

H.E. NO. 82-19

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

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CO-81-116-130

ELIZABETH TEACHERS UNION  
LOCAL 733, AFT-AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner denies the motion of the Board to dismiss the Charging Party's charge of unfair practices. The Charging Party has established a prima facie case with respect to the alleged denial by the Board of Charging Party access to school mailboxes during the open or insulated period.

The Hearing Examiner discussed the Commission's standard concerning the review of motions to dismiss, and also discussed the Commission's analysis of the use of school facilities during the open period provided for in the representation rules. Finally, the Hearing Examiner emphasized that this was a decision on the Motion only and not a decision on the merits of the case.

A Hearing Examiner's denial of a Motion to Dismiss is subject to appeal to the Commission pursuant to its rules.

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Appearances:

For the Respondent  
Murray, Granello & Kenney, Esqs.  
(James P. Granello of counsel)

For the Charging Party  
Sauer, Boyle, Dwyer & Canellis, Esqs.  
(George W. Canellis of counsel)

DECISION AND ORDER ON MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on October 15, 1980 by the Elizabeth Teachers Union, Local No. 733 (the "Charging Party" or "Union") alleging in part that the Elizabeth Board of Education (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charging Party has alleged in part that the Board unlawfully denied the Union access to its facilities and teacher mailboxes during the open period

for representation all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (7). <sup>1/</sup>

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 1, 1981 pursuant to which a hearing was conducted on September 15, 1981. At the hearing the Charging Party had the opportunity to present its full case which consisted of the testimony of one witness, after which it rested. Subsequently, the Board made a Motion to Dismiss the Charging Party's case alleging that a prima facie case had not been established. The parties were given the opportunity to submit a brief with respect to the Motion, the last of which was received on October 26, 1981.

Upon the record to date, the Hearing Examiner makes the following interim:

Findings of Fact

1. The Elizabeth Board of Education is a public employer within the meaning of the Act and is subject to its provisions.
2. The Elizabeth Teachers Union Local 733 and the Elizabeth Teachers Association (the "Association") are public employee representatives within the meaning of the Act and are subject to its provisions.

<sup>1/</sup> 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act. (7) Violating any of the rules and regulations established by the commission."

3. The Elizabeth Teachers Association is the majority representative of a unit of employees employed by the Board which the Charging Party is interested in representing. The Board and the Association were parties to a collective agreement covering the unit in question and a copy of said agreement was admitted into evidence as Exhibit J-1, and covers the period of July 1, 1979-June 30, 1981.

4. Article V Sections C and D of Exhibit J-1 provide that the Association shall have the right to exclusive use of school mailboxes, as follows:

C. The Association shall have the right to reasonable use of the school mailboxes; open material shall receive prior approval of the Superintendent or his representative.

D. The rights and privileges of the Association and its representatives as set forth in this Agreement shall be granted only to the Association as the exclusive representative of the teachers, and to no other organization.

5. That pursuant to N.J.A.C. 19:11-2.8(c)(3), the insulated or open period for the filing of a representation petition in a case involving a school district is that period of time between September 1 and October 15, inclusive, within the last 12 months of an existing agreement. Since Exhibit J-1 expired on June 30, 1981, the insulated or open period with respect to that collective agreement was September 1, 1980-October 15, 1980, inclusive.

6. Victor Gualano, President of the Charging Party testified that during the open period in September 1980, Principal Intele of School 21 told him not to put union material in the

mailboxes. Gualano nevertheless put the material in the mailboxes and he testified that Intele then told him he would remove the material. See Transcript pp. 31-34, 100-101, 110-111.

7. That in September 1980, Gualano, prior to utilizing the mailboxes, notified the Superintendent of Schools that he was going to put union material in the mailboxes and sent him copies of that material. Transcript pp. 31-32, 107.

8. That a vice principal of the Lafayette School denied Gualano permission to use the school mailboxes. Transcript p. 33.

#### Discussion and Analysis

For the following reasons the Board's Motion to Dismiss the Complaint herein is denied.

1. The Commission's standard for reviewing a motion to dismiss is enunciated in In re Township of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (1977) where the Commission, relying on comments in the Current N.J. Court Rules Annotated, R. 4:37-2(b), concluded that the motion must be denied if there is any evidence, including any favorable inference to be drawn therefrom which could sustain a judgment in the Charging Party's favor.

The Commission also cited Dolson v. Anastasia, 55 N.J. 2 (1969) where the Court held:

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.

55 N.J. at pp. 5-6.

Consequently, a review of North Bergen demonstrates that in reviewing a motion to dismiss, the charging party must be given every legitimate inference which can be deduced from the evidence presented.

2. The question of the use of school mailboxes and other school facilities during the open period -- even during the existence of an exclusivity clause -- was considered by the Commission in In re Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976). In that decision the Commission held that despite an exclusivity clause, once a timely representation petition is filed, or during an open period when such a petition could be filed, a public employer could not treat employee organizations differently in the competition for a unit of employees. Furthermore, the Commission held that during this time period if the incumbent organization were permitted access to the facilities for communication with the employees, the employer must permit the challenging organization similar access.

3. The undersigned has reviewed the entire record to date and finds -- giving every favorable inference to the Charging Party at this time -- that a prima facie case has been established. The facts show that the Association is the current majority representative and has an exclusivity clause in its contract. The Charging Party, during the open period, has attempted to use the mailbox facilities and certain officials of the Board have apparently either prevented the Charging Party's use of the mailboxes and/or have removed its material therefrom. The undersigned at this stage of the proceedings can infer that the Board

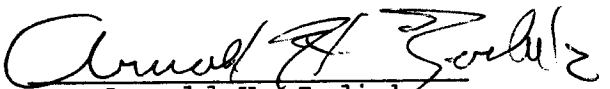
denied the Charging Party access to mailbox facilities during the open period while at the same time permitting the Association exclusive use of those facilities for communication purposes. Therefore, pursuant to Union Cty Reg., supra, a violation of the Act may have been committed which justifies a denial of the Motion to Dismiss at this time.

Finally, as the Commission in North Bergen, supra, noted, nothing in this decision is intended in any way to suggest any findings or conclusions on the merits of this case. Rather, it is simply a decision that, based on the record established to date, the undersigned cannot find sufficient basis for granting the Motion to Dismiss.

ORDER

Accordingly, for the above stated reasons it is hereby ORDERED that:

1. The Board's Motion to Dismiss the Complaint is denied.
2. The hearing in this matter shall reconvene on Thursday, December 17, 1981, at 9:30 a.m. in the P.E.R.C. Offices, 1180 Raymond Boulevard, Room 838, Newark, New Jersey, and the Board shall be prepared to present its case herein.

  
Arnold H. Zudick  
Hearing Examiner

DATED: November 17, 1981  
Trenton, New Jersey