H.E. No. 2010-7

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

In the Matter of

WASHINGTON TOWNSHIP BOARD OF EDUCATION,
Respondent,

-and-

Docket No. CO-2009-175

WASHINGTON TOWNSHIP EDUCATION ASSOCIATION,
Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends dismissal of an unfair practice charge alleging that the Washington Township Board of Education violated Section 5.4a(1) and (5) of the Public Employment Relations Act by unilaterally eliminating stipend seniority language from its successor collective negotiations agreement with the Washington Township Education Association.

The Hearing Examiner determines that the parol evidence rule is not implicated to exclude testimony from the Association's chief negotiator. The testimony goes to the discrepancy between two fully executed documents.

The Board reasonably relied upon the apparent authority of the Association's chief negotiator and president to negotiate and enter into an agreement which eliminated the stipend seniority language in exchange for an increase in compensation for another stipend.

The Hearing Examiner found it significant that the Association's team did not review the Board's contract draft prior to fully executing it and determined that the failure to review the document before signing should not relieve the Association of the bargain it had made.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Charging Party.

Appearances:

For the Respondent,
Adams, Stern, Gutierrez and Lattboudere, LLC, attorneys
(Philip E. Stern, of counsel)

For the Charging Party,
Oxfeld Cohen, attorneys
(Gail Oxfeld Kanef, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 17, 2008, Washington Township Education Association (Charging Party or Association) filed an unfair practice charge against Washington Township Board of Education (Board or Respondent) alleging that the Board violated 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act,

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

N.J.S.A. 34:13A-1 et seq. (Act)by unilaterally deleting language from the parties' 2008-2011 successor contract which had been contained in their 2004-2007, expired collective negotiations agreement. The Association alleges that the parties neither negotiated over, nor agreed to delete Article XVII Stipend Positions, paragraph 2(a) through 2(d) which references seniority provisions for stipends.

On June 8, 2009, a Complaint and Notice of Hearing issued (C1).[2/]

On September 16, 2009, Respondent filed its Answer (C2). It denies that the Board unilaterally removed the language in Article XVII and asserts that the Association and the Board agreed to delete the language during negotiations for the 2008-2011 contract (C2).

The Association seeks an order requiring the Board to revise and ratify the 2008-2011 negotiations agreement, inclusive of the Article XVII, 2004-2007 language. It also seeks monetary payment

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1/ (...continued)
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.

2/ "C" refers to Commission exhibits; "CP" refers to Charging Party's exhibits and "JX" refers to the parties' joint exhibits.

to individual employees who may have been effected as a result of the deletion of paragraphs 2(a) through (d) (T34).[3/]

A hearing was conducted on September 30, 2009. Briefs were filed by November 23, 2009. Based on the record, I make the following:

FINDINGS OF FACTS

1. The Board is a public employer and the Association is a public employee representative within the meaning of the Act.

2. The Association is the exclusive representative of all certified personnel and support staff employed by the Board Article I, Recognition (JX1).

3. The Association and the Board were parties to a collective negotiations agreement which expired on June 30, 2007 (JX1).

4. Article XVII of the expired agreement contains a grid of numerous stipend positions with compensation rates for each position for each contract year. "Level 4" on the grid references "Hourly and/or Fees" and includes "All Chaperones (includes skiing)" and "Weekend Activities" (JX1). The grid lists a higher hourly rate for weekend activities than for all chaperones. Article XVII also provides in pertinent part:

3/ Pages of the transcript of the September 30, 2009 hearing will be referred to as "T"-.

> 1. Listed Article XVI (sic) positions will be advertised as vacancies annually within the school district.
>
> 2. All newly created or newly vacated positions listed below will be filled according to the following procedures:
>
> > a. Preference will be given to the certified staff who have the most years experience in the position.
> > b. Next, preference will be given to the certified staff who have seniority in the district.
> > (emphasis added)

Paragraphs c and d set forth procedures for assignment when no qualified staff are available after application of paragraphs a and b.

