

H.E. NO. 86-17

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

In the Matter of

BRICK TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-85-233-169

BRICK TOWNSHIP EDUCATION  
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act by (a) refusing to negotiate in good faith with the Charging Party concerning a proposed retroactive effective date for the collective negotiations agreement, and (b) by failing and refusing to negotiate with the Charging Party after the filing of the charge.

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,  
Anton & Sendzik, Esqs.  
(Jay C. Sendzik, of Counsel)

For the Charging Party,  
Oxford, Cohen & Blunda, Esqs.  
(Mark J. Blunda, of Counsel)

HEARING EXAMINER'S  
REPORT AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on March 8, 1985, by the Brick Township Education Association ("Association") alleging that the Brick Township Board of Education ("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. ("Act"). The Association alleged that the Board violated N.J.S.A. 34:13A-5.4

(a)(1), (5) and (7) of the Act<sup>1/</sup> by refusing to negotiate in good faith with the majority representative concerning terms and conditions of employment of the aides unit for the school year 1984-1985. It appearing that the allegations in the Unfair Practice Charge may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 18, 1985.

On July 19, 1985, the Association filed an Amendment to the Charge alleging that the Board had also violated §§(a)(2), (3), (4), and (5) of the Act <sup>2/</sup> when, following the Spring filing of the instant Charge, the Board allegedly failed and refused to meet and negotiate in good faith or participate in the mediation process with the Association concerning the teachers aides.

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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; (7) Violating any of the rules and regulations established by the commission."

2/ The additionally alleged subsections of the Act prohibit employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

In its Amendment, the Association also alleged that the Board violated an agreement reached between the parties on April 23, 1985, wherein the parties allegedly agreed to resume negotiations. Pursuant to N.J.A.C. 19:14-1.5, I permitted the entire Amendment to be added to the Complaint.

A hearing was held in this matter on July 29, 1985<sup>3/</sup> in Trenton, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence, and argue orally. After the hearing closed, the Board requested permission to submit an affidavit from an additional witness. Since the Board had every opportunity to present witnesses and documentary evidence at the hearing, this request was denied.

At the hearing on July 29, 1985, the Board requested that its previously submitted statement of position serve as its Answer to the Charge, as amended. The Board's Answer denies the allegations in the Charge and asserts that it did not refuse to negotiate terms and conditions of employment with the Association concerning the aides unit. The Board argues that it was not required to negotiate concerning terms and conditions of employment for aides for the 1984-85 school year.

The transcript was received on September 19, 1985. Both parties waived the filing of post-hearing briefs.

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<sup>3/</sup> The hearing which was originally scheduled for July 15 and 16, 1985, was postponed and rescheduled at the request of the Board with the consent the Association.

Findings of Fact

At the hearing, the parties stipulated to certain acts as follows (T-8-10):<sup>4/</sup>

- a) The Brick Township Board of Education is a public employer within the meaning of the Act.
- b) The Brick Township Education Association is an employee representative organization recognized pursuant to the New Jersey Employer Employee Relations Act as exclusive representative for negotiation and process of grievances for certain employees of the Brick Township Board of Education.
- c) On or about October 19, 1984, the Brick Township Education Association made a written request to the Board for recognition of the Association as the exclusive representative of the teachers aides employed by the Board of Education.
- d) On or about November 15, 1984 the Brick Township Board of Education took formal action recognizing the Brick Township Education Association as exclusive representative for the bargaining unit consisting of teacher aides.
- e) Prior to October 19, 1984...there was no certified or recognized exclusive representative [for teachers aides].
- f) On or about December 19, 1984, the Brick Township Education Association made written request to the Board of Education to commence negotiations for a contract setting forth terms and conditions of employment for teachers aides.
- g) The duly authorized representative of the Board of Education advised the Association that he was not available to commence negotiations until January 17, 1985.
- h) On January 17, 1985, duly authorized representatives of the Board of Education and the Education Association met to commence contract negotiations.

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<sup>4/</sup> All transcript notations are from the transcript of the hearing conducted on July 29, 1985, and are designated as T-1 etc.

Upon the entire record, I find the following additional facts:

1) In December, 1983, Board Secretary/Business Administrator Robert Stutts met with spokespersons for the aides group to discuss salaries and benefits (T-40-42). As a result of those informal discussions, in January, 1984, the Board extended a 5-step salary guide and certain other benefits to teacher aides (Exhibits R-1, R-2; T-42-43). There never was a collective negotiations agreement entered into between the Board and any representative of teacher aides. (T-49)

2). In September, 1984, the teacher aides received an incremental step increase as per the salary guide the Board had established in January, 1984 (T-60).

