

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH AMBOY BOARD OF EDUCATION,

Respondent,

Docket No. CO-80-44-48

-and-

SOUTH AMBOY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

An Unfair Practice Charge was filed with the Commission by the South Amboy Education Association alleging that the Board violated the Act by requiring Guidance Counselor Karen Bishop to work until June 30, 1979. The Commission agreed with the Hearing Examiner's recommendation that the complaint should be dismissed. The record supported a finding that a past practice existed in the district setting the work year for Guidance Counselors from September 1 to June 30. Accordingly, the Commission dismissed the complaint in its entirety.

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Appearances:

For the Respondent, George J. Otlowski, 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 September 5, 1979, and amended at the hearing on April 18, 1980, by the South Amboy Education Association (the "Charging Party") alleging that the South Amboy Board of Education (the "Board") engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Charging Party alleges that on or about June 20, 1979 the Board, in violation of N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7), instructed Karen Bishop, a Guidance Counselor, that her work year did not end until June 30, 1979, and that the Board allegedly failed to negotiate concerning the change in her work load and for extra pay for her extra service.

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 an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 7, 1980. A hearing was held on

April 18, 1980 before Alan R. Howe, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Both parties filed post-hearing briefs in this matter which were received on May 21, 1980. On May 23, 1980, the Hearing Examiner issued his Recommended Report and Decision,^{1/} which included findings of fact, conclusions of law, and a recommended order. The original of the report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof. Exceptions were filed by the Charging Party on June 6, 1980; the Board responded on June 10, 1980.

The Hearing Examiner found that a clear past practice existed in the district since the 1975-76 school year that the work year for Guidance Counselors ended on June 30. Although Karen Bishop only worked until June 16 in 1976, the Hearing Examiner did find that she worked until June 30 in 1977 and 1978, and the Hearing Examiner found that the district's other Guidance Counselors worked until June 30 every year from 1975-76 to 1978-79. The Hearing Examiner found that a past practice existed also because this work year was not inconsistent with the collective agreement between the parties, because the Charging Party did not object to Bishop's working until June 30 in 1977 and 1978, and because the Association in its last negotiations sought but failed to obtain a contractual provision that the Guidance Counselors' work year coincide with

^{1/} H.E. No. 80-48, 6 NJPER ____ (¶ ____ 1980).

that of classroom teachers.

The Hearing Examiner also found that although Guidance Counselors were paid on the last day that classroom teachers were paid, such payment followed by work until June 30 did not violate Title 18A or the N. J. Constitution.

Finally, the Hearing Examiner considered the testimony of Superintendent John Olexa that he advised Ms. Bishop at the time she was hired that the term of her work year was from September 1 to June 30.

Based upon these findings, the Hearing Examiner concluded that the Board did not violate the cited portions of the Act.

The Commission, having fully reviewed the record, finds the exceptions filed by the Charging Party to be without merit and therefore adopts the Hearing Examiner's findings of fact, conclusions of law and recommended order substantially for the reasons stated by him in his Recommended Report and Decision.

The Charging Party's exceptions are basically two. In its first exception, the Charging Party asserted that the Hearing Examiner found that Bishop "waived" her right to assert that the Board violated Title 18A and the N. J. Constitution by failing to object to having worked until June 30 in 1977 and 1978. The Hearing Examiner found no such thing. The basis for the Hearing Examiner's conclusion herein was a finding that a past practice existed in the district that Guidance Counselors worked until June 30. One element that the Hearing Examiner looked to in support of that finding was that neither Bishop nor the Charging

Party ever objected to her having worked until June 30 in 1977 and 1978. The Hearing Examiner looked to other elements as well in support of his finding that a past practice existed. But at no time did the Hearing Examiner find that the Charging Party "waived" its right to proceed before the Commissioner of Education concerning issues arising under Title 18A. That exception therefore is without merit.

