

H.E. NO. 2013-19

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

In the Matter of

HOWELL TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2011-333

HOWELL TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends dismissal of an unfair practice charge filed by the Howell Education Association, alleging that the Howell Board of Education violated the Act when it began paying all replacement teachers on step one of the salary guide without negotiations, in violation of N.J.S.A. 34:13A-5.4a(1) and (5). The Hearing Examiner found that the Association did not prove by a preponderance of the evidence that the replacement teachers were included in the negotiations unit it represents, either by the plain meaning in the Agreement, or by the Board's alleged de facto recognition of the Association as the exclusive majority representative of the replacement teachers.

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
Cleary, Giacobbe, Alfieri, Jacobs, LLC
(Robin T. McMahon, of counsel)

For the Charging Party
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, PC
(Richard A. Friedman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 25, 2011 and July 17, 2012, the Howell Township Education Association (HTEA or Association) filed a charge and amended unfair practice charge, respectively, with the Public Employment Relations Commission against the Howell Township Board of Education (Board). The Association alleges that the Board violated sections 5.4a(1), (3) and (5)^{1/} of the New Jersey

^{1/} These sections prohibit public employers, their agents or representatives from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating against employees with regard to hire, tenure of employment or any term or
(continued...)"

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) when, on or about September 1, 2010, the Board placed all replacement teachers at step one of the collective agreement's salary guide, instead of at higher steps, failing or refusing to credit the teachers for their previous experience. This allegedly changed the parties' past practice and repudiated the collective agreement, without negotiations with the Association. The HTEA seeks an order for compensation on higher steps commensurate with the affected teachers' years of experience.

On December 12, 2011, a Complaint and Notice of Hearing (C-1)^{2/} was issued on the alleged violations of 5.4a(1) and (5) of the Act; the 5.4a(3) allegation did not meet the Commission's complaint issuance standard and was dismissed. On December 21, 2011, the Board filed an Answer to the Complaint (C-2). The Board denies having violated the Act and asserts that the charge is untimely; that the teachers at issue are not members of the

1/ (...continued)
condition of employment to encourage or discourage employees from the exercise of the rights guaranteed by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ Commission exhibits are referred to as "C-", Joint exhibits are referred to as "J-", Charging Party's exhibits are referred to as "CP-" and Respondent's exhibits are referred to as "R-".

Association's negotiations unit and therefore not entitled to credit for past experience, and denies that there was a binding past practice. The Board asserts that a regulation requires they be paid at step one of the guide.

On July 24, 2012 and August 3, 2012, a hearing was conducted at which the parties examined witnesses and placed documents into the record. Briefs and reply briefs were filed by November 19, 2012. Based on the record, I make the following:

FINDINGS OF FACT

1. The Board and Association are parties to a collective negotiations agreement, effective from July 1, 2008 through June 30, 2011 (CP-2).^{3/} The recognition clause defines the negotiations unit:

. . .all professionally certified classroom teachers, special education teacher assistants, auxiliary teachers, media specialist, special services personnel, occupational therapists, certified occupational therapists, assistant (COTA) substance abuse coordinators, nurses, psychologists, principal secretaries, office assistant secretaries, media assistants, interpreters for the hearing-impaired and support staff.
[CP-2, Art. 1]

^{3/} At the time of the hearing the parties were negotiating a successor agreement.

The recognition clause has remained the same from at least 1999 to the present (1T35-1T36).^{4/}

2. Jacqueline Tennant is employed by the Board as a teacher and is a member and officer of the Association. Tennant has been employed for 25 years and has worked as both a replacement and full-time teacher (1T25-1T26). She has been first vice president for 8 years, defending the collective agreement, filing grievances, answering members' questions and conducting elections and meetings (1T28). Tennant is familiar with the contract, including the recognition clause and salary guide (1T28-1T30; CP-2). William O'Brien has been employed since 1973 by the Board as an elementary and middle school teacher, and has been the Association's president for 30 years (2T6-2T8). He negotiates and enforces the collective agreements and handles Association business (2T8). Tennant and O'Brien testified at the hearing on the Association's behalf.

