

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

In the Matter of

CARLSTADT BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-82-146-85

CARLSTADT EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Subsections 5.4(a)(1) and (6) of the New Jersey Employer-Employee Relations Act by its insistence on incorporating certain language in a proposed complete and final collective negotiations agreement based upon disputed provisions of a Memorandum of Understanding. The Hearing Examiner found that the Memorandum of Understanding was ambiguous in three out of four areas in dispute and that the Board could, therefore, rely on past practice and the provisions of the prior agreement and the Teachers' Policy Manual. In order for the Charging Party to obtain a remedy that the Board be ordered to execute an agreement in accordance with the Memorandum of Understanding, the Charging Party would have to have prevailed in all four areas in dispute. Because it prevailed in only one of the four areas no remedy could be granted.

The Hearing Examiner also found that the Board did not violate the Subsection 5.4(a)(5) of the Act by its refusal to implement the agreed upon 1981-82 salary guide until a complete and final agreement was reached on all provisions of the contract. There exists no Commission precedent to the contrary.

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.

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Appearances:

For the Carlstadt Board of Education
Aron, Till & Salsberg, Esqs.
(David A. Wallace, Esq.)

For the Carlstadt Education Association
Bucceri & Pincus, Esqs.
(Louis P. Bucceri, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on December 21, 1981 by the Carlstadt Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Carlstadt Board of Education (hereinafter the "Respondent" or the "Board") had 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. (hereinafter the "Act"), in that the Respondent has refused to reduce to writing and execute a collective negotiations agreement incorporating accurately the terms and conditions agreed to at the conclusion of negotiations and set forth in a certain Memorandum of Understanding dated September 9, 1981, notwithstanding that both the Respondent and the Charging Party ratified the said Memorandum of Understanding by September 15, 1981; and further, that the Respondent has refused to implement the negotiated salary guide for the 1981-82 school year, notwithstanding that the salary guide has been agreed upon, the Respondent taking the position that it will not implement

the salary guide until a full and final agreement has been executed by the parties; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (5) and (6) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 4, 1982. Pursuant to the Complaint and Notice of Hearing, hearings were held on April 27 and April 28, 1982 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by July 16, 1982.

An Unfair Practice Charge having been filed with the Commission a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Carlstadt Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Carlstadt Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

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.

"(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

3. The last collective negotiations agreement between the parties was effective July 1, 1979 through June 30, 1981 (J-1).

4. Negotiations for a successor agreement commenced on November 10, 1980 and concluded on September 9, 1981 with the execution by the parties' negotiators of a Memorandum of Understanding (CP-1). The Association ratified the Memorandum of Understanding on or about September 9, 1981. The Board approved the Memorandum of Understanding at a Public Meeting on September 15, 1981 (CP-3).

5. Paragraph XV of the Memorandum of Understanding provided that the parties would meet in two weeks to develop "mutually agreeable guides and contract language."

6. Under the date of October 22, 1981 the parties reached agreement on a salary guide for the year 1981-82 (CP-4) and on November 4, 1981 an agreement was reached for the salary guide for the year 1982-83 (CP-5).

7. Since the foregoing dates of agreement on the salary guides the Board has been maintaining a salary account in anticipation of payment of salary retroactively. Further, effective November 1, 1981, the Board implemented the Dental Plan provision in the Memorandum of Understanding. All other provisions of the Memorandum of Understanding have not been implemented by the Board pending final agreement by the parties on formal contract language for the 1981-83 collective negotiations agreement.

8. Counsel for the Board was charged with the responsibility of drafting formal contract language for submission to the Association. Proposed language was completed and submitted to the Association's Chief Negotiator, Robert Arzt, an N.J.E.A. Consultant, early in November 1981. Thereafter Arzt met with Board Counsel Richard Salsberg on November 18, 1981, at which time mutual agreement was reached on a number of proposed contract provisions. However, there was no agreement on the language to be included in a certain Article XXI, "Teachers Hours and Teachers Loads," which is the basis of the instant dispute (CP-2). For example,

Arzt, on behalf of the Association, objected to the Board's use of the phrase "professional time" as opposed to "prep" or "preparation time" in Section B. 1, which refers to non-teaching time for teachers in grades 1-8.^{2/} Arzt, relying upon the language in the Memorandum of Understanding where the term "prep" was used, contended that the term "professional" was inconsistent therewith. Further, Arzt objected to excepting Special Education Teachers from the guaranteed 260 minutes of non-teaching time per week. Finally, Arzt objected to the inclusion of proposed qualifying language for 7th and 8th grade teachers, whose teaching periods per day were limited to six (6). Namely, the Board proposed that these teachers must be involved in the teaching of the major subjects of English, Mathematics, Reading, Science and Social Studies.