In its second exception, the Charging Party alleges that certain provisions in Title 18A make it illegal for the Board to compel an employee to work after the final paycheck has been received. The Charging Party asserted that since Bishop's last check was received on June 20, she could not legally be compelled to work until June 30. Once again, however, the Charging Party's misinterprets the findings of the Hearing Examiner. The issue in the instant matter did not involve the payment of Bishop's last check or when that check should have been paid pursuant to Title 18A. The issue at hand concerns whether the Board violated the Act by requiring Bishop to work until June 30. Having found that a past practice existed in regard to a term and condition of employment - Bishop's work year - the Hearing Examiner was correct in concluding that the Board did not violate the Act by requiring her to work until June 30. Even if Bishop's last check were paid at the wrong time, that would not negate the fact that a term and condition of employment had been established that Guidance Counselors work until

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June 3. Therefore, that exception is also without merit.^{2/} 5.

ORDER

Based upon the above, IT IS HEREBY ORDERED that the complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

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

DATED: Trenton, New Jersey
July 10, 1980
ISSUED: July 14, 1980

^{2/} The Commission concludes that this argument may be more appropriately raised in a proceeding before the Commissioner of Education.

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- and -

Docket No. CO-80-44-48

SOUTH AMBOY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices which alleged that the Board violated Subsections 5.4(a)(1), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act when it required one of its two Guidance Counselors to work until June 30, 1979, which was ten days later than the last day on which classroom teachers worked. The Hearing Examiner found that there was a clear past practice at least since 1975-76 whereby Guidance Counselors worked until June 30 in any given school year. The Hearing Examiner also noted that the Association had attempted in negotiations for the 1978-80 collective agreement to obtain a provision that Guidance Counselors work the same school year as the classroom teachers, but failed to obtain the agreement of the Board to such a provision. Finally, the Hearing Examiner rejected the Association's contention that the Board was acting illegally when it paid classroom teachers and Guidance Counselors on the same basis and yet required Guidance Counselors to work additional days after receiving their last pay unlike classroom teachers.

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 South Amboy Board of Education
George J. Otlowski, Jr., Esq.

For the South Amboy 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 the "Commission") on September 5, 1979 ^{1/} by the South Amboy Education Association (hereinafter the "Charging Party" or the "Association") alleging that the South Amboy 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 on June 20, 1979, the last day at work for teachers, advised Karen Bishop, a Guidance Counselor, that her work year did not conclude until June 30, 1979, all of which is alleged to be a violation of past practice procedures and an alleged violation of N.J.S.A. 34:13A-5.4(a)(1), (3),

1/ The Unfair Practice Charge was amended at the hearing on April 18, 1980, as a result of which paragraph 7 of the original charge was deleted and in its place was substituted appropriate language regarding a "make whole" remedy for Karen Bishop, who is the subject of the Unfair Practice Charge (Tr. 6).

(5) and (7) of the Act. ^{2/}

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 7, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on April 18, 1980 ^{3/} in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Counsel for the Respondent argued orally and both parties filed post-hearing briefs by May 21, 1980.

An Unfair Practice Charge, as amended, 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 oral argument of the Respondent and 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 ^{4/}

1. The South Amboy Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The South Amboy Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

^{2/} 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.

"(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.

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

^{3/} The hearing was originally scheduled for February 7 and 8, 1980 but, due to a personal problem of counsel for the Charging Party the hearing was rescheduled to March 11, 1980, on which date the Hearing Examiner was ill and the hearing was thereafter rescheduled to the first mutually available date, April 18, 1980.

^{4/} These Findings of Fact are based upon a stipulation of facts placed on the record at the hearing with the exception of Finding of Fact No. 15, infra, as to which testimony was taken.

3. A collective negotiations relationship has existed between the Board and the Association for approximately ten to twelve years. The current collective negotiations agreement between the Board and the Association is effective during the term July 1, 1978 through June 30, 1980 (J-1).

4. Article I of the current collective negotiations agreement, "Recognition," provides as follows:

"The Board recognizes the Association as the exclusive negotiators representing classroom teachers, nurses, guidance counselors, librarians, department heads, home instruction teachers, and special service personnel employed by the Board." (J-1, p. 4) (Emphasis supplied).

