P.E.R.C. NO. 80-118

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MILLTOWN BOARD OF EDUCATION,

Respondent,

Docket No. CO-80-38-36

-and-

MILLTOWN EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

An Unfair Practice Charge was filed with the Commission by the Milltown Education Association alleging that the Board violated the Act when it notified three part-time custodians represented by the Association that they would not be renewed during the 1979-1980 school year due to a lack of work but that the work previously performed by these individuals after their severance was performed by the Board's supervisory staff. The Commission agreed with the Hearing Examiner's recommendation that the complaint should be dismissed. However, contrary to the Hearing Examiner's conclusion, the Commission did not agree that the utilization of the supervisor constituted subcontracting under these circumstances. Rather, the evidence indicates that the custodial needs of the district were reduced due to the closing of several wings in one of the district's schools. Accordingly, the Commission dismissed the complaint in its entirety.

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MILLTOWN EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Russell Fleming, Jr., Esq.
For the Charging Party, Stephen E. Klausner, Esq.

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on August 23, 1979 and amended on November 7, 1979, by the Milltown Education Association (the "Association") alleging that the Milltown Board of Education (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"). Specifically it alleges that sections (a)(1), (3) and (5) of the Act [1/] were violated in that the Board advised

1/ These subsections prohibit 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. (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. (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."

three part-time custodians represented by the Association that they would not be employed during the 1979-80 school year because of lack of work but that after their severance the work previously performed by the unit employees was performed by Respondent's supervisory staff.

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 21, 1979. In accordance with the Complaint and Notice of Hearing, a hearing was held on January 3, 1980 in Newark, New Jersey before Alan R. Howe, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Both parties filed post-hearing briefs by January 30, 1980. On February 4, 1980 the Hearing Examiner issued his Recommended Report and Decision,[2/] copies of which were served upon the parties and the original was filed with the Commission. A copy of this Report is attached hereto and made a part hereof. A letter appeal in lieu of formal brief excepting to the Hearing Examiner's findings was filed by the Association on February 18, 1980 and the Board filed a response to the letter appeal on February 28, 1980.

2/ H.E. No. 80-30, 6 NJPER ___ (¶_____ 1980).

The Hearing Examiner found that if the Charging Party had proven that a supervisor was performing unit work previously performed by at least one of the terminated employees, then that would have constituted subcontracting which would have required the employer to negotiate prior to implementing the decision to subcontract; however, he found that the Association did not meet its burden of proving by a preponderance of the evidence that the supervisor was performing the work previously performed by one or more of the terminated part-time employees. The Hearing Examiner also concluded that there was a reduction in force ("RIF") of the custodial staff resulting from the closing of a significant portion of one of the schools, with a concomitant reduction in custodial work, and that neither the decision to RIF nor its impact was negotiable.

The Commission, after careful consideration of the record, adopts the Hearing Examiner's findings of facts and his recommended order. However, we do not adopt his legal conclusion that the actions of the Board in utilizing the supervisor would have constituted sub-contracting if it had been proven that the supervisor was performing the work equivalent to one or more of the RIFed custodians.

The Association takes exception to the Hearing Examiner's finding of fact that the supervisor was not performing the work of one or more of the terminated part-time employees. The Association argues that since one full-time day custodian at one of the two district schools was not replaced, it must be inferred

that the supervisor who works days is performing unit work. Further, the Association argues that a negative inference must be drawn from the Board's not calling the supervisor to testify.

We find there is ample record evidence to find as the Hearing Examiner did that the custodial needs of the district were reduced when three of the four wings of one of the two schools in the district were closed, and that the district's superintendent could competently testify as to custodial needs.

We agree with the Hearing Examiner's conclusion that the factual situation presented herein is a RIF which is a non-negotiable managerial decision. This is not a subcontracting case. We make no finding regarding the impact of the RIF on thes employees because that issue need not be reached to decide this case.

ORDER

Accordingly, for the reasons set forth above, the Complaint in this matter, CO-80-38-36, is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Parcells voted for this decision. Commissioner Graves voted against the decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
April 3, 1980
ISSUED: April 7, 1980

H. E. No. 80-30

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

In The Matter of

MILLTOWN BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-80-38-36

MILLTOWN EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by the Charging Party against the Respondent Board of Education. The Charging Party had alleged that the Board had, after terminating three of its part-time custodians in June 1979, utilized a supervisor to perform the work of the affected custodians which, the Charging Party contended, amounted to a subcontracting of unit work without prior negotiations with the Charging Party.

