

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HAZLET TOWNSHIP BOARD
OF EDUCATION,

Charging Party,

-and-

Docket No. CE-79-19-87

HAZLET TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Commission affirms a Hearing Examiner's recommendation that the unfair practice charge be dismissed. The totality of conduct by the Association during contract negotiations does not demonstrate a failure to negotiate in good faith pursuant to N.J.S.A. 34:13A-5.4(b)(3).

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Respondent.

Appearances:

For the Charging Party, Crowell & Otten, Esqs.
(Mr. Robert M. Otten, of Counsel)

For the Respondent, Greenberg & Mellk, Esqs.
(Mr. Arnold M. Mellk, of Counsel)

DECISION AND ORDER

The Hazlet Township Board of Education (the "Board") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Hazlet Teachers Association (the "Association") had violated the New Jersey Employer-Employee Relations Act (the "Act"). A hearing was held before Commission Hearing Examiner Alan R. Howe, who issued his Recommended Report and Decision ^{1/} on August 28, 1979. He concluded that the Association had not violated the Act or in the alternative the conduct at issue was de minimus. Exceptions have been filed by the Board ^{2/} to which the Association responded.

^{1/} H.E. No. 80-5, 5 NJPER 375 (¶10191 1979). A copy of that report is attached hereto and made a part hereof.

^{2/} The Board also requested oral argument before us. That request is denied. This matter was fully litigated before the Hearing Examiner and the parties had an opportunity to argue orally at that time.

The case centers around a scheduled negotiations session on December 7, 1978.^{3/} It is not disputed that parents protesting the scheduled closing of the West Keansburg Elementary School were picketing the Board offices at which the negotiations were to take place. The Hearing Examiner credited testimony by the New Jersey Education Association Field Representative, Hayden L. Messner, that he informed Board Attorney Robert Otten that the Association would not meet with the Board for negotiations as long as the picket line was present. In the exceptions the Board objects to his not having credited contrary testimony by Janet Kay of the Board Personnel Committee that Messner indicated negotiations would cease until the Board agreed to drop plans to close the school, create a new middle school, bus students, and effectuate a reduction in force. We will not overrule Hearing Examiners' credibility determinations except in extraordinary circumstances, and none are present herein. The fact that Mrs. Kay is unsalaried does not imbue her testimony with any aura of irrefutability, nor does Mr. Messner's employment make his testimony automatically suspect.

We agree with the Hearing Examiner that the totality of conduct demonstrates that no violation of the Act took place. Negotiations resumed within six weeks and an agreement was reached regarding one of the units in April, 1979. At no time were any of the issues relating to closing of the West Keansburg Elementary School raised after December 7. Finally, we also agree that the

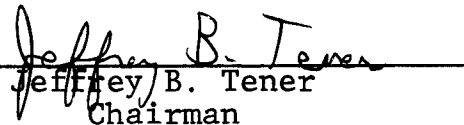
3/ Two separate units - teachers and clericals - were seeking successor agreements.

cancellation of one session certainly does not in and of itself create an impasse requiring invocation of the mediation and fact-finding procedures set forth in N.J.A.C. 19:12-1.1 et seq. Therefore, neither N.J.S.A. 34:13A-5.4(b)(3) nor (b)(5) has been violated and the complaint should be dismissed.^{3/}

ORDER

Upon the entire record and for the foregoing reasons, IT IS HEREBY ORDERED that the Complaint herein is dismissed in its entirety.

BY ORDER OF THE COMMISSION


Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Parcels voted for this decision. Commissioners Hipp and Newbaker abstained. Commissioner Graves was not present.

DATED: October 31, 1979
Trenton, New Jersey
ISSUED: November 1, 1979

^{3/} In view of our conclusion that no violation occurred, we need not reach the issue of whether the conduct was de minimus.

