H.E. NO. 2003-17

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

In the Matter of

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- DOCKET NO. CO-H-2001-199

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a Respondent/Employer Motion for Summary Judgment on a Complaint alleging that it refused to negotiate upon demand mid-contract a peer mediation stipend. This action allegedly violated 5.4a(1) and (5) of the Act.

The Hearing Examiner determined that the dispute was moot as to a duty to negotiate during the term of the current contract, inasmuch as the parties had successfully completed negotiations for a successor contract, the stipend issue was fully bargained, and no evidence suggested that similar circumstances will recur. She further determined that the bargaining history demonstrated that the Association waived its right to continue to negotiate the stipend issue for the term of the parties' current contract.

As to the narrow issue of the demand during the last year of the parties' previous contract, the Hearing Examiner found that by the parties' actions, the peer mediation stipend demand coming at the end of one contract term was essentially rolled into negotiations for the successor agreement. In any event, the Hearing Examiner determined that even if the charge was not moot as to the demand made in the last eleven months of the previous contract and a technical violation could be found, there was no effective remedy and continued litigation would unwisely focus the parties on a divisive past rather than a cooperative future.

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Appearances:

For the Respondent,
Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys
(Christopher B. Parton, of counsel)

For the Charging Party
Oxfeld Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION ON MOTION FOR SUMMARY JUDGMENT

On January 25, 2001, the Middletown Township Education Association (Charging Party or Association) filed an unfair practice charge against the Middletown Township Board of Education (Respondent or Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5)[1/], when

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1/ 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, and (5) Refusing to negotiate in good faith with a majority representative of (continued...)

it refused to negotiate stipends for teachers participating in peer mediation programs.

On June 21, 2001, a Complaint and Notice of Hearing issued. Hearing dates were rescheduled several times at the request of the parties. On January 4, 2002, I granted a joint request to put this matter on inactive status. On September 26, 2002, however, Charging Party notified me that the parties could not resolve this matter. A hearing was scheduled for December 3 and 4, 2002.

On November 15, 2002, Respondent filed a Motion for Summary Judgment with the Commission together with a supporting brief, certification and exhibits and a Request for Stay of the pending hearing. On November 25, 2002 the Chair referred the Motion to me for a decision pursuant to N.J.A.C. 19:14-4.8. The Request for Stay pending my decision on the Motion was granted.

Charging Party requested and was granted thirty (30) days in which to file a response. On January 9, 2003 Charging Party filed its response together with an affidavit and exhibits. Respondent filed a reply brief on January 10, 2003.

By letter of February 10, 2003 I requested the parties brief an additional issue: whether, in the absence of a unilateral change, an employer is obligated to negotiate upon demand, mid-

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1/ (...continued)
refusing to process grievances presented by the majority representative."

contract, over non-contractual terms and conditions of employment. Briefs were due February 26, 2003.

Respondent was also notified that to the extent it seeks to convert its October 10 Supplemental Statement of Position/Answer to an Answer or to incorporate it or any pre-complaint submission into its Motion, it must comport with Commission rules concerning content, form and service. N.J.A.C. 19:14-3.1 and 3.2. To date, neither submission has been served and filed pursuant to our Rules, and, therefore, will not be considered here.

On March 3, 2003 Respondent filed an Answer in compliance with Commission rules which did not incorporate its October 10 Supplemental Statement of Position. It admits that on July 25, 2000 during the term of the 1996-2001 contract Charging Party proposed a guide of stipends for teachers participating in peer mediation. The Respondent further admits it rejected the guide because it determined that the program would continue on a voluntary basis. Respondent denies that it violated the Act. It asserts that there was no negotiations obligation attached mid-contract regarding a peer mediation stipend since, by past practice, the program was voluntary and there was no unilateral change in the program. Alternatively, it contends that it fulfilled its bargaining obligation during negotiations for the 2001-2005 contract thus rendering the charge moot.

On March 3, 2003 Respondent also submitted a letter brief regarding mid-contract negotiations obligations. It contends that absent a unilateral change in a past practice there is no obligation to negotiate triggered by a mid-contract demand. Here, it asserts, there was no change in the voluntary program as it has existed for years in the middle schools. Thus, it contends, the Board had no duty to negotiate during the term of the 1996-2001 contract.

On March 7, 2003, Charging Party submitted its supplemental brief asserting that the Board began the peer mediation program during the 1996-2001 contract and, therefore, had an obligation to negotiate upon demand over compensation.

