

H.E. NO. 2024-2

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

In the Matter of

MENDHAM BOROUGH BOARD
OF EDUCATION,

Charging Party,

-and-

Docket No. CE-2022-001

MENDHAM BOROUGH EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

A Hearing Examiner grants in part Mendham Borough Board of Education's (Board) motion for summary judgment and denies the Mendham Borough Education Association's (Association) cross-motion for summary judgment. The charge alleges that the Association violated subsections 5.4b(3) and (4) of the Act by refusing to sign the parties' successor collective negotiations agreement (CNA) and proposing, post-ratification, to revise the salary guide progression chart that appears in Article I.B.1. The Hearing Examiner found that the parties did in fact reach an agreement; and that the agreement encompassed the salary guide progression chart within Article I.B.1, among other terms conditions of employment in the 2016-2021 CNA, remaining unchanged given that it was not expressly modified in the 2021-2025 MOA. The Hearing Examiner also found that in the absence of proposing any substantive change, the Board was under no obligation to negotiate with the Association regarding the salary guide progression charge within Article I.B.1 after the parties concluded negotiations for a successor agreement via the fully-executed/fully-ratified 2021-2025 MOA. The Hearing Examiner also found that the salary guide progression chart within Article I.B.1 of the Board's proposed 2021-2025 CNA was/is a continuation of existing terms and conditions of employment. Accordingly, the Hearing Examiner concluded that the Association violated subsection 5.4b(3) of the Act by refusing to sign the Board's proposed 2021-2025 CNA.

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 Charging Party,
Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys
(Matthew J. Giacobbe, of counsel and on the brief;
Gregory J. Franklin, of counsel and on the brief)

For the Respondent,
Oxfeld Cohen, P.C., attorneys
(Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT &
CROSS-MOTION FOR SUMMARY JUDGMENT

On August 31, 2021 and February 6, 2023, Mendham Borough Board of Education (Board) filed an unfair practice charge and amended charge against Mendham Borough Education Association (Association or MBEA). The amended charge alleges that the Association violated subsections 5.4b(3) and (4)^{1/} of the New

^{1/} These provisions prohibit employee organizations, their representatives or agents from "(3) Refusing to negotiate in good faith with a public employer, if they are the majority (continued...)"

Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by refusing to sign the parties' successor collective negotiations agreement (CNA) and proposing, post-ratification, to revise the salary guide progression chart that appears in Article I.B.1.

On June 28, 2022, the Director of Unfair Practices (Director) issued a Complaint and Notice of Pre-Hearing. On July 12, 2022, the Association filed an Answer asserting the following:

1. The MBEA admits that an MOA between the parties was signed on or about April 9, 2021. Said MOA did not contain salary guides.
2. Subsequently, on or about April 27, 2021, the parties agreed to and signed off on salary guides.
3. Over the next 3.5 months the parties worked towards incorporating the changes established in the MOA into a fully-integrated CNA.
4. There has always been a salary guide "chart" in the CNA, which, at times, involved "arrows" to demonstrate salary guide movement. This is very significant as the salary guides in Mendham Borough are rather unique and without either arrows or explanatory language how movement on the salary guides is to occur is much less than clear.

1/ (...continued)
representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit"; and "(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

5. During the immediate prior negotiations, i.e., the negotiations which led to the 2016-2021 CNA, Super Conciliator James Mastriani issued a letter dated October 2, 2018, to address this precise issue and stated that if any issue that arose concerning salary guide movement, he "retained jurisdiction". However, said letter addressed the salary guide movement in the predecessor Agreement to the current one in issue herein.

6. Without either arrows or explanatory language no one, not the Board, not the MBEA, and most importantly, certainly not the members of the MBEA, would have any idea how movement on the salary guide is to occur.

7. It must also be noted that as a result of the negotiations in question, the salary guide chart must be modified to reflect the changes that occurred in the bargaining process. In reality, the only issue in question is not whether the salary guide chart must be changed; it must be. The real issue is what those changes/modifications will be; and that issue has not been agreed to by the parties. To be clear, the MBEA will sign no CNA until this issue has been resolved.

[Association's Answer.]

On January 18, 2023, this matter was reassigned to me as Hearing Examiner.

On March 24, 2023, the Board filed a motion for summary judgment, together with a brief and exhibits. On April 11, 2023, the Association filed opposition to the Board's motion for summary judgment and a cross-motion for summary judgment, together with a brief, exhibits, the certification of the Association's Lead Negotiator Elizabeth Goncalves (Goncalves),

and the certification of New Jersey Education Association (NJEA) consultant Louis Migliacci (Migliacci). On April 28, 2023, the Board filed a reply brief. On May 1, 2023, the Association filed a sur-reply brief.

On May 1, 2023, the Commission referred the Board's motion for summary judgment and the Association's cross-motion for summary judgment to me for a decision. See N.J.A.C. 19:14-4.8(a). On May 23, 2023, counsel engaged in oral argument during a telephone conference call. At the conclusion of oral argument, I asked counsel to meet/confer with the parties regarding a settlement proposal. Ultimately, it became clear to me that it was necessary to render a decision with respect to the instant cross-motions for summary judgment because there was no mutual interest in settlement.

On June 19, 2023, I directed the parties to file additional limited briefing/evidence regarding the following discrete issue:

is the salary guide progression chart in the Board's proposed 2021-2025 CNA (specifically Art. I.B.1) a continuation of existing terms and conditions of employment as set forth in the salary progression chart in the parties' 2016-2021 CNA (specifically Art. I.B.1), or not.