9. In an effort to resolve outstanding differences in the proposed language for Article XXI, supra, the Association negotiators plus Salsberg and two Board members met on December 1, 1981 but remained deadlocked on the language differences outlined above.

10. The Board has refused to implement the agreed upon 1981-82 salary guide (CP-4) pending final agreement on contract language. Thus, the unit members are being paid under the 1980-81 salary guide. The Association alleges that in so doing the Board is "... guilty of attempting to coerce the Association and its employees to accept its unilateral alteration of a fully negotiated agreement..." (C-1).

11. The Association witnesses testified that the reason that the term "prep period" was inserted into the Memorandum of Understanding, supra, was as a result of an Association contract proposal dealing with "preparation time" for all teachers and a proposed definition thereof (R-1, p. 5). The Board's sole witness, Superintendent, Kenneth G. Gorab, testified that there was no discussion in the

^{2/} The prior agreement, J-1, supra, used the phrase "professional time" (see Article VII, Section E.).

negotiations regarding the Association's proposed definition of "preparation time." Further, he testified that he was responsible for placing in the proposed contract language the term "professional time" based upon the prior practice of the parties and the use of the term in the prior agreement (J-1) and the Teachers' Policy Manual (R-2). The witnesses for the parties agreed that whether the term "preparation time" or "professional time" was utilized there was no disagreement whatever that it referred to non-teaching time during the school day. The Hearing Examiner, based on his observation of the demeanor of the witnesses, finds that, notwithstanding the use of the term "prep" in the Memorandum of Understanding, supra, there was no conclusive agreement reached by the parties during negotiations that the term "professional time" could not be used by the Board in its proposed contract language.

12. The next area of disagreement in the testimony of the witnesses for the parties was the inclusion of Special Education Teachers in the exception for guaranteed preparation or professional time in relationship to all other teachers except the Speech Specialist. The parties agreed in the Memorandum of Understanding that the Speech Specialist would be excluded from the guarantee of 260 minutes per week of preparation or professional time. The Superintendent acknowledged that he was responsible for placing in the proposed contract language a like exception for Special Education Teachers. The Superintendent testified credibly that Special Education Teachers were not the subject of discussion in the contract negotiations and they are clearly not referred to in the Memorandum of Understanding. Accordingly, the Hearing Examiner finds that excepting the Special Education Teachers along with Speech Specialist from the 260-minute per week guarantee is clearly consistent with the history of contract negotiations and the Memorandum of Understanding. Thus, the Association cannot successfully argue that the Board's proposed contract language that "...Any and all efforts will be made to provide two hundred sixty (260) minutes of professional time for the Speech Specialist and

Special Education Teachers ..." is inconsistent therewith.

13. A further area of disagreement is the Board's proposed contract language that only 7th and 8th grade teachers involved in the teaching of English, Mathematics, Reading, Science and Social Studies shall normally not be scheduled to teach more than six (6) regular teaching periods per day. The Association witnesses agreed that only five teachers are involved in the 7th and 8th grades. Thus, the Hearing Examiner finds no disagreement between the Board's proposed qualifying language, which enumerated the five subjects area, since there are in fact only five teachers who teach in these subject areas as testified to by the Superintendent. Moreover, the Hearing Examiner finds that the Association has failed to establish any reason for objection to the Board's proposed language in Article XXI, Section B. 3., which specifically sets forth the five major subjects of English, Mathematics, Reading, Science and Social Studies.

14. Finally, the Hearing Examiner finds a basis in the Memorandum of Understanding for the Association's objection to the Board's proposed language in Article XXI, Section B. 4. The Memorandum of Understanding states on pages 2 and 3 that "In the event a teacher has to give up a prep period he or she will be paid \$6.00 for a 30 minute period or \$8.00 for any period over 30 minutes..." Arzt, on behalf of the Association, testified that the phrase "...if a teacher is required to give up all or part of a preparation period" should be substituted for the Board's phrase "...teach during a professional period". The Hearing Examiner finds that the Association's proposed change more closely conforms to the language in the Memorandum of Understanding.