Dr. Karen Jones was the assistant superintendent for curriculum, instruction and personnel from 2006 to 2011 (2T24-2T25). Before 2006, Jones was a vice principal and principal for the Board for approximately seven years (2T26-2T27, 2T77). As assistant superintendent, Jones oversaw all hiring procedures, including negotiating initial salaries with new teachers and

^{4/} Citations to the transcript of July 24, 2012 are referred to as "1T-", and to the transcript of August 3, 2012 as "2T-."

recommending candidates to the full Board (2T25, 2T89-2T90). Ronald Sanasac II has been the Board's business administrator/board secretary for the past two years; previously, he was employed by the Board for 6 years in administrative positions and was a Board member for 12 years, ending in 2001 (2T109-2T110). He is responsible for support services personnel and is the liaison with the Board's negotiations committees (2T111). As a Board member, Sanasac served on the negotiations and labor committees during several contracts (2T111). Jones and Sanasac testified for the Board.

3. There are approximately 800 teachers employed by the Board and one other negotiations unit - for principals and supervisors (2T80, 2T115-2T116).

4. The Board regularly uses two types of substitute teachers: per diem, or short term substitutes, and long-term replacement teachers. There is no specific reference to either type of substitute teacher in the recognition clause of the collective agreement (1T66, 2T105, 2T113; CP-2). The parties agree that per diem substitutes are not included in the Association's negotiations unit (1T66). Replacement teachers fill vacancies created by teachers on lengthy temporary leaves of absence - maternity leaves, short-term illnesses and the like - who are expected to return at a set future date; per diem substitutes typically work for fewer than 20 days at a time and

their work is less predictable (2T9, 2T10-2T11, 2T31). The Board has a large number of long-term absences each year and regularly uses replacement teachers (2T31). Replacement teachers are required to have a standard teaching certificate, issued by the state department of education; per diem substitutes are only required to have a certificate issued by the county superintendent (1T66-1T67, 1T72, 2T11, 2T92). Replacement teachers are treated similarly to permanent teachers: their duties are the same, they create and teach from their own lesson plans and are evaluated in the same way (1T47-1T48, 2T10).

5. The parties have negotiated a series of collective agreements over at least 25 years with teachers' salary guides consisting of step increases for experience and education (CP-2 through CP-7). In the past, prior to 2010, replacement teachers were paid amounts identical to the steps in the negotiated salary guides and advanced on the guide after having worked for the Board for at least five months and one day, though nothing in the 2008-2011 Agreement specifies an experience requirement for replacement teachers to advance on the guide (1T37; 2T98-2T99, 2T138-2T139; CP-2; J-1). Replacement teachers receive limited benefits - three leave days per year and single coverage health benefits (2T9, 2T67, 2T98-2T99).

Per diem teachers are paid according to a set daily rate which the Board determines each year; R-1 shows that the 2010-

2011 school-year per diem substitute rate was \$85.00/\$100.00 per day (1T66, 2T9-2T11, 2T32; R-1).

6. The parties disagree about whether replacement teachers are included in the negotiations unit represented by the Association (1T9, 2T9, 2T97-2T98, 2T115, 2T73). The Board does not consider the Association to be the majority representative of replacement teachers and relies on there having been no negotiations about their terms and conditions of employment, or specific references to them in a succession of negotiated Agreements (2T73-2T74, 2T94-2T95, 2T97-2T98, 2T112-2T116, 2T118-2T119; CP-2 through CP-7). No evidence demonstrates that in the past the Board acted affirmatively to notify the Association of its belief or that it objected to the Association's advocacy for the replacement teachers (2T75-2T76).

7. The Association relies on its broad recognition clause language, the absence of an exclusion of replacement teachers, the fact that replacement teachers are paid according to the negotiated guides, the fact that they advance like other teachers and receive some benefits, the fact that replacement teachers have used the grievance procedure, and the fact that a majority of the replacement teachers are dues-paying members of the Association and the Board deducts dues from their pay - the same way it deducts other teachers' dues (1T69, 2T9; CP-2). Before 2010, the Board did not notify the Association that it believed

the replacement teachers were not part of the unit in any writing or conversation (2T73-2T76).

8. The Association has filed grievances on behalf of replacement teachers (1T48-1T50, 1T63).^{5/} Article 9 of the Agreement provides that at step one, a grievant may discuss the matter with the principal "in an effort to settle the grievance informally" (CP-2; 1T50-1T51, 2T11, 2T85-2T87). Most grievances are resolved at this step (1T50-1T54, 2T11). Association President O'Brien has advocated for replacement teachers' advancement into tenure track, or regular, positions (1T48, 2T11-2T12). O'Brien personally handled this issue on behalf of Terry Rogers and Rachel Behen (2T12). The Association also filed a grievance for the replacement teachers who were filling in for a teacher on military leave longer than originally anticipated