On July 17, 2023, the Board filed a supplemental brief together with exhibits. On August 17, 2023, the Association filed a supplemental brief.

Accordingly, I have reviewed the parties' submissions. The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. The Association represents all employees of the Board holding the position of teacher, librarian, psychologist, social worker, and learning coordinator; and specifically excluding all administrators, clerical, custodial/maintenance, aides, teaching assistants, and all other support staff employed by the Board. See 2013-2016 CNA, Preamble.
2. The Board and the Association are parties to an expired collective negotiations agreement (CNA) in effect from July 1, 2013 through June 30, 2016 (see Board's Br., Ex. J); an expired CNA in effect from July 1, 2016 through June 30, 2021 (see Migliacci Certification, Ex. 1); and a fully-executed/ratified memorandum of agreement (MOA) in effect from July 1, 2021 through June 30, 2025 (see Board's Br., Exhs. B-C). The grievance procedure ends in advisory arbitration except with respect to the issue of equivalency of insurance coverage.
3. For the parties' 2007-2010 collective agreement, the following sequence of events occurred:
 - a. The parties completed negotiations and an MOA was executed by both parties.

- b. The MOA was ratified by both parties.
- c. After ratification of the MOA, the Guide Movement Chart, with arrows, was jointly agreed upon by both parties and added to the CNA.
- d. The CNA was executed by both parties.

[Goncalves Certification, ¶3.]

4. For the parties' 2010-2013 collective agreement, the following sequence of events occurred:

- a. The parties completed negotiations and an MOA was executed by both parties.
- b. The MOA was ratified by both parties.
- c. After ratification of the MOA, the Guide Movement Chart, this time without arrows, as agreed by both parties, was added to the CNA.
- d. The CNA was executed by both parties.

[Goncalves Certification, ¶4.]

5. For the parties' 2013-2016 collective agreement, the following sequence of events occurred:

- a. The parties completed negotiations and an MOA was executed by both parties.
- b. The MOA was ratified by both parties.
- c. After ratification of the MOA, the Guide Movement Chart, this time again without arrows, as agreed by both parties, was added to the CNA.
- d. The CNA was executed by both parties.

[Goncalves Certification, ¶5.]

6. For the parties' 2016-2021 collective agreement, the following sequence of events occurred:

- a. The parties completed negotiations and an MOA was executed by both parties.
- b. The MOA was ratified by both parties; the Association ratified on/about June 20, 2018.
- c. After ratification of the MOA, a number of issues were identified including retroactive pay. Thereafter, on/about September 15, 2018 the parties received clarification regarding retroactive pay language from Super Conciliator James Mastriani (Mastriani).
- d. When the parties remained unable to finalize language for a CNA, Super Conciliator Mastriani held a telephone conference call. Thereafter, on/about October 1, 2018 the Board's counsel sent a memorandum to Super Conciliator Mastriani that addressed the Guide Movement Chart.
- e. On October 2, 2018, Super Conciliator Mastriani sent a memorandum to the parties that provides:

Having been noticed as to the issues of concern raised by the Board, and based upon observations made below, I hereby direct both parties to sign the collective negotiations agreement and for the Board to continue processing retroactive payments to unit employees to completion based upon the following.

I note that the draft collective negotiations agreement ("CNA") between the Mendham Borough Board of Education ("Board") and the Mendham Borough Education Association ("Association") contains a Salary Guide Movement Chart in Article I.B that illustrates employees' salary step progression in the incorporated salary guides. Pursuant to Article I.C.3 of the CNA, employees must work ninety-three (93) days of a possible one hundred and eighty-

five (185) days to progress to the next step on the salary guide in the following school year. Specifically, employees progress horizontally across and one step down for each year noted in the incorporated Salary Guide Movement Chart. By way of example, assuming that an employee has worked the requisite number of days in accordance with Article I.C.3 of the CNA, and the employee was on Step 12-13 during the 2015-15 school year (base year), that employee would progress as follows: Step 13-14 in the 2016-17 school year; Step 14-15 in the 2017-18 school year; Step 15-16 in the 2018-19 school year; Step 16-17 in the 2019-20 school year; and Step 17-18 in the 2020-21 school year.

I recognize that the Association retains the ability to raise a claim that a member has not been properly placed on the salary movement chart. Because I have retained jurisdiction to assist the parties in resolving any dispute about an employee's salary guide placement and/or progression based on the Salary Guide Movement Chart, any such disagreement that arises during the term of the Agreement may be submitted to me for resolution.

- f. The CNA was executed by both parties by/before September 26, 2018.

[Goncalves Certification, ¶6, Ex. G; Migliacci Certification, Ex. 1 (emphasis added).]

7. Article I of the parties' 2016-2021 CNA, entitled "Salary Schedule," provides in pertinent part:

B. STRUCTURE - The salary schedule is structured to provide for movement in two directions, vertical, referred to as steps; and horizontal, referred to as levels.

1. STEPS - Advancement at each step on the salary schedule shall be as provided herein. Steps shall correspond to years of accredited service.