DISCUSSION AND ANALYSIS

The Position Of The Parties

The Charging Party argues that the only issue to be determined is whether or not the Memorandum of Understanding (CP-1) "constitutes a valid agreement...", which must be included in a final collective negotiations agreement. Further,

the Charging Party contends that the Commission should not be involved in the "...interpretation of contractual provisions....," but rather, should only be concerned with "... the existence of an agreement, as evidenced by the written memorandum of understanding..." (See Charging Party's Brief, pp. 10, 11). The Charging Party also contends that "...there is no ambiguity in the language in question and, certainly, no question that the parties came to an agreement..." citing, inter alia, Mount Olive Board of Education, P.E.R.C. No. 78-25, 3 NJPER 382 (1977). (See Charging Party's Brief pp. 18, 19). Finally, the Charging Party urges that the failure to pay the negotiated salary increase for 1981-82 is an independent violation of the Act.

The Respondent elects to rely solely on the Mount Olive decision of the Commission, supra (Brief pp. 1-3). Its position is that the Memorandum of Understanding (CP-1) is literally riddled with ambiguities so as to require resort to "existing past practice" in determining the actual agreement reached by the parties in negotiations. The Respondent's basic position is that the Association herein has failed to prove by a preponderance of the evidence that the contractual language sought by it was, in fact, negotiated by the parties. The Respondent states that is under no obligation to increase salaries until a final agreement is reached.

* * * *

The Hearing Examiner will now consider seriatim the contentions of the parties vis-a-vis the contractual language proposed by the Board and the issue of the salary increase for 1981-82.

"Prep" Periods Or Time V.
"Professional" Time

The Hearing Examiner has found in Finding of Fact Nol 11, supra, that, notwithstanding the use of the term called "prep" in the Memorandum of Understanding (CP-1) there was no conclusive agreement reached by the parties during negotiations

that "professional" time could not be used by the Board in its proposed contract language. The Board's use of this term is consistent with the prior agreement (J-1) and the Teacher's Policy Manual (R-2). Further, the parties were in agreement at the hearing that whether or not the term "preparation" or "professional" time was utilized there was no disagreement whatever that it referred to non-teaching time during the school day. Thus, the Hearing Examiner finds and concludes that the Association has failed to prove by a preponderance of the evidence that the Board has violated Subsection(a)(6) or the Act by insisting on the use of the term "professional" time in the collective negotiations agreement.

Guaranteed "Professional" Time
For Special Education Teachers

The Memorandum of Understanding (CP-1) sets forth the guarantee of "professional" or "prep" time for K through 8 teachers, including "Special Area Teachers," the only exception being the "Speech Specialist." There is no reference whatever to "Special Education Teachers."

The Respondent correctly contends that there is, thus, an "ambiguity" in CP-1 with respect to Special Education Teachers. While the prior agreement (J-1) and the policy manual (R-2) are likewise silent on the subject of "professional" time for Special Education Teachers, Gorab, on behalf of the Board, supplied a convincing rationale regarding the impracticality of guaranteeing "professional" time for Special Education Teachers as opposed to regular classroom teachers (1 Tr. 124-126). Gorab noted that the Association proposal concerning "preparation time" (R-1, p. 5) covered K-8 teachers and Special Area Teachers but omitted any reference to Special Education Teachers. Gorab testified credibly that Special Education Teachers are not defined by either K-8 or "Special Area." Thus, it appears to the Hearing Examiner that the parties did not negotiate and, thus, did not resolve in CP-1 the question of "professional" or "prep" time for Special Education Teachers. The Memorandum of Understanding therefore contains a latent ambiguity

regarding Special Education Teachers.

The Hearing Examiner concludes that excepting Special Education Teachers along with the Speech Specialist from the 260-minute per week guarantee is clearly consistent with the history of contract negotiations and CP-1. The association cannot, therefore, successfully argue with the Board's proposed contract language that "...Any and all efforts will be made to provide two hundred sixty (260) minutes of professional time for the Speech Specialist and Special Education Teachers..." is inconsistent with CP-1 and the negotiations herein. Thus, the Board has not violated Subsection(a)(6) by its position on this issue.

The Six Teaching Periods Per Day Ceiling

The Memorandum of Understanding (CP-1) provides on page 3 that "Teachers will be guaranteed that there will be no more than 6 teaching periods a day..." The issue is whether or not that guarantee applies to all teachers, K through 8 or whether it applies only to 7th and 8th grade teachers involved in the teaching of English, Mathematics, Reading, Science and Social Studies. The Hearing Examiner concludes that the Association has failed to prove by a preponderance of the evidence that all teachers, K through 8, were to benefit from the six-teaching period ceiling.