^{5/} I do not credit the Board's assertion that the Association did not file or process grievances for any replacement teachers, despite both Jones' and Sanasac's testimony that they had not personally seen any replacement teacher grievances, beside the one concerning the 2010 salary issue (2T49, 2T51-2T52, 2T88, 2T112, 2T117; R-12). Both Tennant and O'Brien testified to specific instances of grievances, and the Board neither refuted this testimony nor disproved that most grievances are settled at the first step (2T26, 2T51-2T52, 2T86-2T88, 2T126-2T127). Jones testified that she could not recall grievances over replacement teachers, that some of her involvement with grievances was limited to those involving curriculum and instruction and she acknowledged that O'Brien's testimony concerning other informal grievances was likely true (2T26, 2T85, 2T87-2T88). Sanasac admitted that he would not have been made aware of matters informally grieved and settled below the third step - at the first, or informal - grievance step where most grievances are resolved (2T126-2T127).

(2T13-2T14). No one from the Board questioned the Association's right to deal with those issues (2T14). O'Brien was never told by any administrator that he did not have standing or could not discuss replacement teachers' issues with the administration because they were not in the unit (2T12). Association Vice President Tennant filed a written grievance for replacement teacher Ron Sanasac III in 2007-2008 (1T50-1T54, 1T63). The grievance was about to be resolved at the initial step in the grievance procedure - discussion with the principal - but Sanasac left the district (1T51-1T52, 1T63). Tennant also cited a grievance the Association filed for replacement teacher Marty Viera (1T53-1T54).

9. With respect to Association dues, if a teacher submits an authorization to the payroll department directing it to deduct dues to be sent to the Association the Board is obligated to do so (2T131). The Agreement also provides for a representation fee, which requires the Board to properly deduct and transmit the fee to the Association (CP-2). Article 7 provides that employees who do not become members of the Association during any membership year are required to pay a representation fee to the Association for that year and the Board is required to deduct the fee from the pay of non-members (CP-2). Nothing in this record shows that the Association requested or has received representation fees from replacement teachers or that the Board

automatically deducted representation fees from replacement teachers, as it is required to do for other employees.

10. Nothing in the current collective agreement, or several agreements preceding the current agreement, specifically includes or excludes replacement teachers, in fact, there are no specific references to any terms or conditions of employment of replacement teachers in any collective agreement (1T36, 1T76, 2T105, 2T113, 2T129; CP-2 through CP-7). Jones noted that nothing in the collective agreements excludes replacement teachers from the unit, but she noted that the issue of their unit membership was never discussed (2T94-2T95).

11. Over a long period - 30 years - neither the Board nor the Association specifically negotiated the terms and conditions of employment of the replacement teachers; neither sought to add specific references to replacement teachers in any writing, or in their collective agreements, despite having reopened negotiations several times over the years over other issues (1T47, 2T15-2T18, 2T20-2T21, 2T75-2T76, 2T94-2T95, 2T112-2T113, 2T114, 2T116). As a Board member, Sanasac did not recall replacement teachers being discussed in negotiations and he assumed they were not in the unit (2T115). The Association never sought to negotiate separate terms of employment of replacements (2T116).

2010 Reduction in Force

12. In June 2010, because of a severe \$6 million budget shortfall, the Board implemented a reduction-in-force (RIF), which included terminating several non-tenured teachers (2T27). Many teaching staff positions were affected by the RIF, including tenured teachers; 18 to 20 positions were eliminated, and class sizes were increased to achieve budgetary reductions (2T27). The family consumer science program was completely eliminated (2T29). Only non-tenured teachers were affected (2T28; J-2, J-3).

13. The Board and Association met several times following the announcement of the RIF, pursuant to Article 24 of the collective agreement (2T60-2T61; CP-2). The Association's representatives at the meetings did not include any replacement teachers (2T62). The Board did not propose negotiations nor did the Association request negotiations over the replacement teachers' salaries in their RIF discussions (1T42, 1T56, 2T73). At that point, the Association would not have been aware that there would be an issue about the Board's placement of all replacement teachers at step one of the salary guide, since the Board had not yet determined the rate.^{6/}

14. The Board knew it would need several replacement teachers beginning in September 2010 and, in order to ameliorate

^{6/} There is no claim that the RIF was in bad faith, however, one teacher claimed to have been improperly selected for RIF based on seniority rights (2T54, 2T59).

the effect of the RIP on the teachers who had been laid off, it voted to rehire 15 of them at its meeting in early August 2012 (2T33-2T34). R-3 is a copy of a portion of the minutes from the Board's August 11, 2010 regular meeting (2T36; R-3). It shows that the Board approved the appointment of 15 teachers to "non-tenure track leave replacement positions for the 2010/2011 school year." Before voting on R-3, the Board discussed the issue of what pay to offer the replacement teachers (2T37). The Board did not offer, and the Association did not demand, negotiations over the salary of teachers being rehired into replacement positions after the RIF (1T42, 1T56, 2T20-2T21, 2T73).