Guide Movement

BASE	16-17	17-18	18-19	19-20	20-21
1	1	1	1	1	1
2-3	2	2	2	2	2
4-5	3-4	3	3	3	3
6-7	5-6	4-5	4	4	4
8	7-8	6-7	5-6	5	5
9	9	8-9	7-8	6-7	6
10-11	10	10	9-10	8-9	7-8
12-13	11-12	11	11	10-11	9-10
14-15	13-14	12-13	12	12	11-12
16-17	15-16	14-15	13-14	13	13
18	17-18	16-17	15-16	14-15	14
19	19	18-19	17-18	16-17	15-16
20	20	20	19-20	18-19	17-18
21	21	21	21	20-21	19-20
22	22	22	22	22	21-22
23	23	23	23	23	23
24-26	24	24	24	24	24
27	25+	25+	25+	25+	25+

2. LEVELS - Teachers shall be placed on the salary schedule according to seven training levels as follows:

- Level I Bachelor's degree
- Level II Bachelor's degree plus fifteen (15) approved credit points
- Level III Bachelor's degree plus thirty (30) approved credit points
- Level IV Master's degree
- Level V Master's degree plus fifteen (15) approved credit points
- Level VI Master's degree plus thirty (30) approved credit points
- Level VII Master's degree plus forty-five (45) approved credit points

[Migliacci Certification, Ex. 1.]

8. On December 8, 2020, the parties commenced negotiations for a successor agreement by executing mutually agreed upon "Ground Rules for Negotiations" (Ground Rules). See Board's Br., Ex. A. Paragraph 11^{2/} of the parties' December 8, 2020 Ground Rules provides:

Salary guides shall be mutually developed and agreed upon by both parties.

[Board's Br., Ex. A.]

9. On January 6, 2021, the Association proposed - among other things - that the parties' successor agreement include the following:

^{2/} The parties' December 8, 2020 Ground Rules contain a typo - i.e., there are two paragraphs numbered "10." Accordingly, the second paragraph "10" will hereinafter be referred to as paragraph "11."

Article I (p.2) Salary Schedule

* * *

B. Guide Movement

Add diagonal lines to indicate movement from year to year.
Add new contract years based upon settlement.

[Board's Br., Ex. K.]

10. On April 9, 2021, the parties reached an MOA for the period July 1, 2021 through June 30, 2025. See Board's Br., Ex. B. The parties' 2021-2025 MOA provides in pertinent part:

2. Salary Schedules A - Teachers - (inclusive of increment)

- Year 1: 3.05% of the 2020-2021 base effective July 1, 2021
- Year 2: 3.05% of the 2021-2022 base effective July 1, 2022
- Year 3: 3.05% of the 2022-2023 base effective July 1, 2023
- Year 4: 3.05% of the 2023-2024 base effective July 1, 2024

3. Salary Schedules B - Coaches, C - Extracurricular, D - Band, et al. - Increases to each schedule.

- Year 1: 2.0% of the 2020-2021 base effective July 1, 2021 - as identified in the 2016-2021 contract
- Year 3: 2.0% of the 2022-2023 base effective July 1, 2023

* * *

5. Salary guides shall be mutually developed and agreed upon by the parties.

* * *

14. All terms and conditions of employment in the previous Collective Bargaining Agreement shall remain unchanged except as expressly modified herein.

* * *

17. All negotiations proposals not listed herein are considered withdrawn by the parties.

[Board's Br., Ex. B.]

11. On/about April 27, 2021, the parties reached an agreement on salary guides for the 2021-2025 collective agreement. See Association's Answer, ¶2.
12. From June 16, 2021 through August 23, 2021, the parties exchanged proposals for incorporating the changes established in the 2021-2025 MOA into a fully-integrated CNA for the period 2021-2025. However, the parties were unable to reach agreement - particularly regarding the salary guide progression chart - and the Board has insisted upon using its proposed 2021-2025 CNA. See Migliacci Certification, ¶10, Ex. 8.
13. Article I of the Board's proposed 2021-2025 CNA, entitled "Salary Schedule," provides in pertinent part:
 - B. STRUCTURE - The salary schedule is structured to provide for movement in two directions, vertical, referred to as steps; and horizontal, referred to as levels.
 1. STEPS - Advancement at each step on the salary schedule shall be as provided herein. Steps shall correspond to years of accredited service.

	Year 1	Year 2	Year 3	Year 4
2020-2021	2021-2022	2022-2023	2023-2024	2024-2025
				1
		1	1-2	2-3
1	1-2	2-3	3-4	4-5
2	3	4	5	6
3	4	5	6	7
4	5	6	7	8
5	6	7	8	9
6	7	8	9	10
7-8	8-9	9-10	10-11	11-12
9-10	10-11	11-12	12-13	13-14
11-12	12-13	13-14	14-15	15-16
13	14	15	16	17
14	15	16	17	18
15-16	16-17	17-18	18-19	19-20
17-18	18-19	19-20	20-21	21-22
19-20	20-21	21-22	22-23	23+
21-22	22-23	23-24	24+	
23	24	25+		
24	25+			
25+				

2. LEVELS - Teachers shall be placed on the salary schedule according to seven training levels as follows:

- Level I Bachelor's degree
- Level II Bachelor's degree plus fifteen (15) approved credit points
- Level III Bachelor's degree plus thirty (30) approved credit points
- Level IV Master's degree
- Level V Master's degree plus fifteen (15) approved credit points
- Level VI Master's degree plus thirty (30) approved credit points
- Level VII Master's degree plus forty-five (45) approved credit points

[Board's Br., Ex. D.]