As to Respondent's Motion, 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)]

A party seeking a motion for summary judgment claims there is no genuine issue of material fact and that it is entitled to judgment on the undisputed facts and applicable law. See generally, N.J.A.C. 1:1-12.5 and R. 4:46-2(c). In considering a motion for summary judgment, all inferences must be drawn against the moving party and in favor of the party opposing the motion. The motion must be denied if a genuine issue of material fact

exists. Brill v. Guardian Life Insurance Co. of America 142 N.J. 520 (1995).

In determining whether a genuine issue of material fact exists the fact finder 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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. If that issue can be resolved in only one way, it is not a "genuine issue" of material 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'n, P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

Applying these standards, and relying upon the briefs, affidavits and supporting documents, I make the following:

FINDINGS OF FACT

1. The Middletown Township Board of Education is a public employer within the meaning of the Act. The Middletown Township Education Association is a public employee representative of non-supervisory professional employees including teachers employed by the Board.

2. The Board and Association are parties to two successor contracts effective from July 1,2001 through June 30, 2002 and from July 1, 2002 through June, 30, 2005. The Memorandum of Agreement covering both contracts was executed August 29, 2002. The prior contract was effective from July 1, 1996 through June 30, 2001.

3. Schedules D1 (athletic positions) and D2 (non-athletic positions) attached to the current and expired contracts list stipend positions together with compensation for each at the Board's elementary, middle and high schools. Peer mediation is not a stipend position listed in either schedule D1 or D2 of the parties' current or expired agreements.

4. During the summer of 2000 the Board offered in-service credit to teachers attending peer mediation training. In-service training is addressed in the parties' 1996-2001 contract at Article XXXI, entitled Professional Development and Educational Improvement. It provides, in pertinent part:

> All in-service programs shall be conducted during the in-school workday if professional employee's attendance is mandatory. All such programs conducted after the professional employee's workday or during the summer shall be voluntary. Course credit shall be granted for in-service programs in the same manner as graduate credits.
>
> The Superintendent has the authority to decline approval for any course or courses which in his/her opinion are not relevant to the job of the professional or secretarial employee is hired to perform. The

> Superintendent or his designee shall establish criteria for the approval of courses. The MTEA shall be consulted concerning criteria.

5. By letter dated July 25, 2000 to Superintendent Jack DeTalvo, Association President Diane K. Swaim proposed a guide of stipends for teachers who participate in peer mediation. Swaim's letter was prompted by the Superintendent's decision to grant in-service credits to teachers who were to attended peer mediation training in August 2000. She wrote, in pertinent part:

> The Association notes that the training these teachers will obtain will be of great benefit to the children in this district. It is clear that the teachers will be using their skills to help avert student conflict and assist our children in developing the important skills they need to solve conflicts . . . . As our members are called upon to assist these students, it is clear that they will have additional responsibilities. The additional responsibilities for the Peer Mediation Advisors will fall before school, during school and after school. It is these additional responsibilities that must be compensated through an additional stipend negotiated between the Association and the Board.

Swaim then recommended specific stipends for elementary, middle school and high school teachers who participate in peer mediation tying compensation into existing stipend positions - e.g. peer mediation stipends for high school teachers should be the same as class advisors in the high school for grades 9 through 11.

6. On January 3, 2001, Swaim wrote DeTalvo reminding him that she had received no response to her July 25, 2000 letter regarding peer mediation stipends.

7. By letter dated January 10, 2001, Assistant Superintendent of Schools Alan M. Feuer responded on behalf of DeTalvo to Swaim's proposal stating that there was no need to negotiate. He explained:

> To the best of my knowledge no teacher has been assigned to attend workshops beyond their regular school day . . . no teacher has any assigned period of time; either regularly scheduled or otherwise, during which peer mediation or conflict resolution takes place.
>
> It is my understanding that any such activity; either learning, as in Staff Development, or monitoring, as in implementing, takes place on a purely voluntary basis.
>
> In keeping with the tenets of academic freedom, should a teacher wish to volunteer his/her time in a worthwhile endeavor such as peer mediation, we would not impede his/her ability to do so.