15. The State Department of Education issued "accountability guidelines" for districts, the purpose of which is "to assure the financial accountability of boards of education through State monitoring." N.J.A.C. 6A:23A-1.1. The Board understood the rules to require it to hire new positions on step one unless it was hiring for a difficult-to-fill position (2T39, 2T90). R-4 is a copy of a portion of N.J.A.C. 6A:23A-9.3 (2T41; R-4).

Paragraph 8 provides:

8. Vacant positions budgeted at no more than step one of the salary guide unless justification for the additional amount has been approved by the Department [of Education].
[R-4; 2T39-2T41]

Mindful of these guidelines and the budget shortfall, the Board voted to appoint all replacement teachers to step one of the appropriate salary guide (2T36, 2T39-2T41; R-3).^{2/}

16. The Board offered replacement positions to Ashley Kokotos, Beth Gredder, Rachel Behen, Jennifer Bolotsky, Jennifer Bullock, Larissa Sack, Kelly Pham Gilligan, and Jamielynn Cianci, who were not being renewed as regular teaching staff members (2T33-2T34). Two letters per teacher were prepared in advance to cover each possibility - appointment at step one or a higher step. Inadvertently, after the Board decided that the appointments would be at the first step, the incorrect letters were sent to the teachers, but subsequently corrected letters were sent (1T72-1T73, 2T37-2T38; R-3). Letters dated August 24, 2010, correctly identified appointments to step one, reflecting the Board's formal action at its August 11th meeting (1T46, 2T37-2T38; CP-1A, CP1-B, CP1-C, CP1-D, CP1-E; R-3).

Replacement Teachers' Individual Contracts 2010

17. Under Article 8(g) of the Agreement, the hiring step for new teachers is "subject to negotiations between the new hire and the Board" (2T89, CP-2). Jones negotiated with the

^{2/} I take administrative notice of N.J.A.C. 6A-23A-1 et seq. and note that these rules, at N.J.A.C. 6A:23A-2.1 (b), specifically prohibit executive county superintendents from contravening or modifying the Act, or limiting the scope of negotiations. Thus, the rules do not authorize a board to breach its duty to negotiate in good faith with an exclusive majority representative, within the meaning of the Act.

replacement teachers and secured signed individual contracts identifying step one as the salary rate for each of the new replacements (2T38, 2T49). R-5 is a 2-page contract, titled "Substitute Teacher Limited Employment Contract" between the Board and Rachel Behen to fill a leave replacement position for Margaret Phillips from September 1, 2010 through November 5, 2010 (2T42; R-5). Jones confirmed that, as often happens, the Board needed to have Behen continue or return later in the school year because Phillips' leave was extended (2T41-2T43, R-5).

R-6 is a similar contract for replacement teacher Jenna Bolotsky (2T43; R-6). Jones explained that R-6 consists of three contracts specifying that Bolotsky was hired for three periods, all containing beginning and ending dates, Bolotsky replaced a teacher on leave from September 1, 2010 through October 2010 and November 2010 through December 23, 2010, and she was hired to replace a different teacher from February 2011 through June 30, 2011 (2T43-2T44; R-6). The Board approves each distinct period of replacement; the exact periods of leave are often not known at the beginning of the year (2T44).

R-7 is a limited substitute replacement contract for Jamielynn Cianci to replace Suzanne Palmer-Smiga from September 2010 to October 15, 2010, and also from October 18, 2010 to January 14, 2011, to replace Danielle Gianelos (R-7; 2T45-2T46). R-8 is a contract for Larissa Sack to replace Bernadette Kovalak

from September 16, 2010 to March 25, 2011, and to replace Christina Grego from January 28, 2011 to May 31, 2011 (2T46, R-8). R-9, R-10, R-11 and R-13 are limited replacement contracts for replacement teachers Sally Thompson, Bridget Clark, Bonnie Vella and Ashley Kokolos for periods from September 1, 2010, replacing various other teachers on extended leaves (2T46-2T48, 2T50-2T51; R-9, R-10, R-11, R-13).