14. NJEA consultant Migliacci certifies that the Board's "proposed chart is changing the existing chart that was in the [2016-2021] CNA"; that "[i]t appears that . . . the Board is claiming that the parties agreed to leaving the outdated chart in the new CNA"; and that "the real issue in this matter is that the salary chart has to be dealt with, it's a matter of how to deal with it that is at issue." See Migliacci Certification, ¶¶5-8.
15. I take administrative notice^{3/} that the Board has conceded/explained that step progression on the salary guide progression chart within Article I.B.1 of the Board's proposed 2021-2025 CNA is sequential and, therefore, a continuation of existing terms and conditions of employment - i.e., pursuant to Super Conciliator Mastriani's October 2, 2018 interpretation, step progression on the salary guide progression chart within Article I.B.1 of the parties' 2016-2021 CNA was also sequential. See Board's Supplemental Br. at 1-2, Exhs. A-B; Migliacci Certification, Ex. 1; Association's Supplemental Br. at 1-2.
16. I also take administrative notice that the Association has acknowledged the Board's concession/explanation, specifying that "[a]ccepting Super Conciliator Mastriani's verbiage as

^{3/} See N.J.A.C. 19:14-6.6(a) ("[n]otice may be taken of administratively noticeable facts").

to how movement on the salary guide is to occur, on the record, is a large step in the right direction"; and that the Association "will accept . . . Mastriani's verbiage . . . as governing and being incorporated by reference as a term of the CNA going forward" See Association's Supplemental Br. at 1-2. However, the Association believes that "the Board, in accepting Mastriani's verbiage from the most recent past negotiations, must . . . also accept the structure of the movement guide upon which Mastriani was opining." Id.

17. On August 31, 2021 and February 6, 2023, the Board filed the underlying unfair practice charge and amended charge. See Board's Charge; Amended Charge.

STANDARD OF REVIEW

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{4/} In determining whether summary judgment

^{4/} N.J.A.C. 19:14-4.8(e) provides:

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 that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or

(continued...)

is appropriate, we must ascertain “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Id. at 523. “Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial” and “should be denied unless the right thereto appears so clearly as to leave no room for controversy.” Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

While a party is not required to file an affidavit or certification in support of summary judgment, where a “party opposing the motion [for summary judgment] does not submit any affidavits or documentation contradicting the moving party’s affidavits and documents, then the moving party’s facts may be considered as true, and there would necessarily be no material factual issue to adjudicate unless, per chance, it was raised in the movant’s pleadings.” State of New Jersey (Corrections), H.E.

4/ (...continued)

cross-motion for summary judgment may be granted and the requested relief may be ordered.

No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020) (citing CWA Local 1037 (Schuster), H.E. No. 86-10, 11 NJPER 621, 622 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); City of Hoboken, H.E. No. 95-17, 21 NJPER 107 (¶26065 1995), adopted P.E.R.C. No. 95-91, 21 NJPER 184 (¶26117 1995); Nutley Tp., H.E. No. 99-18, 25 NJPER 199 (¶30092 1999) (final agency decision); N.J.A.C. 1:1-12.5(b) (“[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding”). As the New Jersey Supreme Court explained in Judson:

[I]f the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature . . . he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.

[17 N.J. at 7.]

“[N.J.S.A. 34:13A-5.4b(3)] requires a majority representative to negotiate in good faith with a public employer concerning terms and conditions of employment.” Hackensack Bd. of Ed., D.U.P. No. 2020-11, 46 NJPER 506 (¶112 2020) (citing Glen Rock Bd. of Ed., H.E. No. 81-37, 7 NJPER 213 (¶12095 1981), rev'd in pt., P.E.R.C. No. 82-11, 7 NJPER 454 (¶12202 1981)). “To

prove a violation of this section, an employer must establish that the majority representative, by its conduct, adversely impacted negotiations or was an impediment to reaching an agreement." Id. (citing Rutgers University, P.E.R.C. No. 2017-4, 43 NJPER 1 (¶18 2016)).

"N.J.S.A. 34:13A-5.4b(4) makes it an unfair practice for an employee organization to refuse '. . . to reduce a negotiated agreement to writing and to sign such agreement.'" Glassboro Bor., I.R. No. 2020-10, 46 NJPER 356 (¶86 2020). "If a majority representative is found to have violated section 5.4b(4), it will likely be found to have violated section 5.4b(3), too." Id. (Cf. Irvington Tp., P.E.R.C. No. 2010-44, 35 NJPER 458 (¶151 2009)).

"N.J.S.A. 34:13A-5.3 provides, in part: When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and majority representative." Id.

"Accordingly, the Commission may determine whether an agreement was formed and if so whether [the majority representative] refused to sign a written agreement embodying the terms of agreement. Glassboro Bor., I.R. No. 2020-10, 46 NJPER 356 (¶86 2020) (citing City of Newark, P.E.R.C. No. 2016-56, 42 NJPER 441 (¶119 2016)). The Commission has held that "[s]ummary judgment is properly granted in a case alleging a violation of 5.4a(6) if the material facts of record establish without any genuine

dispute that the parties have reached an agreement and that the respondent has refused to sign that agreement.” Irvington Tp., P.E.R.C. No. 2010-44, 35 NJPER 458 (¶151 2009) (citing Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-117, 13 NJPER 282 (¶18118 1987); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983)).

ANALYSIS

I. Fully-Executed/Fully-Ratified MOA

The Commission has held that its jurisdiction in 5.4a(6) matters “is limited to determining whether an agreement has been reached, and whether a party refused to sign that agreement.” Fair Lawn Bor., H.E. No. 91-33, 17 NJPER 201 (¶22085 1989), adopted P.E.R.C. No. 91-102, 17 NJPER 262 (¶22122 1991). In Fair Lawn Bor., the Hearing Examiner stated the following:

In order to determine whether an agreement has been reached we must first discover the intent of the parties. The Supreme Court in Kearny P.B.A. Local #21 v. Town of Kearny, 81 N.J. 208, 221-222 (1979) listed a number of interpretative devices that have been used to discover the parties’ intent. They included consideration of: the particular clauses; circumstances leading up to the creation of the contract; and review of the parties’ conduct regarding the disputed provisions. In addition, in Jersey City Bd. of Ed. [, P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983),] the Commission explained that the intent of the parties, as clearly expressed in writing, is the controlling factor, thus it concluded that the starting point in determining what the parties agreed to was an examination of their memorandum of agreement.