8. There is not presently nor has there ever been a district-wide peer mediation program. However, there briefly existed a partly-voluntary and partly-paid peer mediation program in the middle schools with funding derived from a grant. Neither party presented facts as to when that program began or when it ended nor is there evidence on the record of what peer mediation

program, if any, existed at the time of Swaim's initial negotiations demand in July 2000.

In the 2002-2003 school year, two middle school teachers were scheduled for a period of peer mediation during the regular school day. It is unclear whether these teachers were assigned or volunteered for the program and whether the program began in the current school year or existed in prior years. However, I infer from these two schedules that the program currently exists in the middle schools.

9. The Association filed the instant charge on January 25, 2001, after receipt of Feuer's letter in response to Swaim's negotiations demand.

10. On April 4, 2001, in negotiations for the 2001-2005 contract, the Board and Association exchanged proposals. The Association proposals included, under Article III, section C, paragraph 15, entitled Teacher Issues, Teachers pre-K to 12, the following proposal:

> Create Peer Mediation Advisors (as outlined in letter to Dr. DeTalvo), Incentive or Renaissance Committee, Academic Bowl, and Odyssey of the Mind stipends for all 3 levels (all stipends same as Intramural Coordinator).

The letter to Dr. DeTalvo referred to in the Association's proposal was Swaim's July 25, 2000 letter.

11. The parties discussed the April 4 proposal on several occasions; at a negotiations session on August 29, 2001, Swaim proposed tying a peer mediation stipend into existing stipends at the Board's schools. The parties did not reach agreement at that time, and the Board rejected the concept of any new stipends, including peer mediation, but agreed to submit a counter-proposal regarding schedule D1 and D2 stipend positions.

12. The Board's counter-proposal dated August 31, 2001, was presented to the Association at a September 5, 2001 mediation session. The Board agreed, in principal, to rate increases for some existing extra-curricular stipends and proposed guidelines for increases in some D1 and D2 stipend positions while freezing others for the lifetime of the contract. The Board also restated its position presented to the Association on August 29 that it would "not agree to the addition of any new stipend positions (MTEA Proposals III.C.15 and 18)". The MTEA's proposal (at III.C.15) included the peer mediation stipend.

13. No negotiations sessions were scheduled between September 5 and November 27, 2001, due to the events of September 11, 2001. When negotiations resumed, the Association membership conducted a seven-day strike. At the negotiations session conducted during the strike, the Board presented the super mediator with its proposals, including the Board's August 31

counter-proposal regarding stipend positions in schedules D1 and D2 and the rejection of new stipend positions.

14. On December 7, 2001, the strike ended and the Court appointed a new special mediator to assist the parties in reaching a contract settlement. On December 21, 2001, the special mediator provided the parties with a list of open issues and identified stipends, among other items, as a money issue still in dispute.

15. On January 16, 2002, the Association, by letter to the Board's attorney, responded to a December 19, 2001 Board memorandum and accepted certain of the Board's proposals contained therein including, among others, "[S]chedule D1 and D2 extra and co-curricular stipend increases per Board proposal. (The Association accepts this proposal.)" The letter further stated that "[A]ll other proposals on the table as of the first meeting with the Court-appointed Mediator on Friday, December 14, 2001, to be dropped" except for the issues of salary increases and health insurance.

16. On February 7, 2002, the Association and Board met to discuss final details regarding the preparation of a Memorandum of Agreement (MOA) for the successor contract. The session was called a "Horse Trading" meeting to get rid of pending litigation including the unfair practice charge regarding peer mediation under the instant case, Docket No. CO-H-2001-199. There was no

agreement reached regarding the withdrawal of this charge or any other pending matters.

17. On August 29, 2002, the parties executed a Memorandum of Agreement for two successor contracts effective from July 2001 through June 30, 2002 and from July 1, 2002 through June, 30, 2005.

The Memorandum states in pertinent part:

> Extra- and Co-curricular stipends pursuant to Schedules D1 and D2 shall be increased pursuant to the Board's proposal which is attached hereto, for the 2001-2002, 2002-2003 and 2003-2004 school years. For the 2004-2005 school year, each Stipend shall be increased by 4.60%.
>
> All provisions of the 1996-2001 Agreement not specifically modified in this Memorandum shall carry forward unchanged into the successor Agreements; **all proposals not specifically addressed in this Memorandum are deemed dropped**. [emphasis added]

ANALYSIS

The Parties' Positions

In support of its Motion, the Board contends that it had no obligation to negotiate in July 2000 because there was no unilateral change in the existing middle school peer mediation program. It denies that it extended peer mediation district-wide, e.g., beyond the middle schools to the elementary and high schools. Therefore, it had no obligation to negotiate a different compensation formula mid-contract absent a unilateral

change in the program. The Board, however, does not contest the Association's right to seek to negotiate the issue in the context of the successor contract negotiations.