The Hearing Examiner found that although the supervisor has performed certain custodial work during the 1979-80 school year the Charging Party failed to prove by a preponderance of the evidence that the amount of work performed was equivalent in hours per week to that performed by one or more of the affected custodians. Had the Charging Party sustained its burden of proof in this regard the Hearing Examiner would have found that the Board illegally subcontracted without collective negotiations.

The Hearing Examiner concluded that the Board had made a managerial decision to "RIF" the three part-time custodians and that under court precedent in New Jersey neither the decision to RIF nor its impact on the three affected custodians or other custodians still employed by the Board was negotiable under 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.

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

In the Matter of

MILLTOWN BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-80-38-36

MILLTOWN EDUCATION ASSOCIATION, 1/

Charging Party.

Appearances:

For the Milltown Board of Education
Russell Fleming, Jr., Esq.

For the Milltown Education Association
Stephen E. Klausner, Esq.

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter "Commission") on August 23, 1979, and amended November 7, 1979, by the Milltown Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Milltown 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 the Respondent had by notice dated April 10, 1979 advised three part-time custodians, represented by the Association, that they would not be employed for the 1979-80 school year due to lack of work, and further, that since the severance of these three part-time custodians the custodial work previously performed by them is being performed by Respondent's supervisory staff, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act. 2/

1/ As amended at the hearing.

2/ These Subsections prohibit employers, their representatives or agents from:
"(1) Interfering with, restraining or coercing employees in the exercise of
(continued next page)

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 21, 1979. Pursuant to the Complaint and Notice of Hearing, a hearing was held on January 3, 1980 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties filed post-hearing briefs by January 30, 1980.

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 Milltown Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Milltown Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Since at least July 1, 1977 Respondent's building custodians have been included in a collective negotiations unit of non-certificated personnel together with certain secretaries and teacher aides. This unit also includes part-time custodians who work at least 20 hours per week. The most recent collective negotiations agreement for the foregoing unit was effective during the term July 1, 1977 through June 30, 1979 (J-1). 3/

2/ (continued)
the rights guaranteed to them by this Act.
"(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.
"(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."

3/ Exhibit J-1 indicates that the Agreement was between the Board and the "Milltown Education Association Non-Certificated Personnel." As a result of a petition filed with the Commission on August 1, 1979, Docket No. RO-80-16, the above described collective negotiations unit was merged into and made a part
(continued next page)

4. Prior to the 1979-80 school year the Respondent's schools included two schools known as Parkview School (grades K-4) and Joyce Kilmer School (grades 4-8). The assignment of custodians to these two schools was as follows: at Parkview - one full-time custodian working days and two part-time custodians working evenings; and at Joyce Kilmer - one full-time custodian working days and one full-time custodian and two part-time custodians working evenings.

5. The Joyce Kilmer School consists of four wings built in the years 1907, 1914, 1921 and 1952. As the result of a decision of the Department of Education the Board was directed to close the 1907, 1914 and 1921 wings of the Joyce Kilmer School no later than the 1979-80 school year, which deprived the Board of eight classrooms, certain offices and the industrial arts shop in the basement. To compensate for the said classroom deficiency, the Board leased four classrooms from the United Methodist Church (to house the 5th grade) and two classrooms from St. Paul's Church (to house the kindergarten). The two additional classrooms were gained by placing the 7th and 8th grades on a split-shift at the Joyce Kilmer School.

6. Upon receiving a recommendation evaluating custodial needs for the 1979-80 school year from the Supervisor of Buildings and Grounds, Charles A. Miller, the Board's Superintendent, Patrick J. Wilder, decided that the employment of three part-time custodians was no longer required. Under date of April 10, 1979 an identical letter was sent to the three part-time custodians by Mr. Miller, which explained the reason for termination, namely, lack of work due to the closing of the three wings of the Joyce Kilmer School (CP-1). This letter of Mr. Miller's was confirmed by the Superintendent in a separate letter in May of 1979, which was not offered in evidence.