[17 NJPER at 205.]

The Commission "has expressed a reluctance to set aside an agreement which is clear on its face" and "[a] party seeking such relief must establish by 'clear, satisfactory, specific and convincing evidence that the written agreement does not accurately reflect what the parties had intended.'" Paterson Bd. of Ed., P.E.R.C. No. 90-42, 15 NJPER 688 (¶20279 1989) (citing Hillside Bd. of Ed., P.E.R.C. No. 89-57, 15 NJPER 13 (¶20004 1988)). "While the Commission has recognized that harmonious labor relations would not be served by enforcing contract language that conflicts with both parties' intent, it has warned that a party may not be excused from the unintended consequences of a negotiated agreement" and "cannot expect relief merely because it did not realize the consequences of its assent." Id.; see also Freehold Reg. H.S. Bd. of Ed., H.E. No. 82-60, 8 NJPER 410 (¶13188 1982), adopted P.E.R.C. No. 83-61, 9 NJPER 14 (¶14005 1982), aff'd NJPER Supp.2d 140 (¶124 App. Div. 1984) (holding that "a party drafting a collective agreement cannot deviate from the terms and conditions of employment written into a memorandum of agreement"; finding, however, that the employer did not violate subsections 5.4a(5) or (6) when it also included a salary schedule that "precisely reflect[ed] the . . . established past practice concerning the compensation of long-term substitutes" when/where the union "concede[d] that it did not seek to

negotiate the issue of salaries for long-term substitutes . . . [such that] no proposals seeking to modify this past practice were raised or discussed during negotiations”; specifying that the employer “merely codified a term and condition of employment which both sides had implicitly accepted and neither side had sought to change”).

Here, it is undisputed that the parties engaged in good faith negotiations to reach their fully-executed/fully-ratified - and currently effective - 2021-2025 MOA. See Association’s Answer, ¶¶1-7; Board’s Br., Exhs. A-C. It is also undisputed that as part of those negotiations, the Association proposed that the salary guide progression chart within Article I.B.1 include “diagonal lines to indicate movement from year to year.” See Board’s Br., Ex. K. It is also undisputed that although the 2021-2025 MOA **did include** agreed-upon annual wage increases and that salary guides would be “mutually developed and agreed upon by the parties”,^{5/} the 2021-2025 MOA **did not include** any changes/specifications about the salary guide progression chart within Article I.B.1 (e.g., diagonal lines). See Board’s Br., Ex. B at ¶¶2-3, 5. It is also undisputed that the parties’ 2021-2025 MOA specified that “[a]ll terms and conditions of employment in the previous Collective Bargaining Agreement shall remain

^{5/} The parties’ December 8, 2020 Ground Rules also specified that “[s]alary guides shall be mutually developed and agreed upon by both parties.” See Board’s Br., Ex. A at ¶11.

unchanged except as expressly modified herein"; that "[a]ll signed Tentative Agreements previously agreed upon during the course of these negotiations will be part of this successor Collective Bargaining Agreement . . . [including] [t]he signed scattergrams that will serve as base costs"; and that "[a]ll negotiations proposals not listed herein are considered withdrawn by the parties." See Board's Br., Ex. B at ¶¶14, 16-17. It is also undisputed that after the parties executed and ratified the 2021-2025 MOA, they subsequently reached an agreement on salary guides for the 2021-2025 collective agreement. See Association's Answer, ¶2. Accordingly, based upon an examination of the parties' 2021-2025 MOA and related "interpretative devices" specified above, I find that the parties did in fact reach an agreement; and that the agreement encompassed the salary guide progression chart within Article I.B.1, among other terms conditions of employment in the 2016-2021 CNA, remaining unchanged given that it was not expressly modified in the 2021-2025 MOA.

In addition, although in the past (e.g., the parties' 2007-2010, 2010-2013, 2013-2016, 2016-2021 collective agreements) the Board may have voluntarily negotiated with the Association regarding the salary guide progression chart within Article I.B.1 **after** the parties had reached a fully-executed/fully-ratified MOA, the Board was under no legal obligation to do so and the

Association's reliance upon same in this instance (i.e., 2021-2025 collective agreement) was/is misplaced. See Paterson Bd. of Ed.; Hillside Bd. of Ed.; Freehold Reg. H.S. Bd. of Ed.

Similarly, although in the past (e.g., the parties' 2016-2021 collective agreement) the Board may have voluntarily accepted a super conciliator's interpretation of - and jurisdiction over disputes during the term of the agreement regarding - the salary guide progression chart within Article I.B.1 **after** the parties had reached a fully-executed/fully-ratified MOA, the Board was under no legal obligation to do so and the Association's reliance upon same in this instance (i.e., 2021-2025 collective agreement) was/is misplaced, particularly given that the parties voluntarily reached a successor agreement outside the auspices of a mediator/conciliator/super conciliator. Id.; see also N.J.S.A. 34:13A-35^{6/}; N.J.A.C. 19:12-4.4(e) ("[t]he super conciliator

6/ N.J.S.A. 34:13A-35, entitled "Investigatory proceedings," provides (emphasis added):