18. When the Board offered these non-renewed teachers replacement teaching positions effective September 2010, none of them refused the offers though some noted that by signing, they did not waive their or the Association's rights to object to the step one salary (2T48-2T49; R-6; R-10). When Jones interviewed candidates, the HTEA was not present, nor did it ask to be (2T38-2T39).

19. Shortly after school began in 2010, Association Vice President Tennant was contacted by one of the replacement teachers whose salary rate had been dropped to step one (1T56, 1T71). She investigated and learned of the Board's action and then filed a grievance over the Board's action (1T63, 2T49; R-12). R-12 is the grievance:

In accordance with ARTICLE 9, Part B, step one of the negotiated agreement between the Howell Township Education Association and the Howell Township Board of Education, the ASSOCIATION is requesting a meeting to resolve the grievance of the ASSOCIATION pertaining to, but not limited to, Article(s) of the collective agreement and any

applicable laws currently in effect between both parties.

The Association's grievance states: Actions of the Board of Education violate the terms of the Collective Bargaining Agreement and past practice where individuals of the Association are entitled to advancement on the salary guide. The Board of Education has also violated promises and contracts that were entered into with the individuals.

Please contact the HTEA 1st vice President to arrange a date for this meeting.

Relief sought: Proper placement of individuals on the salary guide with proper compensation backdated to September 1, 2010.
[R-12]

20. Jones and Tennant discussed the grievance several times over a couple of months (1T57-1T60, 2T73-2T74; R-12). Jones explained the Board wanted to hire the affected teachers to ameliorate the effects of the RIF on them but was only able to pay the first step because of the accountability regulations and its fiscal situation (2T74). Jones also explained that the Board had "never considered these people part of the bargaining unit. . . ." (2T74, 2T97-2T98). Jones did not regard the conversations as "collective negotiations" and left it that the disagreement would be referred to the lawyers (1T58-1T60, 2T95-2T97). The Board would not change its position (1T60, 2T74, 2T95-2T97).

21. The replacement teachers began the year in September 2010; all were paid at the first step.

Replacement Teachers' Salary

22. Tennant began her employment with the Board as a replacement teacher at step one of the salary guide (1T26-1T27). The following year when she was rehired at step two, she questioned the advancement, believing it was a mistake (1T27). The assistant superintendent for personnel at that time, Paul Harren, confirmed that the advancement was correct, that the Board's practice was to move teachers, including replacement teachers, up a step if they had previously worked at least five months and a day - about half a year (1T27, 1T37, 1T73-1T74).

23. Until 2010, the practice was to advance teachers one step on the guide, regardless of whether they were regular permanent teachers or replacement teachers, each year after they had worked at least five months and one day (either as a regular teacher or replacement) in a prior year (1T44-1T45; J-1). There was no difference in the way the Board treated replacement and permanent teachers with regard to salary advancement (1T45-1T46, 2T10). Nothing in the collective agreement specifies this practice (CP-2).

24. Exhibits J-1 and J-2 illustrate that other replacement teachers were advanced in accordance with the practice Tennant identified (1T37-1T38, 1T61-1T62; J-1; J-2). J-1 is a chart of several employees who worked for the Board - their employment histories with the salary guide steps they were placed on for

each position held (1T12-1T13, 1T61-1T62; J-1). Jennifer Cory was initially hired as a replacement teacher in January 2008 and paid at the first step of the then-current salary grade (1T39-1T40). Cory was hired again from September 2008 to June 2009 and was advanced to step two of the guide (1T39-1T40; J-1). In 2009-2010, Cory was hired as a regular or permanent kindergarten teacher and placed on step three (1T40-1T41).

25. J-2 is a chart of work histories and salary step placement of teachers who were notified in May 2010 that they were not being renewed or that their positions were being eliminated in the RIF, and who were subsequently rehired as replacement teachers for some part of the school year beginning in September 2010 (J-2; 1T43, 1T60). All had previous employment for at least five months and a day (1T32-1T34; J-2). Some had been employed the previous year (2009-2010) in regular positions - others in replacement positions (1T33). They include Rachel Behen, Jenna Bolotsky, Jamielynn Cianci, Jaclyn Dorf, Nicole Megan, Jessica McPolin, Kelly Pham, Larissa Sack, Sally Thompson, and Bridget Clark (1T34; J-2).