5. Karen Bishop is one of two Guidance Counselors employed by the Board and she has been a Guidance Counselor since the 1975-76 school year. Additionally, Karen Bishop is a tenured Guidance Counselor and is a ten-month employee under contract with the Board from September 1 to June 30 of any given school year.

6. During the 1975-76 school year Karen Bishop worked until June 16, 1976, the same date as the classroom teachers.

7. During the 1976-77 school year Karen Bishop worked until June 30, 1977, which did not correspond to the date of the classroom teachers.

8. During the 1977-78 school year Karen Bishop worked until June 30, 1978, the said school year having been extended to June 29, 1978 due to snow conditions during the prior Winter. ^{5/}

9. During the 1978-79 school year Karen Bishop worked "effectively" until June 30, 1979 ^{6/} while the classroom teachers worked only until June 20, 1979.

10. At the end of any given school year, all Guidance Counselors are paid on the last day that the classroom teachers are paid.

11. John Oleyar, who was a Guidance Counselor during the school years 1975-76 through 1977-78, worked until June 30 of each of the said school years. Elaine Parker, who was a Guidance Counselor during the 1978-79 school year, worked until June 30, 1979

^{5/} Presumably the classroom teachers worked only until June 29, 1978.

^{6/} The term "effectively" refers to the fact that there was some compensable time involved for Karen Bishop, which did not result in any additional compensation to her for the 1978-79 school year. Karen Bishop in fact worked some days in July and August 1979, which served to offset days that she did not work between June 20 and June 30, 1979.

12. The current job description for Guidance Counselors was adopted January 31, 1977 and was received in evidence as Exhibit J-2.

13. In the negotiations for the current collective agreement (J-1), the Association submitted a number of proposals, one of which was that Article VI, "Teaching Hours and Teaching Load," be amended to provide in a Subsection "E" that Guidance Counselors "...shall have the same yearly time schedule as all other teachers, namely, 180 days..." (R-1, p. 2). ^{7/}

14. Article XI of the current collective negotiations agreement contains a provision entitled "Pay Days," paragraph 1 of which provides that, "The usual dates for payments will be the 15th and 30th day of each month." Paragraph 3 further provides that, "When a pay day falls on or during a school holiday, vacation, or week-end, teachers shall receive their pay checks on the last previous working day." (J-1, p. 24).

15. The Board's Superintendent, John Olexa, testified credibly that he spoke to Karen Bishop prior to her employment as a Guidance Counselor in 1975, at which time the Superintendent advised Karen Bishop that "the Guidance Counselor position would be similar to that of the existing high school and it would be from September 1 to June 30..." (Tr. 22). ^{8/}

THE ISSUE

Did the Respondent Board violate the Act when in June 1979 it required Karen Bishop, a Guidance Counselor, to work "effectively" until June 30, 1979, a date ten days after the last day of work for classroom teachers?

^{7/} Although there was no stipulation received, the Hearing Examiner notes that no such provision is included in Article VI of the current collective negotiations agreement (see J-1, pp. 15, 16).

^{8/} Karen Bishop testified that she was interviewed for the position of Guidance Counselor in the Spring of 1975 by the School Principal, Robert Bloodgood, who did not indicate to her when she would cease working during the 1975-76 school year (Tr. 16, 17). Karen Bishop denied having any conversation on this subject with the Superintendent, John Olexa, either prior to her hire as Guidance Counselor or within the first year thereafter (Tr. 18, 19). The Hearing Examiner does not credit this denial in view of the fact that, although Karen Bishop worked only until June 16, 1976 as did the classroom teachers, she thereafter worked without evidence of protest until June 30, 1977 and June 30, 1978 (see Findings of Fact Nos. 6-8, supra). Further, in this regard, it is noted that Guidance Counselors Oleyar and Parker each worked until June 30 during the school years of their respective employment: 1975-76 through 1978-79.

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate The Act, As Alleged, When It Required Karen Bishop, A Guidance Counselor, To Work "Effectively" Until June 30, 1979, A Date 10 Days After The Last Day Of Work For Teachers

The Hearing Examiner finds and concludes that the Charging Party has failed to prove by a preponderance of the evidence that the Respondent Board violated either Subsection (a)(1), (3), (5) or (7) of the Act, as alleged, by having required Karen Bishop, a Guidance Counselor, to work "effectively" until June 30, 1979, a date 10 days after the last day of work for the Board's classroom teachers.