7. At the request of the affected custodians and their NJEA Consultant, James Patten, a meeting was held with the Superintendent in May 1979 where the Superintendent gave his reasons for the termination due to lack of work, stating that the existing workload would be reallocated, and that if there was any extra

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3/ (continued

of one over-all unit of Certificated and Non-Certificated Personnel. As of the date of the hearing, negotiations for a single successor collective negotiations agreement were on-going and it was stipulated that the custodians are still governed by the terms and conditions set forth in Exhibit J-1.

need for custodial services the work would be performed by Mr. Miller. 4/ At the conclusion of the meeting, which the Superintendent said he considered negotiations, he advised those present that they would have to go directly to the Board with their problem. 5/

8. The Board's utilization of the remaining custodians for the 1979-80 school year has been as follows: at the Parkview School - one full-time custodian working days and one full-time custodian working evenings; at the Joyce Kilmer School - one full-time custodian working evenings, who also performs custodial services at the churches; and one part-time custodian working evenings, who performs custodial services at the churches and in several offices.

9. Charles Miller, Supervisor of Building and Grounds, has overall responsibility for the work performance and evaluation of the custodians. Although he does not have fixed hours of work he normally reports at 7:00 a.m. and departs around 2:00 p.m. or 3:00 p.m. unless he has need to communicate personally with part-time custodians who commence work at 4:00 p.m.

10. Notwithstanding that the Superintendent testified that Charles Miller does not perform custodial services on a regular basis, the Hearing Examiner credits Charging Party witness Cheryl Smith 6/ that during the 1979-80 school year she had seen Charles Miller perform such custodial services at the Joyce Kilmer School as the daily cleaning of the gym, and occasionally "setting up" the gym, replacing lighting in the gym, raking leaves and cutting grass, cleaning windows, cleaning out the

4/ In so finding that the Superintendent made this reference regarding the utilization of Mr. Miller, the Hearing Examiner has credited the testimony of two Charging Party witnesses, James Patten, the NJEA Consultant, and Frederick Miller, one of the affected part-time custodians, that the Superintendent made such a statement, notwithstanding the Superintendent's rebuttal of the respective witnesses for the Charging Party. This is further supported by Finding of Fact No. 10, infra, with respect to the work which Charles Miller has performed during the 1979-80 school year.

5/ The Superintendent testified, without contradiction, that Mr. Patten subsequently appeared at a Board meeting where he pointed out the length of service of the three affected custodians and suggested that the Board consider severance pay, a uniform allowance and a preference in rehiring, in the event that there was again an increased need for custodial services. The Board's response, with respect to preferential rehiring and a uniform allowance for the prior work year, was set forth in a letter from the Superintendent to each affected custodian dated June 29, 1979 (CP-2).

6/ A teacher who divides her time between the Joyce Kilmer School, the Parkview School and St. Paul's Church.

refrigerator and raising the flag daily, all of which work was done by other custodians prior to the 1979-80 school year. 7/

THE ISSUE

Did the Respondent Board violate the Act when it terminated the services of three part-time custodians prior to the 1979-80 school year and thereafter utilized a supervisor, Charles A. Miller, to perform certain custodial services?

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate The Act When It Terminated Three Part-Time Custodians As Of June 1979 And Thereafter Used A Supervisor To Perform Certain Custodial Services During The 1979-80 School Year

The Charging Party views the instant case as of one of de facto subcontracting, in that a supervisor, Charles A. Miller, is performing custodial services previously performed by the three terminated part-time custodians. The Charging Party cites, inter alia, the leading Commission decision on subcontracting in support of its position: Township of Little Egg Harbor, P.E.R.C. No. 76-15, 2 NJPER 5 (1976) where the Commission, relying principally on Fibreboard Paper Products v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964), ordered the public employer to negotiate before implementing a decision to subcontract sanitation work. 8/

7/ The foregoing enumeration of custodial services performed by Charles Miller in the 1979-80 school year stands in contrast to the testimony of Frederick Miller, an affected part-time custodian, who testified credibly that Charles Miller performed no custodial duties after becoming the supervisor of the custodians two years ago. Further, the Hearing Examiner does not credit the testimony of the Superintendent that Charles Miller does no more custodial work at the present time than he did before the three part-time custodians were terminated. It is noted, however, that the Charging Party failed to adduce any evidence indicating the quantum of custodial work done by Charles Miller in the 1979-80 school year in relationship to that done by the three part-time custodians who were terminated. This will be discussed infra.