5. During 2007 and early 2008 the parties negotiated two separate successor agreements (JX3, JX4). The first covers the period from July 1, 2007 through June 30, 2008. This agreement maintains the exact Article XVII language contained in the expired 2004-2007 agreement (JX3).

6. The July 1, 2008 - June 30, 2011 agreement references Article XVII at Level 4, "Weekend Activities/Ski Chaperones" and provides hourly compensation rates for each year of the agreement. It omits all reference to posting notices of vacancies for stipend positions or procedures for choosing staff to fill those positions based on seniority, or any other criteria. New language regarding assignment of stipend positions is as follows:

> All appointments to said positions and retention in any of the above positions, as well as any challenges, shall be in accordance with law (JX4).

7. Mary Ellen Summers (Summers) is employed by the Board as a secretary and is part of the negotiations unit. She is an Association First Vice-President. During negotiations for the successor agreement Summers was on the Association's negotiations team as a representative for the support staff (T18).

8. Summers attended approximately ten negotiations sessions for the new contract and was not aware of any negotiations sessions being held which she was unable to attend. The last session she attended where all of the Association's team members and the Board's team members were present occurred on February 21, 2008 (T19). Board President M. Skurchak, Board Chief Negotiator C. Compoli and one other Board member were present at the February 21 meeting. Also present was T. Emley, secretary for the Board's Business Administrator. Emley took notes of the session, as did Summers (T21-22; JX5).

9. Phil Kinney, the Association's chief negotiator was present at the February 21 meeting along with negotiation team member Linda Divietro, who was the Association President at the time, team member Eleanor Bodei, a teacher in the District, and Summers (T21-22).

10. At the February 21 meeting the parties discussed the stipended positions in the context of freezing all stipends for

the 2007-2008 school year, eliminating off-guide increases in stipends, and converting the "ski chaperones" compensation to that for "weekend activities" (T22-T24). These discussions are recorded in the February 21 meeting minutes (JX5). There is no reference in Emley's minutes to a discussion concerning elimination of the Article XVII seniority provision (JX5; T22-T24, T58).

11. On March 19, 2008, the members of both negotiating teams executed a Memorandum of Agreement (MOA) which on its face sets forth the terms of a new one year collective agreement and a three year agreement between the parties (JX2). The MOA includes the following pertinent language:

> "The parties in the above captioned matter have reached the following agreement subject to approval by the Board and ratification by the Association." (JX2 page 1).
>
> Paragraph 26 of the MOA provides:
>
> All proposals not referenced herein are withdrawn. All aspects of the prior agreement not changed by this Memorandum of Agreement continue into the new contract. All prior written agreements are included by reference into this memorandum of agreement (JX2).

12. Language at paragraph 14 of the MOA addresses "Article XVII regarding stipends" and refers to page 30 of the parties' expired agreement. In paragraph 14, the parties recorded their agreement to "freeze all stipends for the 2007-2008 school year"; eliminate Level I off guide increases, and consider "ski

chaperones" the same as "Weekend Activities" under Level 4 of the grid. While this paragraph also cites to a stipend grid attached to the MOA, none was attached to JX2.

There is no reference in the MOA to elimination of the stipend seniority provision.

13. There is no evidence in the record of another written agreement made prior to the execution of the MOA which would have been included by reference.

14. Summers testified that a few days after the March 19, 2008 execution of the MOA she attended an Association ratification meeting at which Kinney handed out a summary of the items that would be in the parties' final agreement. He also made a presentation concerning the agreement (T26-T28; CP1). Additionally, Summers testified that there was no discussion at the ratification meeting concerning any changes in the seniority provision for stipend positions. Likewise, while the document distributed by Kinney at that meeting contained other changes to Article XVII, no changes to the seniority provisions were included (CP1 page 3). The Association members ratified both contracts at the meeting.

15. Sometime between mid-March and early April 2008, the Board prepared a draft and final revision of the parties' agreements and presented them to the Association for review (T29-32; T54-55).