The super conciliator shall promptly schedule investigatory proceedings. The purpose of the proceedings shall be to:

- a. Investigate and acquire all relevant information regarding the dispute between the parties;
- b. Discuss with the parties their differences, and utilize means and mechanisms, including but not limited to requiring 24-hour per day negotiations, until a voluntary settlement is reached, and provide recommendations to resolve the parties' differences;

(continued...)

shall have the authority to exercise the powers granted by P.L.2003, c.126 to institute non-binding procedures deemed appropriate to resolve the parties' negotiations impasse" (emphasis added)). Instead, it was incumbent upon the Association - as it did in this instance - to make any/all proposals about changes to the salary guide progression chart within Article I.B.1 during negotiations for the parties' 2021-2025 collective agreement; and to reach a satisfactory resolution regarding same before concluding those negotiations and executing/ratifying an MOA, particularly given that the Association agreed to language within the 2021-2025 MOA specifying that "[a]ll negotiations proposals not listed herein are considered withdrawn by the parties", "[a]ll terms and conditions of employment in the previous Collective Bargaining Agreement shall remain unchanged except as expressly modified herein", and "[s]alary guides shall be mutually developed and agreed upon by the parties"^{7/} (Board's Br., Ex. B at ¶¶5, 14,

6/ (...continued)

- c. Modify or amend the fact finder's report for reconsideration by the parties in a further effort to achieve a voluntary settlement by the parties; and
- d. Institute any other non-binding procedures deemed appropriate by the super conciliator.

7/ I find that this language within the parties' December 8, 2020 Ground Rules and 2021-2025 MOA clearly demonstrates that the Association was aware that it could seek to reserve its rights, or defer mutual agreement until after MOA
(continued...)

17). See State of Jersey, H.E. No. 85-30, 11 NJPER 179, 189 n.28 (¶16079 1985), adopted P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985) (citing Washington Construction Co. Inc. v. Spinella, 8 N.J. 212, 217 (1951)) (noting that a party cannot “obtain through the unfair practice forum what it could not obtain through negotiations”). Accordingly, in the absence of proposing any substantive change, I find that the Board was under no obligation to negotiate with the Association regarding the salary guide progression charge within Article I.B.1 **after** the parties concluded negotiations via the fully-executed/fully-ratified 2021-2025 MOA.

II. Unchanged/De Minimis Change to Terms & Conditions of Employment

A majority representative is entitled under the Act to negotiate “terms and conditions of employment” on behalf of unit employees. See N.J.S.A. 34:13A-5.3. However, not all changes implicate “terms and conditions of employment.” The New Jersey Supreme Court has defined negotiable terms and conditions of employment as “those matters which intimately and directly affect the work and welfare of public employees and on which negotiated

7/ (...continued)
execution/ratification, regarding any aspect of the parties’ MOA. Despite this awareness, the Association failed to obtain (or insist upon until the point of impasse) such a reservation/deferral regarding the salary guide progression charge in Article I.B.1 within the parties’ fully-executed/fully-ratified 2021-2025 MOA.

agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.” Paterson PBA Local 1 v. City of Paterson, 87 N.J. 78, 86 (1981) (quoting State v. State Supervisory Employees Ass’n, 78 N.J. 54, 67 (1978)). The Court has identified “prime examples” and “essential components” of terms and conditions of employment under the Act, such as wages, working hours, compensation, an employee’s “physical arrangements and facilities” and “customary fringe benefits.” Atlantic Cty., 230 N.J. 237, 253 (2017); State Supervisory Employees, 78 N.J. at 67 (citing Englewood Bd. of Ed. v. Englewood Teachers’ Ass’n, 64 N.J. 1, at 6-7).

In Local 195, IFPTE v. State of New Jersey, 88 N.J. 393 (1982), the New Jersey Supreme Court established the standard for determining whether a change in a term and condition of employment is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulations; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government’s managerial prerogative to determine policy, a subject may not be included in collective

negotiations even though it may intimately affect employees' working conditions.

[88 N.J. at 404-405.]

Workplace changes that do not "intimately and directly affect the work and welfare" of employees are not terms and conditions of employment and are not mandatorily negotiable. For example, public employers may unilaterally adopt rules and regulations governing unit employees if those rules and regulations do not have an identifiable impact on employees' terms and conditions of employment. See, e.g., Pennsauken Tp., P.E.R.C. No. 80-51, 5 NJPER 486 (¶10248 1979) (employer's decision to change the method of recording work time of unit employees from a time clock to using a sign in/sign out time-sheet had no affect on terms and conditions of employment and was not negotiable); City of Plainfield, P.E.R.C. No. 80-72, 5 NJPER 550 (¶10284 1979) (employer's requirement that fire officers use a new, more detailed inspection reporting form did not result in any measurable impact on workload or other terms and conditions of employment and was therefore non-negotiable); State of New Jersey, P.E.R.C. No. 81-81, 7 NJPER 70 (¶12026 1981) (employer is not obligated to negotiate over changes to departmental rules and regulations and is not required to provide notice of such changes where rules do not affect working conditions); Old Bridge Bd. of Ed., P.E.R.C. No. 89-23, 14 NJPER 576 (¶19243 1988) (employer's decision to issue one paycheck and discontinue practice of