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

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Respondent,

- and -

Docket No. CE-79-19-87

HAZLET TOWNSHIP BOARD OF EDUCATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by the Board of Education against the Teachers Association, which alleged that the Association did on December 7, 1978 deliberately and by previous plan refuse to "bargain" with representatives of the Board, and also raised certain issues which were not germane nor proper matters for negotiation.

The Hearing Examiner found that in the context of ongoing negotiations for successor agreements covering units of teachers and secretary-clerical employees, spanning many months, the Association's refusal to negotiate with the Board on one date was "de minimis". The Hearing Examiner refused to credit the Board's proffered evidence that the Association negotiators attempted to raise matters improper for negotiations at the meeting, which lasted two minutes, with neither party offering any proposals. The Association's negotiators announced only that they would not meet while there was a "picket line" outside of the Board's Administrative Offices, which involved parents protesting a possible Board decision to close an elementary school.

The Hearing Examiner noted that about six weeks after the incident of December 7 the Association initiated negotiations, which resulted in a successor agreement for the secretary-clerical employees in April 1979 and that, as of the date of hearing, June 11, 1979, negotiations were continuing for a successor agreement for the teachers. The Association has not raised the elementary school matter in negotiations nor in any way refused to negotiate since December 7. Thus, considering the "totality" of the Association's conduct, there was no violation of the New Jersey Employer-Employee Relations Act.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Docket No. CE-79-19-87

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Appearances:

For the Hazlet Teachers Association
Greenberg & Mellk, Esqs.
(Arnold M. Mellk, Esq.)

For the Hazlet Township Board of Education
Crowell & Otten, Esqs.
(Robert H. Otten, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on January 22, 1979 by the Hazlet Township Board of Education (hereinafter the "Charging Party" or the "Board") alleging that the Hazlet Teachers Association (hereinafter the "Respondent" or the "Association") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent Association did on or about December 7, 1978 deliberately and by previous plan refuse to "bargain" with the representatives of the Board, and also raised certain issues which were not germane nor proper matters for negotiation, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1),(3) and (5) of the Act. 1/

1/ These Subsections prohibit employee organizations, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

(5) Violating any of the rules and regulations established by the Commission."

It appearing that the allegations of the above charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 30, 1979. Pursuant to the Complaint and Notice of Hearing, a hearing was held on June 11, 1979 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were filed by the parties by July 26, 1979.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Hazlet Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Hazlet Teachers Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The Respondent Association has been the collective negotiations representative for separate units of teachers and secretary-clerical employees for several years. The most recent collective negotiations agreement for teachers, effective July 1, 1977 through June 30, 1979, was received in evidence as J-1. ^{2/}
4. Hayden L. Messner, Field Representative of the New Jersey Education Association, has participated in negotiations on behalf of the Respondent Association for several years. He entered the negotiations for successor agreements to the current agreements between the Board and Association covering teachers and secretary-clerical employees in or about October 1978. ^{3/} Mr. Messner attended at least one negotiations session on behalf of the Association prior to December 7.
5. The Board, at a public meeting held at the West Keansburg Elementary School, on December 5 announced that it was studying the closing of the said Elementary School and the opening of a new middle school for the seventh and eighth grades. A "RIF" (reduction-in-force) was also discussed along with the possibility of the

^{2/} The corresponding agreement covering secretary-clerical employees was not offered in evidence.

^{3/} All dates hereinafter are in 1978 unless otherwise indicated.

busing of students. The Board appointed a citizens' advisory committee to make recommendations to it regarding the aforesaid proposal.

6. A negotiations meeting between the parties with respect to the successor collective negotiations agreements was scheduled for December 7 at 8:00 p.m. at the Administrative Offices of the Board. The West Keansburg Elementary School matter, supra, was not on the agenda for this meeting between the parties.

7. During the afternoon of December 7 Garrett Schlenker, the President of the Association, called and spoke to Mr. Messner. Mr. Schlenker said that he had been asked by the leader of a group of parents from the West Keansburg Elementary School not to cross a picket line of parents scheduled for that evening at the Administrative Offices of the Board. Mr. Messner indicated to Mr. Schlenker that the Association negotiators would not cross the picket line.