16. Summers testified that although she could have reviewed both of the contracts before signing either, she only reviewed the "changes agreed upon" and "items that pertained to the secretaries" whom she represented as a negotiations team member (T30-T32). She did not look at anything in either contract related to stipend positions. When asked directly whether she had looked at anything in "either contract related to stipend positions" she answered "No, I did not" (T30). Based upon this testimony, I find that Summer only looked at the items in either of the successor contracts that pertained to the secretaries.

17. In approximately early April 2008, Summers and the remainder of the Association team executed the full collective negotiations agreements for the years 2007-2008 and 2008-2011, as did the Board (T29).

18. Kinney was the Board's sole witness. He testified that he is currently employed as Dean of Students and has been in that position for slightly over one year. Since 1978 he has been an active participant in, and representative for the Association as president, vice-president, grievance chair, membership chair and Local representative (T38). During the negotiations at issue he was an assistant negotiator and was then named by the Association as its chief negotiator (T38-T39). When provided with the March 19, 2008 MOA Kinney testified that the MOA accurately reflected what the Association and the Board had agreed to regarding

Article XVII (T41). Kinney also testified however, that there were additional changes made to Article XVII which were not written in the MOA but had been agreed upon prior to the parties' February 21, 2008 final, full team negotiating session(T42, T46). He did not know why all changes were not included in the March 19 MOA (T53).

19. Kinney testified that the elimination of the Article XVII seniority provision was included in the Board's initial proposals and presented to the Association (T45). Increase in compensation for ski chaperones had been included in the Association's two previous contract negotiations (T45).

20. According to Kinney, a week or two before the February 21 meeting, he and Association President Divietro met with Board President Skurchak, and Board Chief Negotiator Compoli to discuss several negotiations issues in an attempt to break a deadlock in their ongoing negotiations. Among the issues discussed was the elimination of the Article XVII seniority provision and an increase in money for ski chaperones. Kinney believed these items to be a high priority for both the Board and the Association (T49-T50). Kinney further testified that at the pre-February 21 meeting an oral agreement was reached to eliminate the Article XVII seniority provision in exchange for designating ski chaperones at a higher stipended weekend activities rate (T50-T52). The Association did not call Divietro as a witness,

consequently Kinney's version of the meeting is uncontradicted. I find Kinney's testimony credible as to the occurrence of and purpose for the pre-February 21 meeting and the items discussed there. I further credit Kinney's testimony that the parties' negotiators at that meeting reached an agreement to modify Article XVII as described. While the Association attempted to imply in its post hearing brief that Kinney had a personal motive for seeking the agreement to change Article XVII, there is nothing in the record to support that inference. Regardless of his current position as Dean of Students, a non-unit position, I find Kinney's testimony to be thorough, explicit and credible regarding the negotiations between himself, Divietro and the two Board members at their pre-February 21 meeting.

21. On cross examination Kinney corroborated Summer's testimony that: the minutes of the February 21, 2008 negotiation session make no reference to the elimination of the Article XVII seniority provision; the MOA contained no such reference and, that the document he prepared and presented as a summary for the Association ratification meeting contained no reference to elimination of the provision. Kinney admitted that he did not invite the other members of the Association to the pre-February 21 meeting between himself, Divietro, Skurchak and Compoli. Nor did he tell them of the results of that meeting (T58-60).

22. Before signing the March 19 MOA, Kinney realized that it did not contain reference to elimination of the seniority provision. He did not point this out to the other members of the Association team or the Board (T60).

23. After the execution of the MOA and the ratification vote, but before signing the final collective negotiations agreements Kinney fully reviewed both of them in his role as chief negotiator. He found them to reflect what he believed the Association and the Board had agreed to. He characterized the agreements as "exactly what we wanted" (T55-T56).

