public employers and public employees." State Dept. of Law & Public Safety, supra. See also, Rumson-Fair Haven Reg. H.S. Bd. of Ed., supra; Newark Bd. of Ed., supra; and Mount Olive Bd. of Ed., supra.

The Commission in Rumson-Fair Haven found that the Board did not engage in unlawful direct dealing when it surveyed the science teachers to determine their preference in scheduling the labs. The Commission's analysis in Rumson-Fair Haven is appropriate here even though no violation was found in that case. There the Commission stated the following:

> ...in Newark [10 NJPER 545], we found that the unilateral creation of a salary bonus incentive program and the solicitation of suggestions from individual employees about the nature of the award program violated the Act because the topics were mandatory subjects of negotiations and the Union's right to exclusive representation status was undermined by the solicitation. In that case, the employer bypassed the majority representative, unilaterally changed terms and conditions of employment and then solicited individual employee suggestions concerning the "nature of the reward." In N.J. Dept. of Law and Public Safety, the chairman found that an employer violates the exclusivity principle when it holds meetings with a minority representative, over the objection of the exclusive representative, to adjust grievances concerning terms and conditions of employment. In this case, however, we do not believe the exclusivity principle was violated because there is nothing in the record that shows the Board sought to negotiate with anyone other than the Association concerning any terms and conditions of employment, nor did the Board seek to undermine the Association's status as majority

> representative. No negotiations were conducted whatsoever. No individual's terms and conditions of employment were adjusted. No unilateral action was taken. Rather, the Board merely circulated a memorandum soliciting science teachers' advice on possible changes in the teaching of science labs.... We do not, under the circumstances of this case, believe that such actions constitute 'direct dealing'. Compare Hawthorne Bd. of Ed., P.E.R.C. No. 82-62, 8 NJPER 41 (¶13019 1982). The Board was seeking input to further the Board's awareness of facts so that a prudent management decision could be made. There is nothing in our Act under these circumstances which would prohibit the Board from making such inquiries. [Rumson-Fair Haven, 12 NJPER at 832.]

* * * *

The Respondent's brief, particularly at pp. 9 & 10, indicates quite clearly that when Rigassio determined on January 10 or 11, 1992, that the Association had decided not to accept the Hammer Award of December 17th, he met with the Board's negotiating team on January 13th, where he recommended the preparation of salary guides consistent with the Hammer Award. Rigassio also acknowledged that although the guides he developed thereafter were based on the design of the guides submitted by the Board to Hammer, the numbers were changed to avoid a shortfall. Rigassio insisted that his guides were in total compliance with the Hammer Award. Rigassio then testified that he advised the Board's negotiating team on January 13th that they could release the salary guides to the members of the Association's negotiations unit under the circumstances.[8/]

8/ Compare these statements in the Respondent's Brief at pp. 9, 10 with my Findings of Fact Nos. 12-15, supra.

It is difficult for me to comprehend exactly how the conduct and testimony of Rigassio exempted the Board from the doctrine of "exclusivity". In other words, none of Rigassio's testimony, even according to the Respondent at pp. 9 & 10 of its Brief, in anyway exonerates the Board from my finding of violation of the Act since Rigassio afforded no valid legal basis for the premature release of the salary guides on January 15th.

A reading of the Board's Brief at the top of p. 10, regarding what the Association did or did not do through its salary guide expert Wenger, has nothing to do with what the Board unilaterally did at its January 15th meeting. I am in no way concerned with matching what Wenger may or may not have done with salary guides vis-a-vis those which appeared in J-5(c) on January 15th. Further, I have no interest in the Board's bad faith or lack thereof in unilaterally breaching the "exclusivity" principle since I view its conduct as a per se violation of the Act. Because of this, the case is not moot, notwithstanding the argument of the Board at p. 11 in its Brief.

* * * *

I might comment, in passing, upon several items contained in my Findings of Fact, supra. No weight is attached to the fact that each party accepted totally the recommendations in Hammer's report of October 17, 1991. There was left open completely the question of agreement on salary guides. [Finding of Fact No. 6]. The same situation obtained when the parties met on November 25th

since the matter of agreement on the teachers' salary guides was still open and subject to submissions by the parties of salary guides thereafter. [Finding of Fact No. 7]. Further, Hammer's Award of December 17, 1991 did not resolve everything although he attempted to place finality upon the situation in his paragraph (e) (J-4, p. 6). [Findings of Fact Nos. 9, 10].

* * * *

Upon the foregoing, and upon the entire record in this case, I make the following:

CONCLUSION OF LAW

The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(5), and derivatively 34:13A-5.4(a)(1), when the members of the Board and their Superintendent unilaterally disseminated salary guides, as if agreed-upon, at its public meeting on January 15, 1992, where, in addition to members of the public, members of the Charging Party's negotiations unit were in attendance, all of which breached the principle of "exclusivity" per se since the effect was to undermine the position of the Charging Party during the then pending negotiations for a successor collective negotiations agreement.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Refusing to negotiate in good faith with representatives of the Association during the course of negotiations for any successor agreement, particularly by ceasing forthwith to

engage in such conduct at public meetings of the Board as the dissemination of salary guides, as if agreed-upon, where, in addition to members of the public, members of the Association's negotiations unit were in attendance, all of which breached the principle of "exclusivity" per se since the effect was to undermine the Charging Party's position during the then pending negotiations for a successor collective negotiations agreement.

B. That the Respondent Board take the following affirmative action:

1. Upon demand, WE WILL negotiate in good faith with representatives of the Association regarding the terms and conditions of employment to be incorporated into any successor collective negotiations agreement and, further, WE WILL abide strictly by the terms of Paragraph 7 of the "Agreement for Resolution of Dispute" [Dkt. No. CO-92-82].

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

Alan R. Howe
Hearing Examiner

Dated: November 1, 1993
Trenton, New Jersey

Recommended Posting
Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL, upon demand, negotiate in good faith with representatives of the Association regarding the terms and conditions to be incorporated into any successor collective negotiations agreement.

WE WILL abide strictly by the terms of Paragraph 7 of the "Agreement for Resolution of Dispute" [Docket No. CO-92-82].

Docket No. CO-H-92-359 Neptune Township Board of Education
(Public Employer)

Dated _____ **By** _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.