Association President Falcone testified that the ceiling would extend to all teachers in all grade levels (1 Tr. 66, 67). Association Consultant Artz testified that the six-period ceiling applied to 7th and 8th grade teachers, including Special Area Teachers, but not to elementary teachers (K-6) (2 Tr. 120, 121). Falcone acknowledged that the Association had sought a ceiling of five periods per day for 7th and 8th grade teachers only (1 Tr. 59). Falcone also conceded that the Association never amended its proposal to extend beyond 7th and 8th grade teachers (1 Tr. 60). Gorab testified that the discussions in negotiations were limited to the five teachers in the 7th and 8th grades (1 Tr. 142, 145). Finally, Artz acknowledged that the reorganization of the teaching load for 7th and 8th grade teachers was "...the major issue in the negotiations..." (2 Tr. 101).

The Hearing Examiner, therefore, finds and concludes that the Board has not violated Subsection(a)(6) of the Act by adhering to its position that the language in the agreement regarding the six-teaching period ceiling should be limited to the 7th and 8th grade teachers in the major subjects of English, Mathematics, Reading, Science and Social Studies. (See Finding of Fact No. 13, supra).

The "Give Up" Of A "Prep" Or "Professional" Period

As found in Finding of Fact No. 14, supra, the Memorandum of Understanding more clearly reflects the position taken by the Association, namely, that a teacher be paid either \$6.00 or \$8.00 whenever "...a teacher has to give up..." a "prep" or "professional" period. The Hearing Examiner finds no basis for the Board's position that a teacher must "teach" during a "professional" period in order to be eligible for the additional compensation. The Hearing Examiner has not resorted to past practice because, in his opinion, the language at pages 2 and 3 of CP-1 speaks in the imperative regarding the giving up of a prep or professional period. There is no indication of any qualification by the parties, which would support the Board's position that it be limited to teaching during a prep or professional period.

Accordingly, in this one area of the Memorandum of Understanding, the Board has violated Subsection(a)(6) of the Act.

The Withholding Of The 1981-82 Salary Increase
As An Independent Violation Of The Act

The Charging Party argues that the Board has committed a separate unfair practice by refusing to implement the salary guide, which has been agreed upon for the 1981-82 school year (see Charging Party's Brief, pp. 20-24). The Respondent argues more persuasively, in the opinion of the Hearing Examiner, that the Association is improperly seeking to reap the salary benefits of the negotiated settlement while attempting to obtain other advantages in contract language by

the institution of the instant Unfair Practice Charge proceedings.

The Hearing Examiner concludes that there is no separate violation of the Act by the Board in adhering to its position that it will not implement the salary guide for 1981-82 until a complete and final agreement is reached on all contract language. The Hearing Examiner finds, additionally, that the Board has not prejudiced its position by having agreed to implement the Dental Plan on November 1, 1981.

The Hearing Examiner bases this conclusion on the fact that the Charging Party would obviously obtain a negotiating advantage over the Board in settling the dispute over the language provisions of CP-1 if the Board was directed to implement the 1981-82 salary guide before complete and final agreement was reached on the overall contract. It is noted that the Charging Party has not cited any applicable Commission precedent in support of its position. The Commission's decision in Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504 (1980) is clearly distinguishable since that was a representation case, in which the salary policy of the employer formed the basis for an objection to the conduct of an election.

REMEDY

In view of the fact that the Hearing Examiner has found that the Board violated Subsection(a)(6) of the Act in only one of the four areas of dispute between the parties over the meaning of the language in the Memorandum of Understanding (CP-1), the Hearing Examiner must now consider whether or not any remedy can be afforded the Charging Party in the absence of its having prevailed in all four of the areas in dispute.

In an effort to seek clarification on this question, the Hearing Examiner

conducted a telephone conference call with counsel for the parties on July 13, 1982. Counsel for the Charging Party conceded that unless it prevailed in all of the disputed areas no remedy directing the Board to execute an agreement could be granted. Obviously, counsel for the Respondent concurred in this position.

The Hearing Examiner, having found that the Charging Party established a violation of Subsection(a)(6) of the Act in only one of the four areas in dispute, he must recommend dismissal of the Subsection(a)(6) allegations in the Unfair Practice Charge. Further, the Hearing Examiner, having found no independent violation of the Act by the Board's withholding implementation of the 1981-82 salary guide, he must also recommend that the Complaint be dismissed in its entirety.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Board has not violated N.J.S.A. 34:13A-5.4(a)(1) and (6) by its insistence that its proposed language in Article XXI, "Teachers Hours and Teachers Loads" (CP-2), be incorporated into the final collective negotiations agreement (subject to the caveat above regarding "give up" of a "prep" period).
2. The Respondent Board has not violated N.J.S.A. 34:13A-5.4(a)(1) and (5) by refusing to implement the 1981-82 salary guide until a complete and final agreement is consummated by the parties.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: July 19, 1982
Trenton, New Jersey