In so finding and concluding the Hearing Examiner has considered fully the argument of the Charging Party in its Brief, which contends: (1) that Karen Bishop's work year ends on the last day of the "academic year," as distinct from the "school year," as these terms are defined in Title 18A, N.J.S.A.; (2) that by requiring Karen Bishop to work until June 30, 1979 the Board unilaterally extended her work year by 10 days, citing Piscataway^{2/} and Article IV of the current collective negotiations agreement; and (3) that there is no binding inconsistent past practice.

On the other hand, the Hearing Examiner finds the argument and contentions of the Respondent more persuasive, namely: (1) that all Guidance Counselors have at least since the 1975-76 school year worked until June 30, except for the one year when Karen Bishop worked only until June 16, 1976, and that this constitutes a "clear and undeviating past practice;" (2) that the Board did not agree to an Association proposal that the work year of Guidance Counselors coincide with that of classroom teachers; and (3) that the testimony of Karen Bishop, as opposed to that of the Superintendent, demonstrates that the Charging Party has failed in its burden of proof to establish that Karen Bishop's work year ended on a date other than June 30.

In concluding that the Respondent Board has not violated the Act, as alleged, the Hearing Examiner relies primarily upon the following:

^{2/} Piscataway Township Board of Education and Piscataway Township Principals Association, P.E.R.C. No. 77-65, 3 NJPER 169 (1977), aff'd. and enf'd., 164 N.J. Super. 98 (App. Div. 1978).

1. There has existed since at least the 1975-76 school year a clear past practice that the work year for Guidance Counselors has ended on June 30 with the single exception, which the Hearing Examiner finds insignificant, that Karen Bishop worked only until June 16 in the 1975-76 school year. This past practice is in no way inconsistent with or contradicted by the provisions of the collective negotiations agreement between the parties. The Hearing Examiner finds it significant that neither the Association nor Karen Bishop manifested any objection or protest with respect to the fact that Karen Bishop worked until June 30, 1977 and June 30, 1978. The Hearing Examiner also finds it significant that the Association, in negotiations for the current collective agreement, failed to obtain a contractual provision that the work year of the Guidance Counselors coincide with that of that of the classroom teachers.

2. Inasmuch as all Guidance Counselors are paid on the last day that the classroom teachers are paid in any given school year, a practice which presumably has existed since 1975-76, the Hearing Examiner finds it difficult to accept the argument of the Charging Party that such payment followed by work thereafter until June 30 constituted illegal action by the Board under Title 18A and the New Jersey Constitution. If this were so, then presumably the Charging Party would long ago have sought a ruling on this illegality in an appropriate proceeding before the Commissioner of Education. 10/

3. The testimony of Karen Bishop and the Superintendent, John Olexa, regarding the terms under which Karen Bishop was employed as a Guidance Counselor in 1975 has, as previously found, persuaded the Hearing Examiner that her work year as a Guidance Counselor was to be from September 1 to June 30. It is noted additionally that the dates September 1 to June 30 coincide with Karen Bishop's contract with the Board as a ten-month employee.

Based on the foregoing findings and conclusions, the Hearing Examiner has no alternative but to recommend that the allegations in the Complaint that the Board violated the Act be dismissed in their entirety.

* * * *

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

10/ See Charging Party's Brief, pp. 7, 8.

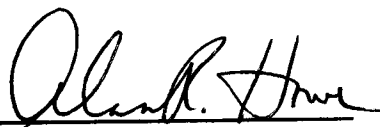
CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7) when it required Karen Bishop, a Guidance Counselor, to work "effectively" until June 30, 1979, a date 10 days after the last day of work for classroom teachers.

RECOMMENDED ORDER

It is hereby ORDERED that the Complaint be dismissed in its entirety.

Dated: May 23, 1980
Trenton, New Jersey



Alan R. Howe
Hearing Examiner