

P.E.R.C. NO. 86-29

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH BRUNSWICK TOWNSHIP BOARD  
OF EDUCATION,

Respondent,

-and-

Docket No. CO-85-11-84

NORTH BRUNSWICK TOWNSHIP EDUCA-  
TION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the North Brunswick Township Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally increased the salary of a reclassified accounts payroll clerk without first negotiating with her majority representative, the North Brunswick Township Education Association.

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TION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Borrus, Goldin, Foley, Gignuolo,  
Hyman & Stahl, Esqs. (Anthony B. Vignuolo, of Counsel)

For the Charging Party, Klausner & Hunter, Esquires  
(Stephen B. Hunter, of Counsel)

DECISION AND ORDER

On July 9, 1984, the North Brunswick Township Education Association ("Association") filed an unfair practice charge against the North Brunswick Township Board of Education ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),<sup>1/</sup> when, following an

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<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an  
(Footnote continued on next page)

employee's reassignment from the 10 month position of clerk/typist to the 12 month position of accounts payroll clerk, it negotiated with the individual employee, rather than the Association, over the compensation the employee would receive in the new position and increased the employee's salary by three steps.<sup>2/</sup>

On January 24, 1985, a Complaint and Notice of Hearing issued. The Board then filed an Answer denying that it had violated the Act and asserting, as separate defenses, that it had advertised and posted the vacant position of accounts payable clerk in accordance with the collective negotiations agreement and that it had a managerial prerogative to determine unilaterally an employee's starting salary for that position.

On April 4, the parties stipulated the facts, introduced exhibits and waived a hearing. The Association filed a motion for summary judgment, and the Board filed a cross-motion. All briefs were received by May 28.

On June 19, Hearing Examiner Alan R. Howe issued a report recommending dismissal of the Complaint. H.E. No. 85-50, 11

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appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

<sup>2/</sup> As a remedy for this alleged unfair practice, the charge requested that the Commission order the Board to cease and desist from negotiating with individual employees over salary guide movement; the charge did not seek rescission of the employee's new salary.

NJPER \_\_\_\_ (¶ \_\_\_\_ 1985) (copy attached). He found that the starting compensation for an accounts payable clerk was a mandatorily negotiable subject, but that the Association had waived its right to negotiate over that subject by agreeing to the following provision, Article XIV(A), in the collective negotiations agreement:

Whenever a clerical employee shall be reclassified due to an opening in the system, the salary shall be adjusted accordingly, but in no event shall the employee be penalized salary-wise through reclassification, but subsequent salary negotiations will be based on the newly assigned category. (Exhibit "A," p. 24) (emphasis supplied by the Hearing Examiner).

On July 23, after receiving an extension of time, the Association filed exceptions. It asserts that the Hearing Examiner erred in finding a contractual waiver.

On July 26, the Board filed a response supporting the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-5) track the parties' stipulations. We adopt and incorporate them here.

We agree with the Hearing Examiner that the Board did not have a managerial prerogative to set unilaterally the starting compensation of an accounts payable clerk. The compensation an employee receives is, of course, one of the most fundamental terms and conditions of employment. Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Ed Secs, 78 N.J. 1 (1978); Englewood Bd. of Ed. v. Englewood Teachers Assn, 64 N.J. 1 (1973). N.J.S.A. 18A:29-9 neither applies to non-teaching staff personnel, such as clerks, nor

preempts negotiations. Dennis Township Bd. of Ed., P.E.R.C. No. 80-157, 6 NJPER 334 (¶11167 1980); Eastern Camden Bd. of Ed., P.E.R.C. No. 80-158, 6 NJPER 348 (¶11174 1980). Negotiations over compensation with individual employees rather than their majority representative would strike at the heart of the Act: the exclusivity doctrine. Lullo v. IAFF, 55 N.J. 409, 426 (1970).<sup>3/</sup> Thus, the Board violated subsections 5.4(a)(1) and (5) unless the Association contractually waived its right to negotiate compensation following the employee's reassignment.