issuing two paychecks for extracurricular work was not mandatorily negotiable since it did not change the amount or method of payment and did not "intimately and directly affect" the work and welfare of employees); City of Trenton, D.U.P. No. 95-12, 21 NJPER 10 (¶26004 1994) (employer does not violate its obligation to negotiate by unilaterally adopting departmental rules and regulations on policy issues that do not have an identifiable impact on terms and conditions of employment); Town of Kearny, H.E. No. 98-28, 24 NJPER 369 (¶29176 1998) (final agency decision) (employer's unilateral adoption of a personnel manual is not a violation of the Act if it does not have an identifiable impact on terms and conditions of employment); South River Bor., P.E.R.C. No. 2008-38, 33 NJPER 338 (¶126 2007) (employer's new requirement that employees submit two separate forms for requesting compensatory and vacation leave was not negotiable, noting that "[t]his is a matter that does not intimately and directly affect the work and welfare of these police officers, but is instead wholly within the managerial realm, it is pertinent to management's need to keep track of employee work hours and time off"); City of Elizabeth, P.E.R.C. No. 2016-83, 42 NJPER 568 (¶158 2016), aff'd 44 NJPER 99 (¶32 App. Div. 2017) (employer's newly-created finger-scanning requirement for timekeeping purposes was not negotiable since it had "at most a minimal effect on employee work and welfare and

allowing a challenge to the new timekeeping system would place substantial limitations on the City's governmental policymaking powers"); accord City of East Orange, H.E. No. 2020-1, 46 NJPER 62 (¶14 2019), adopted as modified P.E.R.C. No. 2020-36, 46 NJPER 318 (¶78 2020).

Even when an employer's unilateral action does impact terms and conditions of employment, the Commission has declined to find an unfair practice or a subject negotiable when the impact is de minimis. The de minimis doctrine stems from the recognition that imposing an obligation to negotiate on an employer over every deviation, no matter how minute, from a prior practice would frustrate the primary purpose of the Act to promote labor peace and stability. See, e.g., Middlesex Cty. Bd. of Social Services, H.E. No. 87-13, 12 NJPER 681 (¶17258 1986), adopted P.E.R.C. No. 87-41, 12 NJPER 804 (¶17307 1986) (short-term increase in workload resulting from employer's reorganization of its case intake procedures was de minimis and non-negotiable); Cinnaminson Bd. of Ed., P.E.R.C. No. 82-84, 8 NJPER 220 (¶13089 1982) (restructuring of the work day for teachers to accommodate student pep rallies on four occasions that resulted in a thirty-six minute increase in pupil contact time over a few months was de minimis and not negotiable); Wharton Bd. of Ed., H.E. No. 82-63, 8 NJPER 417 (¶13191 1982), adopted P.E.R.C. No. 83-24, 8 NJPER 549 (¶13252 1982) (new requirement that teachers submit

already-prepared lesson plans with personal leave request was de minimis and not negotiable); Mercer Cty. Bd. of Social Services, H.E. No. 92-29, 19 NJPER 484 (¶24228 1992), adopted P.E.R.C. No. 92-122, 18 NJPER 356 (¶23153 1992) (workload increase resulting from reorganization by employer of income maintenance unit was de minimis and not negotiable); see also Caldwell-West Caldwell Education Ass'n v. Caldwell-West Caldwell Board of Education, 180 N.J. Super. 440, 447-448 (App. Div. 1981) (in holding that a board of education was not obligated to negotiate over curriculum changes that added fifteen minutes of instruction in English and social studies without lengthening the teachers' work day, the Appellate Division explained that "[t]he Board must have some flexibility in making managerial decisions"; "[t]he concept of preexisting practices should not be so rigidly adhered to as to require negotiation of every minute deviation" and "[u]nless there is room in the joints for modification and adaptation necessary to make the system work, educational machinery would become stalled in endless dispute, grievance procedures, arbitration, unfair labor practice charges, hearings, reviews and appeals"; "[w]ithout some measure of flexibility constant battles would be waged over every change in **format**, with each change viewed as an opportunity to extract more concessions" (emphasis added)); N.J.S.A. 34:13A-2 (declaring the public policy of the State to achieve the "prevention or prompt settlement of labor

disputes..." and "promote permanent, public . . . employer-employee peace" while recognizing that labor strife "regardless where the merits of the controversy lie, are forces productive ultimately of economic and public waste").

Here, the question is whether the salary guide progression chart in the Board's proposed 2021-2025 CNA (specifically Art. I.B.1) is a continuation of existing terms and conditions of employment as set forth in the salary guide progression chart in the parties' 2016-2021 CNA (specifically Art. I.B.1), or not. Clearly, the face of the salary guide progression chart within Article I.B.1 of the parties' 2016-2021 CNA **appears** different when compared to the face of the salary guide progression charge within Article I.B.1 of the Board's proposed 2021-2025 CNA. Compare Migliacci Certification, Ex. 1 with Board's Br., Ex. D. However, the Board has **conceded/explained** that despite appearances, step progression on the salary guide progression chart within Article I.B.1 of the Board's proposed 2021-2025 CNA is sequential and, therefore, a continuation of existing terms and conditions of employment (i.e., pursuant to Super Conciliator Matriani's October 2, 2018 interpretation, step progression on the salary guide progression chart within Article I.B.1 of the parties' 2016-2021 CNA was also sequential). See Board's Supplemental Br. at 1-2, Exhs. A-B; Goncalves Certification, ¶6, Ex. G.