24. On cross-examination, Kinney testified that the value of the change designating ski chaperones as weekend activities for 10 chaperones was approximately an increase of $28.00 per chaperone, per trip. There are five trips per season, resulting in a total estimated increase in value for those positions of approximately $ 1,400.00 to $1,500.00.

25. Summers testified on rebuttal that the change for ski chaperones was not a priority for the Association because it was not part of the Association's initial proposals. According to Summers, the first time she recalls discussion of this item was at the February 21, 2009 meeting (T63).

26. Association rebuttal witness P. Ressland, who is the current Association President testified that she has been the president for slightly over one year and was not involved in the

2007-2008 negotiations (T65). Ressland is an elementary health and physical education teacher, coach for two athletic teams, playground supervisor and ski club advisor (T65). As ski club advisor she receives an annual fixed amount stipend (JX4). She is also familiar with the funding for ski chaperones and testified that the chaperones are funded through student fees (T65). On cross-examination Ressland acknowledged that the amount of a stipend received by ski chaperones is negotiated between the parties and is part of their negotiations agreement (T66).

ANALYSIS

The Association alleges that the Board violated the Act by unilaterally deleting Article XVII-paragraphs 2(a) through (d) from the parties' 2008-2011 collective negotiations agreement. The Association argues that the MOA executed on March 19, 2008 by both negotiations teams is the controlling document in this case rather than the final collective negotiations agreement, which was also executed by both teams. The Board argues that the final terms agreed upon by the parties are reflected in the fully executed 2008-2011 contract. The Board does not deny that Article XVII stipend seniority language was not included in the final contract. It asserts that the elimination of the seniority provision was part of a bilateral agreement reached by the

parties during negotiations in exchange for an increase in compensation for ski chaperones.

Because the Association essentially takes the position that the MOA reflects the final agreement between the parties, it argues that the parol evidence rule requires exclusion of the testimony of its lead negotiator, Kinney, regarding any other agreement allegedly reached by the parties insofar as it varies from the MOA. The parol evidence rule provides that when the parties reduce an agreement to writing as the intended final expression of their agreement, any parol or extrinsic evidence of earlier or simultaneous oral or written agreements should be excluded if offered to vary or contradict the terms of the written agreement. The clear terms of a collective agreement cannot be contradicted by outside evidence. Raritan Township M.U.A. P.E.R.C. No. 84-94, 10 NJPER 147 (¶15071 1984). Specifically, the parol evidence rule excludes evidence of surrounding circumstances when the purpose is to "give effect to an intent at variance with any meaning that can be attached to the words." Cariel v. King, 2 N.J. 45 (1949). See also, Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293 (1953); Borough of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 431 (¶12191 1981).

I do not agree that the parol evidence rule is implicated in this case. Here the terms of the MOA may be clear standing

alone. However, the terms of the final contract are just as clear, although different from the MOA. I cannot ignore the undisputed fact that the final contract exists and was fully reviewed, ratified and executed by both parties. The existence of two written and executed documents frames the issue in this matter, that being; does the MOA or the fully executed contract evidence the final agreement between the parties? If the final contract is the controlling document, the testimony offered by Kinney is not at variance with its terms and the parol evidence rule is inapplicable. In order to determine which document reflects the parties' agreement I have fully considered all testimony, documents and arguments of record offered by the Association and the Board.

The Commission recognizes that our Supreme Court has set forth standards for reviewing intentions of contracting parties to determine the parties final agreement. Jersey City Bd of Ed. P.E.R.C. No. 84-64, 10 NJPER 19 (¶15022 1983). In this regard there are a number of interpretative devices to discover intent. Included are considerations of provision(s) at issue, an overview of all the terms, the circumstances leading up to the formation of the contract and what occurred during negotiations to throw light upon the intent of the parties as expressed in the written contract. Kearny PBA Loc 21 v Tp of Kearny, 81 N.J. 208, 221-222 (1979).