In order to find a contractual waiver of a majority representative's right to negotiate over compensation, the waiver must be "...clearly and unmistakably established, and the contractual language alleged to constitute a waiver will not be read expansively." Red Bank Reg. Ed. Assn. v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); North Brunswick Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978) aff'd App. Div. Dkt. No. A-698-78 (4/11/79). Article XIV(A) does not meet this strict standard.<sup>4/</sup> That provision requires the Board, following a

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<sup>3/</sup> In its brief, the Board argues that any violation would be too trivial to warrant finding an unfair practice. We disagree. The nature of the alleged violation is too central to the purposes of the Act to be overlooked. We also reject the Answer's assertion that the Board discharged its obligations under its contract and the Act by advertising and posting the position.

<sup>4/</sup> The Board did not assert in its Answer or post-hearing brief  
(Footnote continued on next page)

reclassification, to adjust the employee's salary accordingly.<sup>5/</sup> The word "accordingly" must be given some meaning. The Association contends that this word, as commonly used in labor relations contexts, means that the salary must be adjusted in conformance with the negotiated salary step system. Thus, an employee reclassified from a position of clerk/typist position to a position of accounts payable clerk would retain her salary step placement, in this case, step 4.<sup>6/</sup> While we need not decide whether this contractual interpretation is correct, it does persuade us that the clause does not clearly and mistakenly establish the Board's right to determine compensation unilaterally. In particular, nothing in this clause authorizes the Board to determine compensation through negotiations with individual reclassified employees. Given this interpretation, the clause does not clearly and unmistakably establish the Board's right to determine compensation unilaterally. Accordingly, we hold that the Board violated subsection 5.4(a)(1) and (5) when it refused to negotiate with the Association before moving the employee up three steps on the salary guide.

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that the Article constituted a contractual waiver; instead the Association cited this clause to support its case. While that failure would not prevent us from finding a waiver if one existed, it does suggest that the Board did not view this clause to be clear.

<sup>5/</sup> We will assume that a reclassification occurred here.

<sup>6/</sup> The provision further provides that the salary for the new position will not be lower than the salary received before and also permits the parties to negotiate an even higher placement on the salary guide if they so choose based on the newly assigned category.

ORDER

The North Brunswick Board of Education is ordered to:

I. Cease and desist from:

A. unilaterally negotiating with individual employees represented by the North Brunswick Township Education Association over their placement on negotiated salary guides.

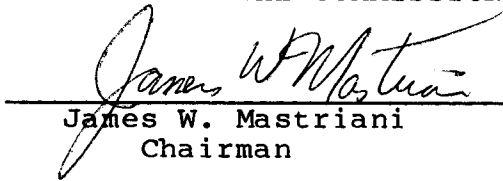
II. Take the following affirmative action:

A. Negotiate in good faith with the Association over placement of reassigned employees on negotiated salary guides.

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

Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Graves, Johnson, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioner Hipp abstained.

DATED: Trenton, New Jersey  
August 27, 1985  
ISSUED: August 28, 1985

# NOTICE TO ALL 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**

We hereby notify our employees that:

WE WILL cease and desist from unilaterally negotiating with individual employees represented by the North Brunswick Township Education Association over their placement on negotiated salary guides.

WE WILL negotiate in good faith with the Association over placement of reassigned employees on negotiated salary guides.

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION

(Public Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_ (Title)

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, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.



H. E. No. 85-50

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

In the Matter of

NORTH BRUNSWICK TOWNSHIP BOARD OF  
EDUCATION,

Respondent,

-and-

Docket No. CO-85-11-84

NORTH BRUNSWICK TOWNSHIP EDUCATION  
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when on February 14, 1984 it unilaterally reclassified Carolyn Tavalare from her position as a 10-month clerk/typist (step 4) to a 12-month accounts payable clerk (step 7). The Hearing Examiner found that notwithstanding the exclusivity doctrine in Lullo v. International Assn. of Firefighters, 55 N.J. 409 (1970), the parties had negotiated a provision in their collective negotiations agreement which recognized the unilateral right of the Board to reclassify a clerical employee due to an opening and to adjust the salary "accordingly." The Board's only obligation to negotiate regarding such a reclassified employee would occur in "subsequent salary negotiations" arising after the initial reclassification.

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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Appearances:

For the Respondent

Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, Esqs.  
(Anthony B. Vignuolo, Esq.)

For the Charging Party

Klausner & Hunter, Esqs.  
(Stephen B. Hunter, Esq.)

