P.E.R.C. NO. 83-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PHILLIPSBURG BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-81-191-190

PHILLIPSBURG EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice the Phillipsburg Education Association filed against the Phillipsburg Board of Education. The charge had alleged that the Board violated subsections N.J.S.A. 34:13A-5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it insisted that the Association agree, prior to the exchange of substantive contract proposals, to certain groundrules. The Commission concludes, however, that under all the circumstances of this case, the Board did not refuse to negotiate in good faith.

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Appearances:
For the Respondent, Harbourt & Duh, Esqs.
(Boyd Harbourt, of Counsel)

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

DECISION AND ORDER

On December 24, 1980, the Phillipsburg Education Association ("Association") filed an unfair practice charge against the Phillipsburg Board of Education ("Board"). The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (5),[1/] when it insisted that the Association agree, prior to the exchange of substantive contract proposals, either not to release any information to the press concerning negotiations without giving the Board two weeks advance notice or to negotiate in public sessions.

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

On February 25, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Board then filed an Answer in which it denied refusing to negotiate in good faith over contract proposals and averred that the Association had refused to follow contractual provisions and past practice on ground rules or to discuss the Board's alternative groundrule proposals.

On March 2, 1981, the Association filed a Motion for Summary Judgment pursuant to N.J.A.C. 19:14-4.8. On April 10, 1981, the Chairman of the Commission referred the motion to Hearing Examiner Joan Kane Josephson for decision.

On June 25, 1981, Hearing Examiner Josephson conducted a hearing at which the parties entered stipulations of fact, examined witnesses, and presented evidence. They waived oral argument, but filed post-hearing briefs by March 8, 1982.

On June 21, 1982, the Hearing Examiner issued her report and recommendations, H.E. No. 82-61, 8 NJPER ___ (¶_____ 1982) (copy attached). She found, inter alia, that negotiations between the parties for a successor agreement to become effective July 1, 1981, had broken off following two meetings -- October 27 and November 25, 1980; that the Board had insisted the Association agree to negotiations groundrules, including a press release rule, prior to the exchange of substantive proposals; that the Association had refused to discuss the press release issue or alternative ground rule proposals; and that, during the litigation, the parties ultimately reached agreement on groundrules requiring seven days advance notice before release to the press of information

concerning negotiations and then went on to reach agreement on a successor contract. While the Hearing Examiner found that both sides were equally intransigent, she went on to conclude that the Board had technically violated subsections 5.4(a)(1) and (5) because of its initial posture of insisting on agreement to negotiations groundrules prior to the exchange of substantive proposals.

On July 12, 1982, the Board filed Exceptions. It specifically objects to the Hearing Examiner's findings that the Board refused to exchange proposals until the Association agreed to a press release ground rule and that the contract and past practice did not require the implementation of the same groundrules as in previous negotiations. On July 30, 1982, the Association filed a response.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-7) are supported by substantial evidence. We adopt and incorporate them here.

In order to determine whether an employer or an employee representative has refused to negotiate in good faith, it is necessary to examine all the circumstances of a particular case. See, e.g., State Locals, NJSFT-AFT, AFL-CIO, 141 N.J. Super. 470 (1976). While we believe that a party may not insist until impasse on a particular groundrule for substantive contract negotiations, there is a mutual obligation to seek agreement on groundrules. Having examined all the circumstances of this case, we cannot find

that the totality of the Board's conduct constituted a "technical" violation of its duty to negotiate in good faith.

We are mindful that the Board, not the Association, presented the groundrule proposal which became the focal point of the dispute during the parties' initial attempts to negotiate a new agreement. However, we must also consider the Board's willingness to discuss the past groundrules and to present alternative groundrule proposals, the Association's initial unwillingness to discuss the past groundrules or to respond to the Board's proposals, and the parties' ultimate ability to resolve the groundrule issue and enter a successor contract. Under all these circumstances, we believe it would be inappropriate to find that the Board refused to negotiate in good faith. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Suskin, Butch, Hartnett and Graves voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed.