To determine the intent of the Association and Board regarding Article XVII an examination of both the March 19, 2008 MOA and the final contract is appropriate. There is no dispute that the executed written MOA contains a reference at paragraph 14 to freezing all stipends for the 2007-2008 school year. For the 2008-2011 contract, it directs elimination of off guide increases and establishes ski chaperones as "weekend activities". No other changes to this Article are recorded in the MOA (JX-2). Likewise, Kinney's testimony with regard to the successor contract for 2007-2008 confirms that there was to be no change to Article XVII for 2007-2008, including the ski positions because "everything was frozen that year for the stipend positions; that was an agreement between the Association and the Board for that year (T-53)". In fact, the executed 2007-2008 contract mirrors Article XVII of the parties' expired agreement; no changes were made. As to the 2008-2011 contract, Kinney further testified that there was language added to the final contract which changed the Article XVII ski club provision to memorialize that ski chaperones would be designated as weekend activities for the life of that contract (T55). The MOA and the 2008-2011 executed contract reflect that change. With respect to the increase in ski chaperone compensation it is apparent that the Association was aware of this benefit and agreed to it as part of their final contract.

As to the MOA, however, there is no language which eliminates the Article XVII seniority provision. Based upon my review of the MOA and the final agreement, clearly they are different with respect to the Article XVII seniority provision, but are alike as to increased benefits for ski chaperones. Given this difference I must now review what occurred during negotiations and the circumstances leading up to the formation of the parties' final contract.[4/]

Negotiations

Association witness, Summers testified that she attended approximately ten negotiations sessions including one on February 21, 2008, prior to signing the MOA. Summers recalled that there was no mention of eliminating seniority provisions in Article XVII at the February 21 meeting and that the meeting minutes accurately reflect what occurred there (T22-24). Likewise, there was no discussion of a change to the seniority provisions during a ratification meeting at which the Association ratified the MOA (T26-T28). Summers was the sole witness presented by the Association to testify concerning what the Association believed it had agreed to. When Summers executed the MOA it reflected what she believed the parties had agreed to.[5/]

4/ Jersey City Bd of Ed., supra.

5/ Kinney testified that the Board presented a proposal to eliminate the seniority provision in its initial

(continued...)

The Association's negotiating team consisted of Kinney who was at first an assistant negotiator and then chief negotiator, Summers as the secretaries representative, teacher Eleanor Bodei, Dominic Giordano, and Divietro the Association's then-president. Kinney and Summers attended all of the team negotiation sessions for the contract. There is no evidence of whether the other team members attended all sessions. Kinney was aware of the Board's initial proposals and knew that they contained a proposal to eliminate the stipend seniority provision. He also knew that the Association had proposed changes to the ski chaperone stipend in two previous negotiations. It appears that Kinney was also responsible for reviewing the final contract document, which he did. Summers felt obliged to review final contract terms only as they related to the secretaries and there is no evidence that any other Association team member reviewed the final document prior to signing it. Finally, it was Kinney and Divietro who met with the Board's lead negotiator and president prior to the parties' February 21, final team negotiation session. By meeting with Board's negotiators, he hoped to break a deadlock in the ongoing negotiations for the next team session. Kinney credibly testified that the Board representatives and he and Divietro believed they had reached an agreement on the Article XVII

5/ (...continued)
negotiations proposals. Summers was not questioned on this point.

language at the conclusion of their meeting. In fact, based on this sequence of events it appears that deadlock was broken and at the subsequent February 21 meeting between the parties' full teams a tentative agreement on all terms was reached.

In the circumstances noted above, particularly with regard to Kinney's lengthy involvement as an active leader for the Association and his role as chief negotiator during the negotiations for the parties' recent successor contract, it is clear that he has consistently acted as an agent for the Association. Having chosen an agent, a principal may be bound for its agent's acts where a third party justifiably presumes that the agent has authority because of a business usage and the nature of the particular business.[6/] Following the standard set by the courts, the Commission has concluded that standard agency law provides for a principal to be bound by the conduct of an agent clothed with apparent authority. It has stated that:

> The test which has been applied by the courts in determining whether apparent authority existed as to a third party who had transacted business with an agent, is whether the principal has, by his voluntary act, placed the agent in such a situation that a person of ordinary prudence, conversant with the business involved, is justified in presuming that such agent has the authority to perform the particular act in question.