For example, using the salary guide progression chart in the parties' 2016-2021, the parties agreed with the super conciliator's interpretation that unit members progress sequentially (which, on the 2016-2021 chart, happens to mean moving one step down and one step to the right each year; more simply, diagonal annual step movement) - i.e., a unit member who begins at Step 12-13 for the base year progresses to Step 13-14 for the 2016-2017 school year; to Step 14-15 for the 2017-2018 school year; to Step 15-16 for the 2018-2019 school year; to Step 16-17 for the 2019-2020 school year; and to Step 17-18 for the 2020-2021 school year. See Migliacci Certification, Ex. 1; Board's Supplemental Br. at 1-2. Using the salary guide progression chart in the Board's proposed 2021-2025 CNA,^{8/} unit members also progress sequentially (which, on the proposed 2021-2025 chart, happens to mean moving one step to the right each year; more simply, horizontal annual step movement) - i.e., a unit member who begins at Step 17-18 for the base year progresses to Step 18-19 for the 2021-2022 school year; to Step 19-20 for the 2022-2023 school year; to Step 20-21 for the 2023-2024 school year; and to step 21-22 for the 2024-2025 school year. See Board's Br., Ex. D; Board's Supplemental Br. at 1-2. In sum, the

^{8/} N.B. - the base year for the salary guide progression chart within the Board's proposed 2021-2025 CNA is identical to the 2020-2021 year for the salary guide progression chart within the 2016-2021 CNA.

two salary guide progression charts are operationally/functionally identical with - at most - a de minimis change in format that does not result in **any** identifiable/measurable impact on employees' terms and conditions of employment.

Moreover, the Association has failed to sufficiently demonstrate that there is in fact **any** operational/functional difference between the salary guide progression chart within Article I.B.1 of the parties' 2016-2021 CNA and the salary guide progression charge within Article I.B.1 of the Board's proposed 2021-2025 CNA. Rather, the Association appears to admit that this is simply a different format that achieves identical results in terms of unit member salary progression. See Association's Supplemental Br. at 1-2. As a PERC Hearing Officer once stated, "[t]he exaltation of form over substance in the absence of any showing of harm or prejudice . . . should not be used to impede the rights of [p]ublic [e]mployees to organize and negotiate collectively." See Clearview Reg. Dist. Bd. of Ed., H.O. No. 76-8 adopted E.D. No. 76-24, 2 NJPER 63 (1976). Correspondingly, the exaltation of form over substance in the absence of an operational/functional change that results in **any** identifiable/measurable impact on employees' terms and conditions of employment should not be used to impede the right of a public employer to make - at most - de minimis changes in **format**. See

Caldwell-West Caldwell Ed. Ass'n, 180 N.J. Super. at 447-448

("[w]ithout some measure of flexibility constant battles would be waged over every change in **format**, with each change viewed as an opportunity to extract more concessions") Pennsauken Tp.; City of Plainfield; State of New Jersey; Old Bridge Bd. of Ed.; City of Trenton; Town of Kearny; South River. Bor.; City of Elizabeth; City of East Orange; Middlesex Cty. Bd. of Social Services; Cinnaminson Bd. of Ed.; Wharton Bd. of Ed.; Mercer Cty. Bd. of Social Services. Accordingly, I find that the salary guide progression chart in the Board's proposed 2021-2025 CNA (specifically Art. I.B.1) is a continuation of existing terms and conditions of employment as set forth in the salary guide progression chart in the parties' 2016-2021 CNA (specifically Art. I.B.1).

CONCLUSION

Under these circumstances, I find that the Board has established that it was under no obligation to negotiate with the Association regarding the salary guide progression charge within Article I.B.1 after the parties concluded negotiations and executed/ratified the 2021-2025 MOA; and that the salary guide progression charge within Article I.B.1 of the Board's proposed 2021-2025 CNA is a continuation of existing terms and conditions

of employment.^{9/} Even when viewed in the light most favorable to the Association, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in its favor. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b). Accordingly, I find that summary judgment must be granted in the Board's favor.

For these reasons, I grant in part the Board's motion for summary judgment and deny the Association's cross-motion for summary judgment. I find that the Association violated subsection 5.4b(3) by refusing to sign the Board's proposed 2021-2025 CNA (see Board's Br., Ex. D).

RECOMMENDED ORDER

I recommend that the Commission order the Mendham Borough Education Association (Association) to:

- A. Cease and desist from:

^{9/} However, I also find that the Board has failed to establish that the Association refused to negotiate in good faith, particularly given the parties' collective negotiations history and the Board's recent concession/explanation that despite appearances, step progression on both salary guide progression charts is sequential and, therefore, a continuation of existing terms and conditions of employment. See Goncalves Certification, ¶¶4-6; Migliacci Certification ¶5-8, 10; Board's Supplemental Br. at 1-2.

1. Refusing to sign the proposed 2021-2025 collective negotiations agreement (CNA) submitted to it by the Mendham Borough Board of Education (Board)

B. Take this affirmative action:

1. Immediately sign the 2021-2025 CNA submitted to it by the Board that implements the parties' fully-executed/ratified 2021-2025 memorandum of agreement (MOA).

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Charging Party's authorized representative, be posted immediately and maintained by it for at least sixty (60) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Charging Party has taken to comply herewith.

/s/ Joseph P. Blaney
Hearing Examiner

DATED: August 23, 2023
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 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by September 5, 2023.



RECOMMENDED



NOTICE TO EMPLOYEES

**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

The Mendham Borough Education Association (Association) hereby notifies all employees of the Mendham Borough Board of Education (Board) represented by the Association that:

WE WILL cease and desist from refusing to sign the proposed 2021-2025 CNA submitted to the Association by the Board.

WE WILL immediately sign the proposed 2021-2025 CNA submitted to the Association by the Board that implements the parties' fully-executed/ratified 2021-2025 MOA.

Docket No. CE-2022-001

Mendham Borough Education Association
(Public Employee Organization)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830