The Board's second contention is that it fulfilled its negotiations obligation during negotiations for the two successor contracts covering 2001-2002 and 2002-2005. It contends the Association and Board exchanged proposals and counter-proposals addressing extra- and co-curricular stipends, including the Association's proposal for a new peer mediation stipend. When the Association accepted the Board's counter-proposal on existing extra-curricular stipends in schedules D1 and D2, it implicitly accepted the Board's whole proposal which also included its position that no new stipends would be added to D1 and D2. When the Association executed the Memorandum of Agreement agreeing to drop all other proposals not specifically addressed in the MOA, it waived its right to further pursue the peer mediation stipend during the term of the current contract.

Additionally, the Board asserts these collective negotiations took place after the peer mediation charge was filed. The parties addressed and disposed of the peer mediation stipend issue during negotiations. The Board contends the issues raised in the Complaint are, therefore, moot. Continuing litigation, it asserts, would not effectuate the purpose of our

Act, specifically to encourage the resolution of parties' differences through collective negotiations.

The Association responds that the peer mediation program was instituted for the first time during the term of the 1996-2001 contract and that, therefore, the Board had a mid-contract negotiations obligations once the Association requested negotiations over the issue of compensation for those participating in the new program.

Additionally, the Association contends it did not waive its right to negotiate peer mediation stipends during negotiations for the successor contract. It argues that any such waiver would have to be clear and unequivocal. Rather, the Association contends it determined the peer mediation issue could not be resolved in those negotiations and removed it from the negotiations table, thus, preserving its right to continue negotiating the issue.

Finally, the Association rejects the Board's contention that the settlement of the contract moots the charge. It contends that a meeting to discuss resolving pending litigation (including the instant charge) occurred after the acceptance of the Board's contract proposals thereby evidencing the parties recognition that the peer mediation stipend issue was still open. The Association asserts that its refusal to withdraw the charge

expressly preserved its right to continue bargaining over a peer mediation stipend.

Mid-contract Negotiations Obligation

The obligation to negotiate derives from N.J.S.A. 34:13A-5.3 which entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. It further provides that proposed new rules or modifications of existing rules governing working conditions must be negotiated with the majority representative before they are established. In other words, the Act prohibits unilateral employer action either establishing new working conditions or implementing a change in existing terms and conditions of employment without negotiations.

Rules governing working conditions derive from the parties' contract as well as past practice. Tp. of Middletown, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997); Morris Cty. Park Comm'n, P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982). As long as the term and condition of employment is mandatorily negotiable, a negotiations obligation attaches. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). Thus, in order to prove a violation of the duty to negotiate in good faith, the charging party must show that the underlying issue is mandatorily negotiable, and that the respondent had an obligation to negotiate.

Here, the first requirement is satisfied. Peer mediation stipends would be part of a teacher's compensation; compensation is mandatorily negotiable. See generally, Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 7 (1973).

Next, the parties disagree as to whether peer mediation was a program which existed during the term of the prior contract, whether there was a change to the existing program or whether it was a new program. In order to establish a violation the Association must first identify a proposed new rule or modification to existing rules which would trigger a negotiations obligation mid-contract. Where the term and condition is set by past practice, an employer's refusal to negotiate, absent a change mid-contract, does not constitute a violation of 5.4a(5) of the Act. State of New Jersey (Stockton State College), P.E.R.C. No. 90-91, 16 NJPER 260 (¶21109 1990). See also, Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983) (Town did not have an obligation to negotiate mid-contract over past practice of temporary assignments to higher ranks without compensation even though the subject of the union's proposal was negotiable).

Based on the foregoing legal standards and facts, I find that the Association's President demanded stipends for teachers who participated in peer mediation based on the Board's granting

of in-service credit for peer mediation training during the summer of 2000. It appears Swaim assumed that the training would result in additional responsibilities relating to peer mediation and sought to negotiate compensation for these additional responsibilities.