DATED: Trenton, New Jersey
September 14, 1982
ISSUED: September 15, 1982

H. E. No. 82-61

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

In the Matter of

PHILLIPSBURG BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-81-191-190

PHILLIPSBURG EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner recommends that the Commission find that the Respondent violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it insisted that the Association agree to negotiations groundrules prior to exchanging substantive proposals. The Hearing Examiner reviewed the totality of conduct of both parties and did not recommend under the circumstances an affirmative remedy against the Respondent.

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.

H. E. No. 82-61

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

In the Matter of

PHILLIPSBURG BOARD OF EDUCATION,

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PHILLIPSBURG EDUCATION ASSOCIATION,

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Appearances:

For the Respondent
Harbourt & Duh, Esqs.
(Boyd Harbourt, Esq.)

For the Charging Party
Klausner & Hunter, Esqs.
(Stephen B. Hunter, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on December 24, 1980 and amended on February 4, 1981 by the Phillipsburg Education Association (the "Charging Party" or the "Association") alleging that the Phillipsburg Board of Education (the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). The charge alleges that the Respondent insisted that the Association agree to negotiations groundrules prior to exchanging substantive contract proposals which is alleged to be

a violation of N.J.S.A. 34:13A-5.4 (a)(1) and (5) of the Act. 1/ The Board responded that its negotiations position was taken in reliance on a contractual provision to negotiations groundrules procedures as provided in the parties contract under the negotiations procedure clause and the past practices clause.

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 and a hearing was scheduled.

On March 2, 1981 a Motion for Summary Judgment was made by the Charging Party to the Chairman of the Commission purusant to N.J.A.C. 19:14-4.8. The motion was opposed by the Respondent. On April 10, 1981 Chairman James W. Mastriani referred the Motion for Summary Judgment to the undersigned for consideration. A hearing was held on June 25, 1981 in Trenton, New Jersey at which time parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by March 8, 1982. 2/

1/ 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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

2/ During the interim period between June 1981 and March 1982 the parties attempted to work out a voluntary resolution of the matter.

An Unfair Practice 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 briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

The parties entered into certain stipulations of fact and these stipulations are incorporated herein into the findings of fact made upon the entire record by the Hearing Examiner:

STIPULATIONS

1. The Charging Party, Phillipsburg Education Association, is the exclusive majority representative of all certified teaching personnel under contract with the Phillipsburg Board of Education and is a public employee representative within the meaning of the Act and is subject to its provisions. 3/

2. The Respondent, Phillipsburg Board of Education, is the employer of all the employees involved in this proceeding and is a public employer within the meaning of the Act and is subject to its provisions.

3. Two negotiations sessions were held by the parties during the period between October 27, 1980 and April 1, 1981. The dates of those sessions were October 27, 1980 and November 25, 1980.

4. The instant dispute arose when the Education Association announced at the negotiations session held on October 27, 1980,

3/ The parties stipulations neglected to include that the Association is an employee association subject to the Act. I have so found and add it to this finding.

that it was not prepared to agree with one of the items relating to the negotiations groundrules. At the October 27, 1980 meeting the Board asked in the alternative if the Phillipsburg Education Association desired to have open or public negotiations with representatives of the press being allowed to sit in on the ongoing negotiations. The Association rejected this proposal. After a brief caucus, the Board of Education returned to the discussion of the groundrules issue with the Association whereupon the Association wished to exchange substantive contract proposals immediately.

5. During the next negotiations session conducted on November 25, 1980, the Board of Education proposed several alternatives relating to the negotiations groundrules issue. More specifically, the Board offered to discuss: (A) a shortening of the number of days that would be required in terms of notice to the other party relating to the dissemination of information to the public or to the press; (B) to negotiate with the Education Association Negotiations Committee in front of other members of the Phillipsburg Education Association; (C) to negotiate with the Phillipsburg Education Association Negotiations Committee in front of any Education Association member desiring to observe the proceedings; (D) to negotiate in front of invited members of the press; or, (E) to negotiate with the Phillipsburg Education Association Negotiations Committee at an open public meeting.

ADDITIONAL FINDINGS OF FACTS

6. At the time the charge was filed there was collective negotiations agreement between the parties effective during the

term July 1, 1979 - June 30, 1981.