8. Mr. Messner arrived at the Administrative Offices of the Board at about 7:50 p.m. where he observed the presence of police and a mass of people outside of the building. Mr. Messner met Mr. Schlenker on the steps of the building where they encountered a person, whose name Mr. Messner does not recall, who presented himself as the leader of protesting parents from the West Keansburg Elementary School. A request was made by this person that the Association negotiators honor the "picket line". Mr. Messner and Mr. Schlenker thereupon entered the building and, upon meeting three other members of the Association negotiating team, all proceeded to a meeting room where the Board negotiators were present.

9. In the meeting room, Mr. Messner, speaking on behalf of the Association negotiators, stated to Robert H. Otten, Esq., the Board's attorney, that as long as "conditions" existed outside, referring to the "picket line", the Association was not going to meet with the Board in negotiations. Mr. Messner testified that Mr. Otten's response was that he would have to see Judge Yaccarino to obtain an order to negotiate. Mr. Messner also testified specifically that he did not speak with Mrs. Janet Kay, the Chairman of the Board's Personnel Committee, who was involved in the negotiations. ^{4/}

^{4/} Mrs. Kay testified that Mr. Messner spoke to her only and said that the "HTA" (Association) would not negotiate with the Board until the Board dropped the elimination of the West Keansburg Elementary School, the opening of a proposed new middle school, the "RIF" and the busing. The Hearing Examiner credits Mr. Messner's testimony that he spoke only to Mr. Otten as found above and does so for the reason that Mr. Messner's version as to what transpired appears more plausible.

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10. Mr. Messner, after ascertaining that the other members of the Association's negotiating team concurred with his position, left the meeting room with the Association negotiators and they departed from the building. ^{5/}

11. Once outside the building, Mr. Messner and the other Association negotiators spoke to newspaper reporters, stating that they were going to respect the picket line, and thereafter Mr. Messner and others joined the protesters for 10-20 minutes. Mr. Messner then left.

12. At the request of the Respondent Association, negotiations resumed between the parties, according to Mrs. Kay, about six weeks after the incident of December 7. Since then a successor agreement for the secretary-clerical unit has been consummated as of April 1979 and negotiations have continued, and are continuing, for a successor agreement covering the teachers. The Association has not raised the West Keansburg Elementary School matter in negotiations nor in any way refused to negotiate since December 7. ^{6/}

THE ISSUE

Did the Respondent Association violate the Act when it unilaterally refused to negotiate with the Board on December 7, 1978 and, if so, what should the remedy be?

DISCUSSION AND ANALYSIS

Introduction

Preliminarily it is noted that the Hearing Examiner requested of the parties that they address the issue of whether or not the Respondent Association's conduct on December 7 was "de minimis" in terms of a violation of the Act and, it was further requested that the parties consider the "totality of conduct" of the Association under State of New Jersey and Council of New Jersey State College Locals, etc., E.D. No. 79, 1 NJPER 39 (1975), aff'd. 141 N.J. Super. 470 (App. Div. 1976) and Township of Hillside, P.E.R.C. No. 77-47, 3 NJPER 98 (1977).

^{5/} Mr. Messner testified that the Association negotiators left the meeting room within 30 seconds of his statement to Mr. Otten, and that the meeting had lasted about two minutes. No proposals were made by either side during that time. In view of the statement of Mr. Messner, as contained in Finding of Fact No. 9, supra, the Hearing Examiner deems it unnecessary to make a finding as to whether Mr. Schlenker said, according to Mrs. Kay, that the Board drop the "plan" or the Association would not come back to negotiate.

^{6/} Mr. Messner has not appeared in negotiations on behalf of the Association since December 7.

The parties have in their briefs followed the Hearing Examiner's request and these cases will be considered in the light of the facts as found herein.