Compensation and credit for in-service training is covered by the parties' 1996-2001 contract. There is no mid-contract negotiations obligation triggered by the granting of in-service credit. However, Swaim's demand related to what she perceived to be additional responsibilities growing out of the training, but there has been no showing yet that additional responsibilities have been implemented.

To the extent that a new program was created in the Board's schools or the existing program was modified, the Board was obligated to negotiate upon demand, even mid-contract, over compensation relating to peer mediation duties performed by teachers at these schools. Here, the evidence submitted is unclear whether there was an existing past practice, modification to existing past practice, a new program or that additional responsibilities were implemented. Assuming the facts in the light most favorable to the Association that there was a new program, as a matter of law the Board may for that period of time covered by the 1996-2001 agreement have had a duty to negotiate over a peer stipend mid-contract. However, for the reasons

discussed below, the Association cannot renew a demand to negotiate for peer mediation stipends or use this charge to justify such negotiations for the period of time covered by the 2001-2002 and 2002-2005 collective negotiations agreements.

Two issues remain: first, whether successor negotiations rendered the mid-contract negotiations demand moot, and second, whether the Association preserved or waived its right to negotiate a peer mediation stipend.

The Mootness Issue

As to whether successor negotiations and agreements moot the Association's claim, the Commission has found that it is within its, not the Charging Party's, discretion to determine on a case-by-case basis whether the circumstances warrant such a course of action. Galloway. If the circumstances demonstrate a sufficient potential for recurrence of the illegal conduct in the course of future negotiations, the concern is not academic and, therefore, even if the parties have negotiated a successor agreement, the unfair practice charge is not moot concerning pre-contract allegations of misconduct. Bayonne Bd. of Ed., P.E.R.C. No. 89-118, 15 NJPER 287 (¶20127 1989)(where Board repeatedly withheld increments during negotiations despite clear Commission and Court precedent, conclusion of successor agreement did not moot charge as to illegal pre-contract activity.)

In this case, unlike Bayonne, the comprehensive settlement of the parties' successor contract moots the charge as to the 2001-2005 contracts. The Association put its proposal for a peer mediation stipend on the table during negotiations for the parties' successor contract. The proposal was identical to the mid 1996-2001 contract proposal it made to DeTalvo in July 2000 which triggered the filing of the instant charge. The Association's peer mediation proposal was considered by the Board during negotiations for the 2001-2005 contracts and rejected. The Board counter-offered to increase some existing schedule D1 and D2 stipends and to freeze others, but rejected the addition of new stipends. The Board fulfilled its negotiations obligation on that issue for the term of the successor agreements covering 2001-2005. There are no circumstances demonstrating a sufficient likelihood of the conduct occurring in the course of future negotiations.

Moreover, the Board's consistent refusal during negotiations to add new stipends, although it may constitute hard bargaining, is not inconsistent with a sincere desire to reach an agreement. In re State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super 470 (App. Div. 1976); Spotswood Bd. of Ed., P.E.R.C. No. 86-34, 11 NJPER 591 (¶16208 1985).

The parties' give-and-take negotiations includes the Board's proposal which was accepted by the Association, to increase

several existing stipends, but did not include new stipends. The Board rejected any proposals for new stipends. The mere fact the final agreement reached between the parties did not include a "new stipend" for peer mediation does not mean that the issue was not fully bargained. Moreover, to permit further negotiations after the parties' reached agreement on the 2001-2005 contracts would give the Association more than it was able to get during collective negotiations. This would not effectuate the purposes of the Act to encourage settlement of differences through collective negotiations.

Finally, even if the charge is not moot on the narrow issue regarding the July 2000 negotiations demand and a technical violation could be found, I would not recommend the normal remedies of a bargaining order and a posting. The Association demanded negotiations in July 2000, less than one year before the end of the contract term. When the Board did not respond, the Association made a second demand in January 2001 shortly before proposals were exchanged for the successor contract.

Successor contract negotiations in education often begin in the fall and certainly by the spring of the final contract year. It would not be unusual, therefore, to roll issues arising near the end of one contract into the negotiations for a successor agreement. The record here shows the subject of a stipend for peer mediation was thoroughly addressed in successor negotiations

resulting in the Association having waived the right for such a stipend during the 2001-2005 contracts by having agreed to withdraw its proposal in favor of the Board's proposal. As a practical matter, the parties rolled the peer mediation stipend issue, arising at the end of the 1996-2001 contract term, into negotiations for the 2001-2005 contracts. A bargaining order remedy here to negotiate the last eleven months of the 1996-2001 contract would no longer effectuate the Act because the parties negotiated, addressed the peer mediation proposal and settled the successor contracts.

