H.E. NO. 2010-11

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

In the Matter of

ASBURY PARK BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2009-251

ASBURY PARK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner denies Respondent Board of Education's motion for summary judgment. The Hearing Examiner held that the doctrine of res judicata was not applicable, and that a State-appointed monitor is subject to the Act and therefore if he reneged on an agreement such could be a violation of the Act.

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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Appearances:

For the Respondent
Kenney, Gross, Kovats & Parton
(Michael J. Gross, of counsel, and Douglas Kovats, on the brief)

For the Charging Party
Detzky & Hunter, LLC
(Stephen G. Hunter, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 20, 2009, the Asbury Park Education Association (Association) filed an unfair practice charge against the Asbury Park Board of Education (Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-5.4a(1) and (5)[1/] when it failed to

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...)

implement a negotiated settlement agreement that provided for back pay for Association member, William Hill (Hill).[2/]

A Complaint and Notice of Hearing issued on June 9, 2009. The Board filed an answer on July 2, 2009. A prehearing conference was held on September 10, 2009 and a hearing was scheduled for January 12, 2010; and rescheduled for January 26, 2010. The hearing was adjourned in light of the parties' partial voluntary resolution of the charge and in anticipation of filing the within motion.

On February 25, 2010, the Board filed a motion for summary judgment together with an affidavit and brief. The motion was referred to me for disposition on March 16, 2010. N.J.A.C. 19:14-4.8(a). The Board's motion asserts that the Complaint should be dismissed under the doctrine of res judicata, i.e. that a final determination on the merits had previously been reached, or in the alternative, if any agreement between the parties had been reached, the State-appointed monitor had the authority to overturn it pursuant to N.J.S.A. 18A:7A-15 et seq.

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/ The charge also included an allegation regarding union release time. That allegation was withdrawn upon voluntary resolution by the parties.

On April 5, 2010, the Association filed opposition papers, including an affidavit of the Association President and a brief. Based upon the parties' submissions, I deny the Board's motion.

The following facts are gleaned from the pleadings, as well as the briefs and affidavits and are set forth in the light most favorable to the party opposing the motion, in this case the Association.

The Board and the Association are, respectively, a public employer and a public employee representative within the meaning of the Act. Hill is a Drop Out Prevention Officer employed by the Board since September 1997 and is a member of the Association. Due to a reduction in force, Hill was not employed by the Board during the 2003-2004 school year. Hill was reemployed by the Board for the 2004-2005 school year and has remained so employed. Hill maintains that his non-employment during the 2003-3004 school year was improper under N.J.S.A. 6A:24-1.4 and, as such, he sought back pay and an adjustment in his seniority calculation for that year. Hill filed a complaint in the Superior Court of New Jersey, Docket No. L-1460-06, seeking same. By order of September 22, 2006, Hill's complaint was dismissed with prejudice as untimely and for lack of subject matter jurisdiction.

John Napolitano (Napolitano), the Association President, became aware of the September 22, 2006 Superior Court Order

dismissing Hill's complaint. Thereafter, Napolitano and NJEA UniServ Representative Ron Villano (Villano) engaged in substantive discussions and negotiations with agents and representatives of the Board, including then Board Attorney Alan Schnirman,[3/] and, later, State appointed monitor Mark Cavell (Cavell), regarding compensation owed to Hill for the 2003-2004 school year.[4/] The Association alleges that the Board, including State-appointed monitor Mark Cavell, agreed to compensate Hill for the 2003-2004 school year notwithstanding the Superior Court Order dismissing his complaint.

ANALYSIS

N.J.A.C. 19:14-4.8(d) provides that a motion for 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.

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court enunciated the standard to determine whether a genuine issue of material fact precludes summary judgment. The factfinder must "consider whether the

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3/ On August 24, 2009, a substitution of attorney was filed on behalf of the Board.

4/ In September 2006, the Commissioner of Education appointed a State monitor to oversee the Asbury Park School District.

competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. "While 'genuine' issues of material fact preclude the granting of summary judgment, . . . those that are 'of an insubstantial nature' do not." Id. at 540. If the disputed issue of fact can be resolved in only one way, it is not a "genuine issue" of material fact. Id. at 540.