HEARING EXAMINER'S  
RECOMMENDED REPORT AND DECISION  
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on July 9, 1984 by the North Brunswick Township Education Association (hereinafter the "Charging Party" or the "Association") alleging that the North Brunswick Township Board of Education (hereinafter the "Respondent" or the "Board") 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 on or about February 14, 1984, the Respondent entered into

individual unilateral negotiations with a member of the unit, as a result of which the individual was reassigned from a 10-month clerk/typist position at step 4 of the secretaries' salary guide to a 12-month accounts payable clerk at step 7 of the salary guide, which violated the Association's right to be the exclusive negotiator for all members of the unit; all of which is alleged to be a violation of N.J.S.A 34:13A-5.4(a)(1) and (5) of the Act.<sup>1/</sup>

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 24, 1985. Pursuant to the Complaint and Notice of Hearing, the parties entered into a written stipulation of facts and waived an evidential hearing, which stipulation was executed on April 4, 1985. Thereafter, the Association filed a Motion for Summary Judgment on May 7, 1985 with a supporting brief and on May 17, 1985, the Respondent filed a Cross-Motion for Summary Judgment with a supporting brief. The Association filed a reply on May 28, 1985.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as

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<sup>1/</sup> These Subsections prohibits public employers, their representatives or agents from:

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

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

amended, exists and, after consideration of the stipulation of facts, supra, and the briefs of the parties in support of their respective Motions for Summary Judgment, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

1. The North Brunswick Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The North Brunswick Township Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The current collective negotiations agreement between the parties is effective during the term July 1, 1983 through June 30, 1986 (Exhibit "A"). Article I, Recognition, recognizes the Association as the exclusive and sole representative for, among others, secretaries and clerks (Exhibit "A," pp. 1, 2). Appendix IV thereto contains the salary guides for secretarial and clerical employees for 1983 through 1986.
4. At a regular meeting of the Board on February 14, 1984, it approved a change in the classification of Carolyn Tavalare for the 1983-84 school year, which change was as follows: Tavalare, who was a 10-month clerk/typist at step 4 (\$9,590.00), was appointed

a 12-month accounts payable clerk, step 7, at an annual salary of \$14,373.00, pro rated from February 16, 1984 (Exhibit "B," p. 10).

5. Article XIV(A), Reclassification, of the current agreement provides as follows:

Whenever a clerical employee shall be reclassified due to an opening in the system, the salary shall be adjusted accordingly, but in no event shall the employee be penalized salary-wise through reclassification, but subsequent salary negotiations will be based on the newly assigned category. (Exhibit "A," p. 24)(emphasis supplied).

6. The Respondent at no time prior to the above personnel action involving Tavalare negotiated the issue of a change in compensation with the Association as the majority representative (Stipulation of Facts No. 6).

7. The Respondent maintains and has maintained that the initial starting salary for anyone filling the then vacant position of a 12-month accounts payable clerk is wholly an area of managerial prerogative and not subject to negotiations with the Association (Stipulation of Facts No. 7).

8. It is undisputed that the Respondent advertised and posted the position of 12-month accounts payable clerk in accordance with the collective negotiations agreement, supra.

9. The Respondent has an existing unwritten practice of considering relevant private sector secretarial and clerical experience in salary guide placement determinations for its employees but there are no fixed criteria applied by the Respondent in said matters of placement (Stipulation of Facts No. 10). The

employment history of Tavalare between September 29, 1980 and June 30, 1985 is annexed to the Stipulation of Facts as Exhibit "D," disclosing only her employment with the Board.

10. The Association by the instant unfair practice charge is not seeking to rescind the Board's personnel action concerning the compensation for Tavalare (Stipulation of Facts No. 11).

#### DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate Subsections (a)(1) And (5) Of The Act When On February 14, 1984 It Unilaterally And Without Negotiations With The Association Changed The Classification Of Carolyn Tavalare From The Position Of 10-Month Clerk/Typist (Step 4) To 12-Month Accounts Payable Clerk (Step 7).

The concept of "exclusivity" was adopted in the public sector in New Jersey by the Supreme Court in Lullo v. International Assn. of Firefighters, 55 N.J. 409 (1970) and has not been departed from since. Thus, where a majority representative has been voluntarily recognized or certified by the Commission a public employer acts at its peril when it negotiates with an individual employee in derogation of the majority representative's right to exclusive representation of the said individual employee. Tavalare is such an employee in this case.