The Respondent Association Did Not Violate
The Act By Its Conduct On December 7, 1978

The Hearing Examiner finds and concludes that, contrary to the position of the Charging Party, the Respondent Association's conduct at a single scheduled negotiating session was "de minimis" and additionally, within the framework of the totality of negotiations between the parties, was not a violation of the Act.

The Hearing Examiner has found that the West Keansburg Elementary School matter was not on the agenda for the December 7 meeting between the parties and has credited Mr. Messner's testimony that he spoke only to Mr. Otten, stating that as long as "conditions" existed outside, referring to the "picket line", the Respondent Association was not going to meet with the Board in negotiations. (Findings of Fact No. 6, 9, supra). The meeting between the parties lasted only about two minutes and the Association negotiators left within 30 seconds of Mr. Messner's statement to Mr. Otten (footnote 5, supra). ^{7/}

Further, it is undisputed: that it was at the instance of the Respondent Association that negotiations resumed about six weeks after the December incident; that as of April 1979 a successor agreement for the secretary-clerical unit had been consummated; that negotiations have continued, and are continuing, for a successor agreement covering the teachers; and that the Association has not raised the West Keansburg matter in negotiations nor in any way refused to negotiate since December 7 (Finding of Fact No. 12, supra).

The Charging Party, after quoting from the Black's Law Dictionary definition of "de minimis non curat lex", ^{8/} goes on to cite the Commission's decision in Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254 (1976) where the Commission held that a 15-minute addition to the workday of all teachers at a particular school was not "de minimis" and that there was a violation of the Act. (2 NJPER at 255). The Charging Party next cites Borough of Montvale, P.E.R.C. No. 78-33, 4 NJPER 28 (1977), which affirmed the Hearing Examiner's rejection of the Boro's contention that the impact of a managerial decision that police officers wear uniforms when testifying in court on off-duty hours was "de minimis". ^{9/} Finally, the

^{7/} It is also noted that no proposals were made by either side during this brief period.

^{8/} "The law does not care for, or take notice of, very small or trifling matters. The law does not concern itself about trifles..."

^{9/} See 3 NJPER at 347.

Charging Party refers to Union County Regional High School Board of Education, P.E.R.C. No. 79-90, 5 NJPER 229 (1979) where the Director of Unfair Practices was affirmed in refusing to issue a Complaint where the charging party there had sought an award of interest on the increments paid to teachers. The Director had concluded that, given the Board of Education's prompt compliance with the New Jersey Supreme Court's decision in Galloway, ^{10/} "...there was minimal likelihood for reoccurrence of this conduct (the failure to pay increments), and that any harm to public rights underlying the policy of the...Act was de minimis..." and that the interest sought by the charging party was small in amount.

The Hearing Examiner has considered the Charging Party's citations, supra, and the supporting arguments in its brief (pp. 8-12), and concludes that the doctrine of "de minimis" is applicable to the facts found in the instant case, relying essentially upon the rationale of Union County, supra. Plainly, the Respondent Association's conduct on December 7 has not reoccurred, negotiations resumed at the instance of the Association, the secretary-clerical contract has been concluded, and the West Keansburg matter has not been raised. Under these circumstances, the Hearing Examiner would be dealing with "trifling matters" if he were to find a violation of the Act, in particular Subsection (b)(3), which the Hearing Examiner perceives as the heart of the charge. ^{11/}

Next, turning to the matter of the "totality" of the Respondent Association's conduct in negotiations in the instant case, the Hearing Examiner is persuaded that the Association has not violated the Act, in particular Subsection (b) (3). References to the pertinent Findings of Fact, supra, will not be repeated. The Charging Party has failed to prove that, viewed in the total context of negotiations, the Respondent Association did not bring to the negotiating table "...an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach an agreement." ^{12/}

10/ Galloway Township Board of Education v. Galloway Township Education Association, 78 N.J. 25 (1978).