3) On January 17, 1985, and on several occasions thereafter, the Board's and the Education Association's respective negotiation teams met to negotiate for the aides unit (T-32, 37). The Association proposed a two-year contract beginning September 1, 1984, with increases in 1984-85 and 1985-86 (T-18, 36).

4) Ronald Villano, the Chief Negotiator for the Association, testified that the Board would not negotiate terms and conditions of employment for school year 1984-85:

At the bargaining table...Mr. Stutts informed myself and the unit of aides that the Board of Education would not bargain for the 1984-85 school year, and they would be very happy to commence negotiations for the 1985 through '86 school year effective September 1 -- or July 1, depending on the dates. The Board of Education would not bargain for the 1984-85 school year. They said that matter was closed, they had negotiated with the aides prior to that. (T-18-20)

5) During his testimony, Stutts was questioned regarding the Board's response to the Association's negotiations proposals for school year 1984-85. Stutts' testimony confirms Villano's account of the Board's position concerning 1984-85. For example, on direct examination, Stutts testified that,

Q Mr. Stutts, in your January 17th meeting with Mr. Villano, did you inform him that there was presently an existing salary guide?

A If I recall, we had a discussion, as the whole question came up about negotiating for '84-'85. Our position...is we were not convinced that just the mere proposal from the aides that we should be negotiating the '84-85, since we felt we had an agreement in which the salary guide was in place for including the '84-'85 school year,...(T-45-46)

Later, Stutts testified on cross-examination:

Q It was your position, when you commenced bargaining with the Brick Township Education Association, that those same benefits [previously given to the aides] were the contract for the '84-85 academic year?

A Right.(T-51)

Q ...And were you willing to negotiate on the other benefits for the '84-85 academic year?

A ...We, in our position, had not been convinced that we should be negotiating anything additional for '84-85. (T-51)

Q: Now, you indicated a couple of times on your direct testimony that you didn't give a direct refusal to negotiate for '84-'85; that neither you nor Mr. Murphy was convinced that you had an obligation to. Is that correct?

A: Right. (T-52)

Based upon the testimony of both the Association's witness and the Board's witness, I find that the Board's negotiators

expressed an unwillingness to negotiate with the Brick Township Education Association concerning any terms and conditions of employment for the aides for school year 1984-85. I find, from Stutts' testimony, that the Board believed that it had no obligation to negotiate for this period of time because it had already given aides a salary guide step increase (T-60) and certain other benefits (T-50) for school year 1984-85. However, I find, based upon the parties' stipulations, that there was no recognized or certified majority representative of the aides prior to October, 1984, and further, that there was no collective negotiations agreement negotiated with representatives of the aides.

6) In January, 1985, the Board received the Association's written contract proposals which contained proposed terms and conditions of employment for 1984-85 and 1985-86. Sometime thereafter, the Board submitted written counter-proposals to the Association containing a proposed contract starting date of September, 1985. (T-51-52)

7) After the filing of the original Charge on March 8, 1985, the parties had one additional negotiations session in late March. (T-20). Villano's unrefuted testimony shows that one week prior to the scheduled exploratory conference concerning the instant Charge, the Board cancelled a negotiations session scheduled for April 17, 1985, (CP-2, T-20-21) and advised the Association that it would not schedule a negotiations session until "all legal matters were settled." (T-21).



8) On April 23, 1985, an exploratory conference was conducted by the Commission's assigned staff agent. The evidence shows that although a settlement agreement to resume negotiations was discussed, no such agreement was ever signed (Exhibit J-1, T-56). Thereafter, the Association was informed that attorney Seymour Kagan was appointed as Board negotiator on or about May 1, 1985. (T-23, 53) The record shows that Villano contacted Kagan and was told there would be no dates for negotiations.