See also: Galloway Twp. Board of Education v. Galloway Twp. Assn. of Educational Secretaries, 78 N.J. 1 (1978) and NLRB v. Everbrite Electric Signs, Inc., 562 F.2d 405, 96 LRRM 2129 (7th Cir. 1977).

The Charging Party in its main brief quotes Article XIV(A), Reclassification, in support of its position that the employer violated the Act as alleged when it unilaterally reclassified Tavalare on February 14, 1984 from clerk/typist (step 4) to accounts payable clerk (step 7) without negotiations with the Association. The Respondent in its main brief, in reply to the Association's main brief, failed to discuss Article XIV(A) and instead relied upon N.J.S.A. 18A:29-9, which deals with members of the teaching staff and the manner of their initial place on the salary schedule as being subject to agreement by the teaching staff member and the board of education. Several Commissioner of Education decisions are cited as supporting what the Board did in the instant case regarding Tavalare.

The Hearing Examiner finds that the Board's reference to Title 18A is inapposite and of no assistance to the Hearing Examiner in deciding the instant dispute. Similarly, the Hearing Examiner fails to see the relevance of the Commission's decision in Oakland Board of Education, P.E.R.C. No 82-125, 8 NJPER 378 (1982), aff'd App. Div. A-4975-81T3 (1983), which is cited by the Association.

Having analyzed fully the arguments of the parties in their respective briefs, the Hearing Examiner is persuaded that the case can be disposed of on the basis of Article XIV(A) in the current agreement, supra. While, as a general rule, the Board would be precluded from "negotiations" with an individual employee under Lullo, supra, the Hearing Examiner finds and concludes that any

contention by the Association that the doctrine of exclusivity has been violated by the Board herein must fall inasmuch as there has been a clear and unmistakable waiver by the Association in Article XIV(A) of the current agreement.

The doctrine of contractual waiver in the public sector is the law of this State: Red Bank Regional Education Assn. v. Red Bank Regional H.S. Board of Education, 78 N.J. 122, 140 (1978) and Dover Board of Education, H.E. No. 81-23, 7 NJPER 65, 68, 69 (1981), aff'd P.E.R.C. No. 81-110, 7 NJPER 161 (1981). The requisite to be met in finding such a waiver is that it be "...clearly and unmistakably established, and the contractual language alleged to constitute a waiver will not be read expansively..." (Red Bank, 78 N.J. at 140).

Turning now to an analysis of Article XIV(A), and why, in the opinion of the Hearing Examiner, it constitutes a waiver by the Association of any right to object to the reclassification of Talavare from clerk/typist (step 4) to accounts payable clerk (step 7), it is first noted that the parties have recognized the right of the Board (1) to reclassify a clerical employee due to an opening in the system; and (2) to adjust the salary of the reclassified clerical employee "accordingly." This is exactly what was done by the Board in the case of Tavalare, namely, she was reclassified from clerk/typist to accounts payable clerk due to an obvious opening, and thereafter Tavalare's salary was adjusted accordingly, in that she was placed at step 7 on the clerical salary



guide. The only limitation imposed on the Board by Article XIV(A) is that any reclassified clerical employee not be penalized salary-wise (and Tavalare was not) and that "subsequent salary negotiations" must be based upon the "newly assigned category." Thus, if the Board were thereafter unilaterally to adjust Tavalare's salary upward from step 7, this would be a violation of Article XIV(A) and might well be a violation of Subsection (a)(5) of the Act, assuming that a Complaint was not foreclosed under State of N.J. (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 421 (1984).

The Hearing Examiner having concluded that the Association has clearly and unmistakably waived any right to complain about the Board's unilateral reclassification of Tavalare in view of Article XIV(A), supra, and this provision clearly governing the dispute herein, the Complaint must be dismissed.

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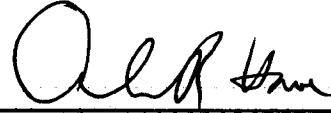
Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4 (a)(1) and (5) when on February 14, 1984 it unilaterally reclassified Carolyn Tavalare from her position as a 10-month clerk/typist (step 4) to a 12-month accounts payable clerk (step 7).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



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Alan R. Howe  
Hearing Examiner

Dated: June 19, 1985  
Trenton, New Jersey