Under all the circumstances, this case does not warrant an exception to the Commission's reluctance to resurrect pre-contract negotiations disputes. Continued litigation over past allegations of misconduct which have no present effect unwisely focuses the parties' attention on a divisive past rather than a cooperative future. Ramapo-Indian Hills Regional H.S. Dist., P.E.R.C. No. 91-38, 16 NJPER 581 (¶21255 1990).

Reservation of Rights or Waiver

As to whether the Association reserved its right to continue negotiations on peer mediation stipends, it provides no factual support for its proposition other than its refusal to withdraw the instant unfair practice charge during a meeting to discuss pending litigation before finalizing the MOA. It asserts that since its refusal to withdraw the instant charge occurred after

its initial acceptance of the Board's proposals on D1 and D2 stipends but before the execution of the Memorandum of Agreement (MOA), it reserved its right to continue negotiating over peer mediation stipends despite agreement on a successor contract. That argument lacks merit.

The Commission has long held that the filing of an unfair practice charge does not constitute a demand to negotiate. Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984). Thus, the refusal to withdraw the charge cannot constitute a continuing demand to negotiate after contract settlement. The Charging Party cannot use this litigation to obtain what it failed to acquire through successor negotiations.

The Association's acceptance of the Board's comprehensive proposal on extra- and co-curricular D1 and D2 stipends and the execution of the MOA dropping all other proposals constituted a waiver of the right to further negotiate peer mediation stipends during the term of the current contracts despite its refusal to withdraw the present charge. Absent an express reservation of rights in the MOA there was no obligation to continue negotiations over the peer mediation stipend issue. See generally, Tp. of Ocean, P.E.R.C. No. 95-12, 20 NJPER 331 (¶25172 1994)(although parties completed successor negotiations, Commission entertained union's scope of negotiations petition

where union expressly reserved right to challenge specific provision included in agreement.)

Additionally, when the Association accepted the Board's counter-proposal regarding existing D1 and D2 stipends and executed the MOA dropping all other proposals not specifically addressed in the MOA, the Association waived its right to continue bargaining the issue during the term of the current collective agreement. To constitute a waiver, the language in the MOA must be clear and unequivocal and cannot be read expansively. City of Burlington, P.E.R.C. No. 89-132, 15 NJPER 415 (¶20170 1989)(where general provisions of the parties' contract - Management Rights, Fully Bargained Agreement and Rules and Regulations - did not constitute a waiver of CWA's right to negotiate the timing of paychecks.) However, the "clear and unequivocal" waiver test has been modified by the Commission to include other factors, such as negotiations history. Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980).

For instance, the Association cites the Hearing Examiner in State of New Jersey, H.E. No. 85-30, 11 NJPER 179, 185 (¶16079 1985)to support its assertion that the language of the MOA is not a clear and unequivocal waiver. There the Hearing Examiner found that clear and unequivocal language in the collective negotiations agreement constitutes a waiver, but he then added:

> . . . a mere reading of a collective agreement is not necessarily enough to

> determine whether a waiver exists. It may be necessary to consider other factors before reaching such a determination.

Citing Commission and National Labor Relations Board decisions, he reasoned that evidence of the parties' negotiations might need to be considered. In considering the history of CWA negotiations, he found that the union negotiated away or waived the right to subsequent negotiations over changes in starting and quitting times by agreeing to use the same contractual language as in predecessor agreements.

Here, the parties' negotiations history demonstrates that peer mediation stipends were proposed by the Association which subsequently accepted the Board's counter-offer to increase some existing stipends without adding new stipends. The Association traded its proposal for a peer mediation stipend for the employer's offer to increase other stipends. Thus, taking the peer mediation stipend proposal off the table served as consideration for obtaining other stipend language.

This history, considered together with the MOA's language which drops all other proposals not specifically addressed, acts as a waiver. Consequently, the Association by its actions during negotiations for the 2001-2005 contract waived further rights to negotiate a peer mediation stipend during the term of the current contract.

DECISION

Accordingly, I grant the Motion for Summary Judgment and thereby recommend that the Complaint be dismissed.

Wendy L. Young
Hearing Examiner

DATED: March 31, 2003
Trenton, New Jersey