7. Article II contains six sections under a heading "Negotiations Procedure." These sections provide:

> "A. The parties agree to enter into collective negotiations in a good-faith effort to reach agreement concerning the terms and conditions of teachers' employment. Any Agreement negotiated shall apply to the unit defined in Article I, be reduced to writing, be ratified by the Association, be adopted by the Board, and be signed by the Association and the Board."
>
> B. During negotiations, the Board and the Association shall present relevant data, exchange points of view and make proposals and counter-proposals. The Board shall make available to the Association for inspection at reasonable times that information which is available to the public. The Board shall also make available to the Association, that information which by custom and usage has been made available in the past.
>
> C. Neither party in any negotiations shall have any control over the selection of the negotiating representative of the other party.
>
> D. The Board agrees not to negotiate concerning said employees in the negotiating unit as defined in Article I of this Agreement, with any organization other than the Association.
>
> E. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. Unless otherwise provided in this agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce nor otherwise detract from any terms and conditions of employment prior to its effective date.
>
> F. This Agreement incorporates the entire understanding of the parties on all matters which were, or could have been, the subject of negotiations. During the terms of this Agreement neither party shall be required to negotiate with respect to any such matter whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or executed this Agreement.

G. This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties."

8. The Association and the Board have had a 15 year bargaining history. (Tr. p. 12)

9. Since 1969 the parties have followed certain groundrules covering the conduct of negotiations. There have consistently been agreements concerning the handling of dissemination of information on the conduct of negotiations. (Tr. p. 59)

10. Charles E. Eck has been the Board's negotiator since 1977. He testified credibly that the negotiations practice with the Charging Party as well as three other associations representing employee bargaining units was to discuss the groundrules for negotiations at their first meeting in September or October. 4/ Superintendent of Schools, Peter Merluzzi, testified that he was a negotiator on behalf of Phillipsburg's Administrator's Association for three administrators associations contracts and that similar groundrules were established for that unit and discussed at their first negotiations session. These groundrules concerned many aspects of negotiations, one of which was a groundrule concerning press releases. The press release groundrule was that press releases would be mutual if agreed; if not, the proponent was required to give the other side 14 days advance notice prior to releasing any information unilaterally.

4/ Eck testified "We just review them. The purpose for the review is that the new people know what they are and that they are bound by them both, the Board and the PEA." (Tr. p. 84)

11. At the initial negotiations session on October 27, 1980, the Association refused to discuss the press release issue, the Board refused to exchange substantive proposals as requested by the Association and the Association declared the parties were at impasse and left the meeting. (Tr. p. 69)

12. At the negotiations session on November 25, 1980, the Board proposed the alternatives listed in Stipulation 5 above, the Association would not discuss the alternatives and again requested the exchange of substantive proposals. The Board would not exchange substantive proposals. The session ended. It lasted only 15 or 20 minutes. (Tr. p. 30)

13. The Unfair Practice Charge was filed on December 24, 1980. 5/

THE ISSUE

Did the Respondent Board violate Subsection (a)(1) and (5) of the Act when it insisted on agreement to negotiations ground-rules prior to the exchange of substantive proposals?

DISCUSSION AND ANALYSIS

In determining whether an illegal refusal to negotiate occurred in a case of this nature, the undersigned believes it is necessary to examine the totality of conduct. In re Township of Maple Shade, D.U.P. No. 80-14, 6 NJPER 28 (1979); and State Locals

5/ The parties were able to reach an interim agreement on ground-rules by the Association agreeing to an alternate groundrule (See Finding of Fact 5(A)-a seven-day prior notification provision) and in April the parties returned to the table. They have since concluded negotiations on a contract. The Association's post-hearing brief indicates the agreement to the ground-rules was made without prejudice to each party's legal position in this proceeding.

NJSFT-AFT, AFL-CIO, 141 N.J. Super, 470 (1976). The parties have contractually reiterated their statutory responsibility to enter into good-faith negotiations to reach agreement on terms and conditions of employment and also to exchange proposals and counter-proposals.

The Respondent Board did refuse to exchange proposals and counter-proposals until the Charging Party Association agreed to a press release groundrule. It took the parties six months to enter into negotiations concerning terms and conditions of employment and they did so only after the Charging Party agreed to some form of the groundrule in dispute. In refusing to exchange proposals the Board technically violated subsection (a)(5).

The undersigned finds this to be a technical violation. The Board's insistence on agreement should not be viewed in a vacuum. It was hardly unreasonable for the Board to expect the parties to follow the bargaining pattern that had been followed by the same representatives on both sides for many years.