Replacement Teachers' Committee Participation, Tuition Reimbursement, Miscellaneous/Leave Benefits, and Discipline

26. Under the Agreement, teachers are entitled to tuition reimbursement (CP-2). The Board paid replacement teachers Elaine Mack and Jennifer Cory tuition reimbursement, a benefit provided in the Agreement (1T47-1T48, 2T65-2T66; CP-2). The Board

believes the payments were an error and that tuition reimbursement is not a benefit available to replacement teachers, though it did not seek recoupment of the monies (2T65-2T67, 2T99).

27. The Agreement also provides for the establishment of various advisory committees and an academic council to study issues and advise the superintendent; the Association has never included replacement teachers on the committees nor raised for discussion any replacement teacher issues in the academic council (2T27, 2T62-2T65, 2T108-2T109; CP-2). The committees generally have fewer than 20 participants and thus, overall the number of Association participants is small (2T81-2T84).

The parties stipulated:

During the seven years that Principal Joseph Isola was principal of the Middle School North, no replacement teachers served on the building level committee between the Board's representatives and the HTE3A representatives (2T108).

Isola replaced Jones as assistant superintendent.

28. Teachers are entitled to other benefits under the Agreement, however, no replacement teachers applied for or were given personal leave in excess of three absences per year, according to Jones, and no replacement teacher applied for or was granted maternity, paternity or any extended medical or sabbatical leave (2T67-2T69, 2T70, 2T72; CP-2). However, Jones

acknowledged that their taking leave would be inconsistent with their primary purpose of replacing teachers on extended leaves (2T79-2T80). No non-renewed replacement teacher ever requested a meeting with Jones, as provided in Article 23 Section B of the Agreement, to explain why he or she should be re-employed (2T63).

29. Jones does not recall a specific example, but stated she would likely have met with a replacement teacher over discipline and does not recall such a meeting (2T71-2T72).

Analysis

The issue presented is whether the Board violated the Act when it placed all replacement teachers hired for the 2010-2011 school year on step one of the salary guide. The parties disagree about whether the replacement teachers are included in the Association's negotiations unit. If the replacement teachers are included in the Association's unit, then the Board was required to negotiate with the Association before changing the practice. I find that the replacement teachers were not included in the unit, and thus, the Board did not violate the duty to negotiate changes in their terms and conditions of employment.

The Association argues that the replacement teachers are encompassed within the plain meaning of the recognition clause language, particularly in the phrase "all professionally certified classroom teachers." In the alternative, the Association argues the Board, by its conduct, granted de facto

recognition of the Association as the replacement teachers' representative. It asserts that the past practices and conduct between it and the Board concerning the treatment of replacement teachers, particularly their job duties, pay and benefits, evaluations, dues deductions and use of the negotiated grievance process prove the Board's de facto recognition that the replacement teachers are members of the negotiations unit. It argues that the Board violated the Act when it unilaterally decided to hire them at the first step of the salary guide.

The Board argues that the teachers at issue are not members of the Association's negotiations unit and, therefore, in determining their salaries, not entitled to credit for past experience. It denies that prior to September 2010, there was a binding past practice concerning replacement teachers' salary advancement. It further asserts that the RIF and a regulation required it to compensate them at no higher than step one of the guide. Finally, the Board argues that the charge is untimely. The Board argues that no contractual provisions give replacement teachers specific rights; they are not included by title in the recognition or salary clauses, or mentioned in any other article.

N.J.S.A. 34:13A-5.3 requires public employers to negotiate proposed new rules or modifications of existing rules governing working conditions with the majority representative before they are established.

N.J.S.A. 34:13A-5.4a(5) and (1) make it an unfair practice for a public employer to refuse to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

The charge is timely. N.J.S.A. 34:13A-5.4c requires that unfair practice charges be filed within six months of the conduct on which they are based. The Board formally notified the teachers of their new salaries on August 24, 2010, and implemented the change on or about September 1, 2010. The notification was a potential unfair practice and the implementation was a second potential violation. The charge was filed on February 25, 2011, less than six months after the Board's implementation of the salary policy and therefore, the charge is timely.

In PBA Local 53 v. Town of Montclair, 153 N.J. Super. 505 (App. Div. 1974), vacated and remanded 70 N.J. 130 (1976)^{8/}, the Appellate Division held that an employee organization could gain de facto status as a majority representative, that recognition need not be formal and may be inferred from conduct and

^{8/} The Supreme Court agreed with the Appellate Division's analysis but it vacated and remanded the case so that the Commission could exercise jurisdiction over the main issue. The case settled before the Commission could decide it.

circumstances.^{9/} The Commission later addressed the issue in State of New Jersey, (Dept. of Higher Ed.), P.E.R.C. No. 85-077, 11 NJPER 74 (¶16036 1985), aff'd. N.J.Supp. 2d. 162 (¶143 App. Div. 1986), where it found no violation of section 5.4a(5) of the Act in the College's unilateral reduction in certain employees' hours, finding their positions were not included in the unit. The Commission relied on its interpretation of the plain language of the recognition clause, the history of the clause and the parties' behavior in interpreting the clause.