8/ The Charging Party also cites the following additional decisions of the Commission on subcontracting: Township of Stafford, E.D. No. 76-9, 1 NJPER 54 (1975); Camden County Bd. of Chosen Freeholders, P.E.R.C. No. 78-16, 3 NJPER 332 (1977), enf'd. App. Div. Docket No. A-1347-77; and East Windsor Board of Education, P.E.R.C. No. 80-28, 5 NJPER 394 (1979). The Charging Party additionally cites Creative Engineering, Inc., 228 NLRB No. 67, 94 LRRM 1507 (1977) and Pa. Labor Relations Board v. Mars Area School District, 99 LRRM 2441 (Pa. Supr. Ct. 1978).

Based upon the Charging Party's cited authorities the Hearing Examiner is completely persuaded that if the Charging Party was able to prove by a preponderance of the evidence that a supervisor, such as Charles Miller, was performing the unit work previously performed by one or more of the terminated part-time custodians then the Respondent Board's conduct would thereby constitute a violation of its negotiations obligation within the meaning of Subsection (a)(5) of the Act. Under such circumstances a "cease and desist" order and an order of reinstatement pro tanto as to one or more of the affected custodians with back pay would be appropriate. The NLRB's decision in Creative Engineering (see footnote 8, supra) constitutes clear authority for such a remedy since, factually, it is almost "on all fours" with the facts alleged herein.

Unfortunately for the Charging Party its proofs fall short of establishing that Charles Miller is performing the work of one or more of the three terminated part-time custodians. Although the Hearing Examiner has previously found as a fact that the Charging Party established that Charles Miller has performed certain custodial services at the Joyce Kilmer School during the 1979-80 school year (Finding of Fact No. 10, supra), the Hearing Examiner also noted therein that the Charging Party failed to adduce any evidence which could support a finding of the actual amount of custodial work done by Charles Miller in terms of hours per day or days per week (footnote 7, supra). In the absence of such measurable proof of the amount of work done by Charles Miller the Hearing Examiner concludes that the Respondent Board did not violate the Act by the termination of three part-time custodians and subsequently utilizing Charles Miller to perform certain custodial work. The Hearing Examiner cannot speculate as to whether the amount of Miller's custodial work is equivalent to that done by even one part-time custodian working 20 hours per week. 9/

In conclusion, the Hearing Examiner views the factual situation presented herein as a "RIF" (reduction-in-force) involving three part-time custodians. The Respondent Board, in reaching its decision to terminate three of its part-time custodians, clearly was engaged in the exercise of a non-negotiable management prerogative 10/ and provided an adequate business justification for its decision, i.e.,

9/ It is here noted that the collective negotiations agreement requires a part-time custodian to work at least 20 hours per week in order to be within the unit (see Finding of Fact No. 3, supra, and J-1, p. 2).

10/ See Union County Regional H.S. Bd. of Ed. v. Union County Regional H.S. Teachers Ass'n., 145 N.J. Super 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977).

the mandated closing of three wings of the Joyce Kilmer School in the 1979-80 school year. Not only is the decision to "RIF" non-negotiable, but further, the impact on either the three affected custodians or those who remained in the Board's employ is likewise non-negotiable. 11/

The Charging Party having failed to prove that supervisor Charles Miller is performing work equivalent to that performed by one or more of the terminated part-time custodians, the Hearing Examiner must recommend dismissal of the allegations that the Respondent Board violated Subsections (a)(1) and (5) of the Act. Further, no anti-union animus on the part of the Respondent Board having been established the Hearing Examiner must also recommend the dismissal of the alleged Subsection (a)(3) violation.

* * * *

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

CONCLUSIONS OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) by its termination of three part-time custodians in June 1979 and by utilizing its supervisor, Charles A. Miller, to perform certain custodial services during the 1979-80 school year.

RECOMMENDED ORDER

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

Alan R. Howe
Hearing Examiner

DATED: February 4, 1980
Trenton, New Jersey

11/ See Maywood Board of Education and Maywood Education Ass'n., 168 N.J. Super 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979).