East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976).

6/ Napolitano v. Eastern Motor Exp., Inc. 246 F 2d 249 (3rd Cir. 1957).

Applying this principal to the instant case, the facts reveal that the Board was familiar with Kinney's historic role in the Association and has dealt with him in various situations when he was the Association's President, grievance chair, and local representative. For the duration of the negotiations at issue the Board knew him as the Association's assistant and then chief negotiator. Given this relationship, the Board viewed Kinney as a bona fide agent for the Association. Thus, when Kinney and negotiator Divietro met with the Board's chief negotiator and Board President, the Board could reasonably presume that Kinney and Divietro had the authority to negotiate and enter into an agreement on behalf of the Association which included elimination of the stipend seniority provision in exchange for an increase in the ski chaperone compensation.

The Association's witnesses testified that an increase in the ski chaperone stipend was not a priority during negotiations and that its dollar value was minimal compared to the elimination of the seniority language. However, negotiators have a wide range of discretion to make concessions and accept benefits they believe will serve the best interest of the parties represented. Belan v Woodbridge Tp. Bd. of Ed. and Woodbridge Federation of Teachers, 142 N.J. Super 486 (App. Div), certif. den 72 N.J. 458 (1976). Given Kinney's apparent authority to negotiate on behalf of the Association, the Board was not obligated to decline the

trade-off because, in the end, it may not have provided as much value to the Association as it did to the Board.

In sum, based upon the parties' previous relationship and their actions leading up to the exchange of the seniority provisions for increased ski chaperone compensation, I conclude that the Board reasonably relied upon Kinney's title and actions as evidence of his ability to enter into an agreement on behalf of the Association. Kinney, as chief negotiator intended to break what he described as a "deadlock" in overall negotiations and get movement for the next meeting of the joint negotiations teams. He and Divietro intended to trade the benefits at issue here in order to reach a full agreement. Likewise, the Board intended to make the same agreement.

The Association solicited testimony from its witness and from Kinney on cross-examination that any agreement made prior to the February 21, 2008 was never made known to the Association's full team before execution of the MOA or at its ratification meeting. It argues that the MOA is an agreement which is only enforceable contingent upon ratification. Because the elimination of the seniority agreement was not contained in the MOA, nor considered during the ratification, the Association asserts the agreement as set forth in the final contract was not ratified and is, therefore, unenforceable. While I find these omissions troubling, I cannot conclude that the MOA standing alone conveys the entire intent of the parties, particularly in

light of all of the circumstances leading up to the final agreement and the subsequent execution of the contract by the Association's full negotiating team. Moreover, with regard to the Association's ratification process, the Act does not regulate internal union conduct, City of Jersey City, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982), app. dism. App. Div. Docket No. A-768-8271 (7/22/83). There is no dispute that the procedure employed by an employee organization to ratify a collective agreement is viewed as an internal union matter and is generally considered beyond the scope of the Commission's regulatory authority. PBA (Miller), D.U.P. No. 94-4 19 NJPER 431 (¶24196 1993); Camden County College Faculty Association, D.U.P. No. 87-13, 13 NJPER 253 (¶18103 1987); Newark Building Trades Counsel, D.U.P. No. 82-34, 8 NJPER 333 (¶13151 1982). The Commission considers a union's ratification procedure a private matter and will not interject itself into that process. Likewise, the Board has no role in that procedure and cannot be held responsible for the information provided or not provided to the membership. In this case, the Board relied on the information it received that the Association had ratified the parties' agreement. The Board also ratified the agreement. It believed that agreement to include the trade between the seniority provision and the re-designation of the ski chaperone. Thereafter it drafted the final contract language to reflect what it had every reason to believe had been agreed upon and ratified by both groups.