Applying these factors here, the plain language could include the replacement teachers because, as the Association argues, it includes "all professionally certified classroom teachers," and the Board requires all replacement teachers to have professional State certifications. There is no specific exclusion of long-term substitutes or replacement teachers anywhere in the recognition clause.

The record does not contain any evidence of the history of the clause. However, the record shows that the parties have never met to discuss and reach agreement or negotiate over the replacement teachers' terms of employment. They have never memorialized their mutual understandings or agreements about the replacement teachers' terms and conditions of employment.

^{9/} This principle is in accordance with cases under the Labor-Management Relations Act 29 U.S.C. §141, et seq. ("LMRA").

With respect to their pay, the Board used the same contractually based practice with replacement teachers it uses with permanent teachers in setting their initial pay: the assistant superintendent negotiates the initial salary, and in most cases, it is the first step. Replacement teachers were paid on the first step when first hired and were able to advance on the salary guide if they had worked a half year in the past for the Board (See Findings of Fact 5, 17, 22, 23; J-1; J-2).

The parties have not apparently accorded all of the benefits in the Agreement to the replacement teachers. They receive limited benefits - three leave days per year - and single coverage health benefits. The Agreement provides for greater levels of benefits and there is no evidence the parties agreed to prorate the benefits in accordance with the replacement teachers' schedules. There is no evidence that the parties negotiated these benefits; it appears they were determined by the Board. There is scant evidence that replacement teachers received tuition reimbursement, a contractual benefit, but the Board asserted that these payments were made in error.

The Board deducts dues from some replacement teachers, apparently pursuant to N.J.S.A. 52:14-15.9(e), and transmits them to the Association, which is provided for in the Agreement (See,

Findings of Fact 7, 9; CP-2)^{10/}. However, the Board is required to do this upon any teachers' completion of a dues deduction authorization. The Board asserts that its deduction of dues is not its acknowledgment that replacement teachers are included in the unit. Dues deductions prove, at most, that the teachers became members of the Association but do not prove unit membership. Dues deductions alone do not dispose of the issue.

10/ N.J.S.A. 52:14-15.9(e), "Deduction from compensation to pay dues to employee organization; written authorization; withdrawal; negotiation of exclusive dues deduction provisions," provides in pertinent part:

Whenever any person holding employment, whose compensation is paid by this State or by any county, municipality, board of education or authority in this State, or by any board, body, agency or commission thereof shall indicate in writing to the proper disbursing officer his desire to have any deductions made from his compensation, for the purpose of paying the employee's dues to a bona fide employee organization, designated by the employee in such request, and of which said employee is a member, such disbursing officer shall make such deduction from the compensation of such person and such disbursing officer shall transmit the sum so deducted to the employee organization designated by the employee in such request.

Any such written authorization may be withdrawn by such person holding employment at any time by the filing of notice of such withdrawal with the above-mentioned disbursing officer. The filing of notice of withdrawal shall be effective to halt deductions as of the January 1 or July 1 next succeeding the date on which notice of withdrawal is filed.

It appears that all replacement teachers are not Association members and yet nothing in the record shows that the Association requested or received representation fees from non-dues paying replacement teachers, which would be true if they were unit members. If they were in the unit, the Board would be required to deduct representation fees from the replacement teachers' pay, as it is required to do from other employees.

The Board has permitted the Association to present grievances and advocate with principals over the replacement teachers' terms and conditions of employment (See, Findings of Fact 8). However, there are few examples of replacement teachers' grievances and it appears none went further than the principal's level (step one).

That the Association did not include replacement teachers on any of the advisory committees, building committees, etc., is not persuasive evidence that it did not treat them as if they were unit members; overall very few employees participated in these committees. Similarly, the fact that replacement teachers did not take maternity, paternity, sabbaticals or extended medical leaves of absence is also not persuasive that they are not unit members because they themselves are replacements for others on long-term leaves. Long-term leaves of absence, though available in the Agreement, are inconsistent with the nature of replacement teachers' employment.