The Association refused to discuss any restrictions on releasing material to the press arguing this was an impermissible prior restraint on free speech guaranteed by the First and Fourteenth Amendments of the United States Constitution. 6/

6/ The Commission has noted that it is appropriate in certain cases to consider the relevance of Federal Constitutional questions such as First Amendment freedom of speech considerations. In re City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER ___ (_____(1981). Under the circumstances of this case, however, the undersigned does not believe it is necessary to analyze the constitutionality of the disputed clause.

The Board was willing to offer alternatives to the clause that might have met the Association's constitutional concerns but the Association refused to discuss any aspect of it. The Association declared the parties were at impasse and left the table.

At those first two meetings there was not an inordinate amount of time spent on groundrules. Given the Association's intransigent position on the dispute, and the practice of reaching agreement on groundrules at the first negotiating session, it is difficult to find that the Board even technically refused to negotiate in good faith with the majority representative.

However, I do find the Board's continued insistence on agreement to some press release groundrule as a prerequisite to the exchange of substantive proposals equally intransigent in creating a stalemate that continued for six months. The National Labor Relations Board has found that a party violated the National Labor Relations Act when they insisted on agreement to groundrules as a prerequisite to negotiations. The NLRB noted that groundrules are "a threshold matter, preliminary and subordinate to substantive negotiations," adding "we believe we would be avoiding [the statutory] responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue." NLRB v. Bartlett Collins Co., 237 NLRB 770, 99 LRRM 1034 (1978) affirmed 639F, 2d 652, 106 LRRM 2272 (110th Cir. 1981).

The undersigned finds unconvincing the Respondent's argument that the parties were contractually bound to prior negotiations groundrules. Finding of Fact 7 sets out the clauses upon which the

Board relies. It affirmatively sets out the parties agreement to negotiate in good faith. There is no mention of groundrules procedure, but the clause does specifically require the "exchange of proposals and counter-proposals." (Finding of Fact "7.B.") The Respondent argues that both parties are bound to negotiations groundrules by a general past practices clause in the contract. (Finding of Fact "7.E.") Yet, the Respondent did not feel bound by the specific clause requiring the exchange of proposals. The Board cannot have it both ways.

Nevertheless, the Board did try to address the Association's concerns by proposing alternatives but the Association refused to discuss any alternatives. No proposals were exchanged until the Association agreed to a groundrule on the release of information. Eventually the contract was settled. The Respondent believes this makes the matter moot. Signing a contract does not necessarily make an unfair practice moot. In Galloway Twp. B/E v Galloway Twp. Assoc. of Educational Secretaries, 78 N.J. 1 (1978) the Supreme Court addressed the question of mootness and said:

> "We cannot say in the present record, that there is no conceivable liklihood of repetition..." al 24.

This too presents a situation where there is a conceivable possibility of repetition. Technically the Respondent violated the Act when they refused to exchange proposals prior to agreement or groundrules. The Board reacted to a difficult situation. The Association declared impasse when the disagreement over groundrules arose. While the issue may not be moot, the undersigned does not feel an affirmative remedy

is appropriate under the circumstances in this case.

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

CONCLUSIONS OF LAW

The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it insisted on agreement to negotiations groundrules prior to the exchange of substantive proposals.

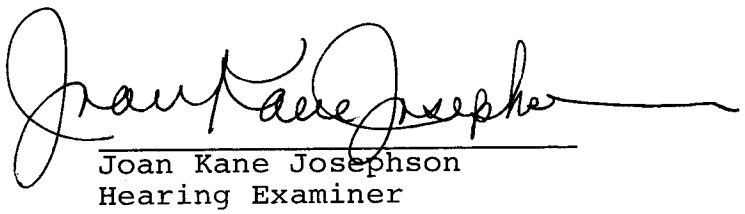
RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by insisting on agreement to negotiations groundrules prior to the exchange of substantive proposals.

2. Refusing to negotiate upon demand in good faith with the Charging Party by insisting on agreement to negotiations groundrules prior to the exchange of substantive proposals.



Joan Kane Josephson
Hearing Examiner

DATED: June 21, 1982
Trenton, New Jersey