9) On May 13, 1985, the Association filed a Notice of Impasse with the Commission requesting the assignment of a mediator (CP-3), and a mediator was appointed on May 30, 1985. (CP-5). Villano testified that the mediator told him that she was unable to get the Board to participate in the mediation process, and, therefore, no mediation dates could be arranged (T-26-30).<sup>5/</sup>

On May 16, 1985, Villano contacted Stutts and advised him of the Association's willingness to continue direct negotiations (T-25). On May 20, 1985, Villano sent Stutts a letter with a copy to Kagan, expressing his hope that negotiations could resume (CP-4). By letter dated May 22, 1985, the Association's attorney requested the Commission process the Charge, since the parties had not been negotiating since the exploratory conference on April 23, 1985

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<sup>5/</sup> While I cannot rely upon Villano's hearsay testimony about what the mediator told him that Mr. Kagan told her concerning the Board's position with regard to scheduling of mediation dates, nevertheless, there is no record evidence to suggest that the Board did agree to participate in the mediation process.

(T-56-57). By letter dated July 10, 1985, Villano advised the Board that it was the Association's understanding that the Board refused to schedule any mediation meetings to resolve the outstanding issues (Exhibit CP-6).

I find that there is no evidence in the record to conclude that the Board, either through Stutts or its more recently appointed negotiator, Seymour Kagan, ever responded affirmatively to the Association's repeated requests to return to the negotiations table after the processing of the instant Charge was initiated. While Stutts testified that it was the Board's intention to continue negotiations (T-57), the Board negotiators' actions, or lack thereof, bely that intention.

#### ANALYSIS

I. Did The Board Violate The Act By Its Refusal To Negotiate With The Association Concerning Terms And Conditions Of Employment For School Year 1984-85?

The Commission has held that the duration of a collective negotiations agreement is a mandatorily negotiable term and condition of employment. In Re Dover Board of Education, P.E.R.C. No. 76-34, 2 NJPER 188 (1976), ("Dover"); In Re City of Union City, P.E.R.C. No. 82-18, 7 NJPER 500 (para 12222 1981).

The Commission noted in Dover, the obligation to negotiate with the majority representative begins with a certification issued by the Commission or a proper recognition by the employer. Nothing in the Act or the Commission's Rules restrict negotiations to

only prospective periods, or prohibit retroactive contracts. In fact, such a result is absurd and unworkable. In the private sector, to whom we may look for guidance,<sup>6/</sup> the National Labor Relations Board, has long held that it is an unfair practice to refuse to negotiate retroactivity of a contract with the employee representative. See Bergen Point Iron Works, 79 NLRB 1133, 22 LRRM 1475 (1948).

In Dover, supra, which is substantially analagous to the instant facts the Commission noted,

We recognize that the timing of the recognition or certification of an employee organization may well have a bearing upon the positions of the parties regarding the effective date of an agreement. We also recognize that the positions of the parties, especially on economic issues, may well be influenced by the existence of a previously established budget. However, these facts do not relieve the parties of the obligation, upon demand, to negotiate regarding the effective date of an agreement or regarding a period of time in a fiscal year with a previously established budget. (Dover, 2 NJPER at 189)

From the Board's Answer to the Charge as well as from Stutts' testimony, it is clear that the Board believed that it did not have an obligation to negotiate terms and conditions of employment for school year 1984-85. Its position was based upon the fact that, as a result of informal discussions with teacher aides in December, 1983, the Board had granted increases in pay in the form of incremental movement on the salary guide, and other benefits to teachers aides in September, 1984. Therefore,

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<sup>6/</sup> See Lullo v. Int'l Association of Fire Fighters, Local 1066, 55 N.J. 409 (1970).

the Board reasoned that it had no obligation to negotiate anything additional with the Association for 1984-85. In addition to salary increases, it is clear that there are many other items in collective negotiations to be negotiated, both economic and non-economic; for example, a grievance procedure. In the instant matter, the Board did not express its willingness to negotiate any other items with the Association for the 1984-85 school year. It is important to distinguish between an employer's legitimate proposal of "zero" increases for employees, and its refusal to negotiate at all for terms and conditions of employment for that period. See In Re State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd sub nom. State v. Council of N.J. State College Locals, 141 N.J. Super. 470 (App Div. 1976). In the instant matter, I find that the Board did refuse to negotiate with the Association for school year 1984-85, rather than simply take a hard-line negotiations position concerning additional money for that period.

Additionally, I conclude that the fact that the Board had already given increases to the unit members in September, 1984, does not relieve the Board of its obligation to negotiate with the Association regarding the effective date of the agreement.

For the foregoing reasons, I recommend that the Commission conclude that the Brick Township Board of Education violated section (a) (5), and derivatively (a) (1) of the Act by

refusing to negotiate in good faith with the Association for the 1984-85 school year.