Replacement teachers are treated similarly to permanent teachers in that their duties are the same, they create and teach from their own lesson plans and are evaluated in the same way (1T47-1T48, 2T10). These items signify a community of interest with permanent teachers but are not negotiable issues. See, e.g. Bd. Of Ed. of Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown-Pilesgrove Ed. Ass'n., 81 N.J. 582, 591 (1980) ("when the dominant issue is an educational goal wherein the Supreme Court stated that there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration. . .").

Long-term substitutes may arguably be eligible for membership in the negotiations unit, but the question here is whether the parties have acted in a way to have created a de facto recognition of their membership in the unit. In fact, the Board noted in its brief that it does not argue they cannot be included but that they are not now included in the unit.

The Association cites NJ Transit Bus Operations, Inc., P.E.R.C. No. 86-021, 11 NJPER 520 (¶16182 1985) in support of its de facto recognition argument. The Commission found there that the employer had improperly withdrawn its de facto recognition of a position from one union and added it to a rival union's unit. The evidence of the de facto recognition was compelling, in that the disputed job classification was specifically included in the prevailing union's unit description and the work had previously

been performed by that unit's members. There, unlike here, the job title had been expressly included in the prevailing union's agreement.

The Association also relies on Collingswood Bd. of Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985) and West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973). In Collingswood, the Commission found a de facto collective bargaining relationship existed. Citing West Paterson, it focused on:

. . . [w]hether there was . . . an organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement. West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973), modified P.E.R.C. No. 79 (1973). To determine, in turn, whether negotiations has occurred, we focus on whether there was ". . .the give and take of a bilateral relationship, through proposal and counter-proposal directed towards consummation of a mutually acceptable agreement." Henry Hudson Reg. Bd. of Ed., E.D. No. 12 (1970) and Township of Teaneck, E.D. No. 23 (1971).

Here, there is some evidence of a bilateral relationship in that grievances were permitted, dues deductions were made and replacement teachers advanced like other teachers, but there is no evidence of negotiations - exchanges of proposals and counter-proposals, and a give and take directed toward the development of mutually acceptable agreement (Findings of Fact 10 and 11).

Neither the Board nor the Association specifically negotiated the

terms and conditions of employment of the replacement teachers; neither sought to add specific references to replacement teachers in any writing, or in their collective agreements, despite having reopened negotiations several times over a long period over other issues.

The Association apparently did not ask for negotiations specifically over the replacement teachers' terms and conditions. As previously noted, replacement teachers do not appear to have access to all of the benefits in the Agreement (tuition, health benefits) and do not pay representation fees. The Association did not negotiate with the Board to acquire the benefits the replacement teachers do receive. Apart from its reliance on the recognition clause, the Association did not demonstrate that a bilateral relationship exists. Accordingly, in 2010, the Board had not de facto recognized the replacement teachers and they were not included in the Association's unit. The Board did not violate the Act when, in September 2010, it changed the replacement teachers' salary advancement practice and assigned them all to step one. Until the Board and Association negotiate the replacement teachers terms and conditions of employment, there are no binding past practices to be enforced. See, State of New Jersey, (Dept. of Higher Ed.), P.E.R.C. No. 85-077.

The Board's arguments regarding a potential infringement on its managerial prerogative to conduct a RIF are irrelevant; the

Association does not challenge the Board's right to conduct a RIF and aptly notes that replacement teachers serve a purpose unrelated to RIF - filling in for teachers' long-term absences, not filling in after RIFs. The Board cites several cases that deal with issues not present here - the impacts of RIF, especially on workload, and a Board's right to fill vacancies or absences with substitutes. A Board has the right to employ long-term substitutes but it may not repudiate negotiated agreements or binding past practices that apply to them. Here, the evidence does not support a finding that a collective negotiations relationship exists, and the Board was free to offer the replacement teachers the first step salary.

Accordingly, based on the entire record, I make the following:

Conclusions of Law


1. The Association did not prove by a preponderance of the evidence that the replacement teachers employed by the Board were included in the negotiations unit it represents either by the plain meaning in the Agreement, or by the Board's alleged de facto recognition of the Association as the exclusive majority representative of the replacement teachers.

2. The Board did not violate N.J.S.A. 34:13A-5.4a(1) or (5) of the Act when in September 2010, it began paying all replacement teachers the first step of the negotiated salary

guide, without first negotiating with the Association, whether it regarded them as new hires or returning employees.

Recommendation

Based on the above, I recommend that the Commission dismiss the charge in its entirety.


Patricia Taylor Todd
Hearing Examiner

DATED: June 20, 2013
Trenton, NJ

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 July 1, 2013.