11/ See footnote 1, supra. The Charging Party contends that derivative violations of Subsections (b)(1) and (b)(5) have occurred, adding that, alternatively, there has been an independent violation of Subsection (b)(5) (brief, p. 10).

12/ State of New Jersey, supra, (1 NJPER at 40). The Executive Director also noted that: "The 'totality of conduct' presented in this case does not reveal a fixed determination on the part of the State to avoid, rather than reach, an agreement. It is admitted...that negotiations have taken place and continue at the present time...(T)entative agreements have been reached on several issues. In fact, at least one such agreement has been implemented..."

In Township of Hillside, supra, the Hearing Examiner, who was affirmed by the Commission, relied on State of New Jersey, supra, in concluding that the respondent union (PBA) did not refuse to negotiate in good faith in violation of Subsection (b)(3) of the Act by unilaterally terminating one negotiation session, given the totality of the PBA's conduct in negotiations. In so concluding, the Hearing Examiner said:

"...the PBA's isolated conduct on this occasion was insufficient to manifest evidence of an unwillingness to reach agreement on the terms of a successor contract. 47/ Its participation at length at two succeeding negotiating sessions held with the assistance of a mediator..negates the Township's further claim that the PBA unlawfully refused to resume negotiations. I conclude that the Township has failed to prove by a preponderance of the evidence that the PBA unilaterally terminated the February 21, 1976 session without explanation..." 13/

The Hearing Examiner herein finds and concludes that, based on State of New Jersey and Township of Hillside, supra, the "totality" of the Respondent Association's conduct in the ongoing negotiations for two successor agreements clearly does not constitute a violation of Subsection (b)(3) of the Act. The Hearing Examiner will, therefore, recommend dismissal as to this Subsection. As noted previously, the Charging Party does contend that there was an independent Subsection (b)(1) violation and therefore a dismissal as to this Subsection must be recommended.

There remains only the question of Subsection (b)(5), as to which the Charging Party contends, in the alternative, that the failure of the Respondent Association to follow the negotiations and impasse procedures of N.J.A.C. 19:12-1.1 et seq. constitutes an independent violation of this Subsection. 14/ The Hearing Examiner finds and concludes that the Charging Party has failed to prove by a preponderance of the evidence that the Respondent Association's conduct on December 7 in any way created an impasse, or that the Charging Party treated the Association's

13/ H.E. No. 77-8, 3 NJPER at 9, 10. Footnote 47 in the Hearing Examiner's Report contrasted the PBA's conduct with that of the respondent Board of Education in Englewood Public Schools and Englewood Administrator's Association, P.E.R.C. No. 76-18, 2 NJPER 53 (1976). Note is also taken of the fact that the Hearing Examiner in Township of Hillside noted a "tense atmosphere" in the ongoing negotiations which, although not literally present herein, clearly applied to the "picket line" situation which Mr. Messner encountered when he arrived at the Administrative Offices of the Board on the night of December 7 (see Finding of Fact No. 8, supra).

14/ See footnote 11, supra.

conduct on that date as creating an impasse, as a result of which the Charging Party initiated mediation or fact-finding under N.J.A.C. 19:12-3.1, 4.1. Therefore, the Hearing Examiner will likewise recommend dismissal as to any alleged independent violation of Subsection (b)(5).

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following.

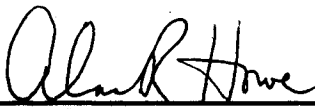
CONCLUSIONS OF LAW

The Respondent Association did not violate N.J.S.A. 34:13A-5.4(b)(1), (3) and (5) by its conduct on December 7, 1978.

RECOMMENDED ORDER

The Respondent Association not having violated the Act, supra, it is **HEREBY ORDERED** that the Complaint be dismissed in its entirety.

Dated: August 28, 1979
Trenton, New Jersey



Alan R. Howe
Hearing Examiner