Nevertheless, a motion for summary judgment should be granted cautiously. The procedure should not be used as a substitute for plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981) and N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

The Board argues that the doctrine of res judicata requires dismissal of the unfair practice complaint because Hill's Superior Court action and the unfair practice complaint are identical. I disagree.

> Broadly stated, the doctrine of res judicata bars "relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 298, 505, 589 A.2d 143 (1991). It provides that "a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Ibid. The doctrine fosters "the important policy goals of 'finality and repose; prevention of needless litigation;

> avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness. . . .'" First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352, 921 A.2d 417 (2007) (quoting Hackensack v. Winner, 82 N.J. 1, 32-33, 410 A.2d 1146 (1980)). It also "maintain[s] judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter." Velasquez v. Franz, supra, 123 N.J. at 505, 589 A.2d 143.

For the doctrine of res judicata to bar an action, there must be "substantially similar or identical causes of action and issues, parties, and relief sought" between the two actions, and a final judgment must have been entered in the earlier action by a court of competent jurisdiction. Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989).

The doctrine of res judicata is not applicable in this matter. First, the civil complaint in Superior Court was between William Hill versus the Board, the Superintendent and the Business Administrator. The parties to the instant charge are the Association and the Board; Hill is not a named party to the charge. Furthermore, the PERC Complaint cannot be identical to the cause of action asserted in the law division.[5/] The Superior Court action seeks to enforce individual rights while the matter before PERC is the collective rights of the Association to enforce an Agreement. PERC uniquely maintains jurisdiction over

5/ Neither party presented a copy of the complaint filed, only a copy of the order dismissing same.

the Act. In addition, only a majority representative may assert a violation of N.J.S.A. 34:13A-5.4a(5), so Hill could not have asserted even a substantially similar cause of action. See, N.J.S.A. 34:13A-5.4(c); Hunterdon Cty Freeholder v. CWA, 116 N.J. 322 (1989) (holding the Commission has exclusive power to adjudicate unfair practices). Finally, the Superior Court order dismissing Hill's action specifically stated that it is based upon lack of subject matter jurisdiction and for untimeliness. As such, Hill's complaint could not have been a final determination on the merits by a tribunal having competent jurisdiction over the case. Accordingly, the doctrine of res judicata is not applicable in the instant matter.

In the alternative, the Board argues that if it were found that there was an agreement between the Board and the Association to compensate Hill for back pay, the State-appointed monitor has the specific authority to invalidate such an agreement under N.J.S.A. 18A:7A-55 et seq. However, the Association asserts that an agreement to pay Hill was made with the State-appointed monitor.[6/] The Board presents no facts to dispute that an agreement was reached.

N.J.S.A. 18A:7A-55(a) grants the Commissioner of Education the authority to appoint a state monitor to "provide oversight of

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6/ Whether the State-appointed monitor had the authority to bind the Board has not been presented and is not, therefore, considered.

a board of education's business operations and personnel matters" under certain circumstances. The State monitor has "authority to override a chief school administrator's action and a vote by the board of education on any matters, . . . except that all actions of the State monitor shall be subject to the education, labor and employment laws and regulations, including the New Jersey Employer-Employee Relations Act and collective bargaining agreements entered into by the school district." N.J.S.A. 18A:7A-55b(5).

The State-appointed monitor is subject to the Act. Therefore, if the State-appointed monitor agreed to pay Hill back wages and then subsequently reneged on that agreement as alleged by the Association, then such actions could constitute a violation of the Act. N.J.S.A. 34:13A-5.4a(1) and (5).

CONCLUSION

Accordingly, the Board's motion for summary judgment is denied. Consequently, I hereby ORDER that a plenary hearing commence in this matter on August 10 and 11, 2010 at 9:30 a.m. in the Commission's offices in Trenton, New Jersey.

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Deirdre K. Hartman
Hearing Examiner

DATED: June 11, 2010
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-4.8(e) this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by June 24, 2010.