Kinney testified that he reviewed the final drafts carefully and it reflected "what we wanted." Summers testified that she only reviewed the portions of the draft pertinent to the secretarial unit members. There is no evidence that any other Association team members reviewed any part of the drafted contract. The Association negotiations team had every opportunity to review the entire collective agreement. The Association does not dispute that its full negotiation team executed the contract. It argues that its failure to review the agreement before executing it should not bar reformation of the contract to include the seniority stipend position. In support of its argument the Association relies on Town of Kearny, P.E.R.C. No. 2005-012, 30 NJPER 352 (¶114 2004).

Kearny is distinguishable from the instant case in two important regards. In Kearny the union's negotiation team members and first vice-president, who was not even on the team, conducted two word-for-word reviews of the contract draft before executing the document. One review was completed shortly after the parties reached a tentative agreement and the second was conducted several months later but only two days before the contract was fully executed. Their review of the draft involved comparing their expired contract with the new successor draft and noting on the draft anything they believed was a mistake. The Commission, in affirming the hearing examiner's recommendations, found that the employer had unilaterally added language to the

final contract which was not included in the draft reviewed by the union's representatives either of the two times they conducted their review. The Commission agreed that having conducted thorough reviews of the contract, one of which occurred only two days before signing, the union had no reason to do another review. By completing two reviews before executing the final contract it had performed "due diligence". In the instant case the only Association team member other than Kinney to review the Board's draft was Summers. She admitted that she only reviewed the parts of the draft pertinent to her support staff constituents. The failure of the Association team to properly review the draft is significant. Had the Association sat down with the MOA and the draft and compared the two documents they would have confirmed that the change to increase the ski chaperone stipend was included in the contract. More importantly, if they had compared the two documents they could have realized that the stipend seniority provision had been omitted. Absent a satisfactory explanation for that omission the Association would presumably have raised the issue with the Board and could have refrained from executing the contract until any alleged dispute over Article XVII was resolved. Given these circumstances, unlike the hearing examiner in Kearny, I cannot conclude that the Association exercised due diligence. It's failure to review the final contract before its entire

negotiations team executed it is not the type of mistake which can release the Association from its agreement.

Kearny is further distinguishable from the instant case. In Kearny the union's entire negotiating team agreed that the change inserted into the final contract had never been negotiated, nor was there evidence that the parties had agreed to make the change. Without evidence of negotiations between the parties concerning the language at issue, the Commission found that the union could not be held to a bargain it never made. In the case before me there is evidence that the Association's chief negotiator and its president, negotiated on behalf of the Association with the Board's lead negotiator and president. Each understood that an agreement had been reached on the stipend seniority and ski chaperone provision. The ski chaperone provision was accepted at the team's February 21 meeting and subsequently included in the MOA. When Kinney reviewed the entire contract he saw no discrepancy between what the parties had negotiated and what appeared there. Likewise, the Board believed that it had correctly set forth the parties' agreement in the final contract. When all of the other members of the Association's negotiating team, including Kinney and Divietro executed the contract without raising any issues as to its content, the Board's belief as to the terms of the final agreement was confirmed. Thus, the facts in the instant case are significantly different from Kearny where the evidence showed

that the union never agreed that the inserted language at issue had been discussed or agreed upon, nor had it been included in the two contract drafts carefully scrutinized by the union's representatives.

Based on the foregoing, I find that the Board's exclusion of the stipend seniority language from the parties' 2008-2011 collective negotiations agreement was not a unilateral act which would have violated Section 5.4a(1) and (5) of the Act. I further find that there is sufficient evidence to show that the Association and the Board entered into a binding contract, the agreed upon terms of which are set forth in the 2008-2011 collective negotiations agreement.

Consistent with the above, I recommend that the Commission ORDER that the charges against the Board be dismissed in their entirety.

Susan L. Stahl
Hearing Examiner

DATED: March 12, 2010
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 22, 2010.