Issue #2: Did the Board violate the Act by its failure to negotiate with the Association after the filing of the initial Charge on March 8, 1985?

The Act, at section 34:13A-5.3 requires that

...the majority representative and designated representative of the public employer shall meet at reasonable time and negotiate in good faith with respect to grievances and terms and conditions of employment.

Following the filing of the instant charge on March 8, 1985, the parties had one negotiations session in late March, 1985.<sup>7/</sup> Thereafter, and up to the hearing on July 29, 1985, the Board failed to affirmatively respond to any of the Association's repeated requests to continue negotiations.

Subsequent to the negotiations session in late March, the Association on several different occasions attempted to arrange negotiations with the Board. The Board cancelled the April 17

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<sup>7/</sup> Although the parties made much ado about the settlement agreement drafted by the PERC staff agent at the exploratory conference on April 23, 1985 ( Exhibit J-1)-- it was specifically alleged in the amended charge that the Board violated the settlement agreement; the Board attempted to demonstrate that since it had not signed the agreement it did not breach the agreement for settlement -- I find that the settlement agreement to be immaterial to the issue of whether the Board violated its statutory duty to negotiate with the majority representative.

session because of the impending proceeding before the Commission, and declined to schedule subsequent sessions "until all legal matters are cleared up." Clearly, during this four-month hiatus, the Board did nothing to fulfill the statutory mandate to meet at reasonable times and negotiate in good faith.

In this instance, I find that neither the filing of the Notice of Impasse, nor the filing of the Unfair Practice Charge, relieved the Board from its obligations to negotiate. It is also apparent that the Board failed and refused to participate in the mediation process which, standing alone, is a violation of the Act. Mediation is an integral part of the overall negotiations process as required by §§6(b) of the Act. This matter can be distinguished from the conclusions reached in City of Camden, P.E.R.C. No. 85-118, 11 NJPER 371 (para 16132 1985), wherein the Commission found that the Employer was not required to meet in face-to-face negotiations after impasse had been declared since there the employer fully participated in mediation and interest arbitration proceedings<sup>8/</sup> to resolve the dispute. Further, the Board cannot seek to benefit from its first refusal to negotiate with the Association for school year 1984-85, by then suspending bargaining altogether when a charge is

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<sup>8/</sup> Interest arbitration is a statutory right afforded to police and fire employees designed to provide finality to police and fire negotiations disputes. The parties in the instant case were not required to go through the interest arbitration process.

filed. The Board's refusal to meet with the Association demonstrates a contempt for the process and in an attempt to undermine the Association's right to reach an agreement through collective negotiations.

Therefore, I recommend that the Commission find that the Board's failure and refusal to meet with the Association and negotiate in good faith after the processing of the Charge was initiated constitutes a per se violation of the Act, specifically, section (a) (5), and derivatively, (a) (1).

I find nothing in the record to support a finding that the Board violated sections (a) (2), (3), (4) or (7) of the Act. There was no showing that the Board dominated or assisted an employee organization, that it discriminated against any employee, or that it violated any section of the Commission's Rules. Therefore, I recommend that the complaint with regard to those allegations be dismissed.

#### RECOMMENDED ORDER

I recommend that the Commission ORDER:

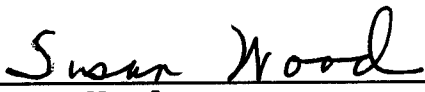
A) That the Respondent Brick Township Board of Education cease and desist from interfering with, restraining and coercing its employees in the exercise of the rights guaranteed to them by the Act, by refusing to negotiate in good faith with the majority representative, Brick Township Education Association.

B) That the Brick Township Board of Education take the following affirmative action:

1) Negotiate in good faith with the Brick Township Education Association concerning terms and conditions of employment for Aides, including terms and conditions for the 1984-85 school year.

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, 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 for a period of at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

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

  
\_\_\_\_\_  
Susan Wood  
Hearing Examiner

Dated: October 16, 1985  
Trenton, New Jersey



# 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 refusing to negotiate in good faith with the Brick Township Education Association concerning terms and conditions of employment for teachers aides.

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act.

WE WILL negotiate in good faith with the Brick Township Education Association concerning teachers aides, including the terms and conditions of employment for school year 1984-85.

~~BRICK 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 James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618 Telephone: (609) 292-9830