H.E. No. 79-28

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

In the Matter of	:	
NEPTUNE TOWNSHIP BOARD OF EDUCATION,	:	
Respondent,	:	
-and-	:	Docket No. CO-78-55-32
NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
Charging Party.	:	
NEPTUNE TOWNSHIP BOARD OF EDUCATION,	:	
Public Employer,	:	
-and-	:	Docket No. CU-77-44
NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
Petitioner.	:	

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a clarification of unit petition because it is inappropriate to clarify the scope of a collective negotiations unit to include permanent substitutes that were created under a 1971-72 contract.

The Hearing Examiner recommends that the Commission dismiss an unfair practice charge alleging the Board violated §5.4 (a)(5) by unilaterally changing terms and conditions of employment of employees who are not members of a negotiations unit.

The Hearing Examiner recommends that changing terms and conditions of employment, without offering business justification therefor, following the filing of a CU petition does interfere with, coerce and restrain employees in the exercise of rights guaranteed by the Act under subsection 5.4 (a)(1) of the 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.

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Appearances:

For the Neptune Township Board of Education

Laird, Wilson and MacDonald
(Andrew J. Wilson, Esq.)

For the Neptune Township Education Association

Richard Springer, Chief Negotiator
Neptune Township Education Association
Kevin Cofield, President of the
Neptune Township Education Association
Morgan and Falvo, Esqs.
(Peter S. Falvo, Esq., on the Brief)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 15, 1977, by the Neptune Township Education Association (hereinafter the "Association") alleging that the Neptune Township Board of Education (hereinafter 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 Board unilaterally reduced the salary, removed coverage

of insurance benefits and altered the method of notification for work of certain "permanent substitutes" or "per diem substitutes" during negotiations for these employees, all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

A petition for clarification of unit was filed on January 25, 1977, by the Neptune Township Education Association seeking a determination as to whether "permanent substitute teachers" employed by the Neptune Township Board of Education [2/] are included or should be included, in a negotiating unit represented by the Neptune Township Board of Education.[3/]

It appearing that the allegations contained in 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 October 3, 1977. Also on October 3, 1977, an Order Consolidating Cases was issued by the Director of Unfair Practice Proceedings, which Order joined together the unfair practice charge and the clarification of unit petition for hearing.

Pursuant to the complaint and notice of hearing, hearings were held on October 20, 1977, November 1, 1977, and November 29, 1977, in Trenton, New Jersey at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties agreed to file

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1/ These subsections prohibit employers, representative, or their agents from: "(1) interfering and restraining or coercing employees in the exercise of the rights guaranteed to them by the 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/ The Clarification of Unit Petition was orally amended at the hearing (Tr. 1-9) in order to list the name of the public employer as "Neptune Township Board of Education." The petition has incorrectly listed the name of the Association in the space provided for the name of public employer.

(References to the transcripts will be as follows: the hearing of October 20, 1977 will be cited as I followed by the page number, the hearing held on November 1, 1977 will be cited as II followed by the page number, and the hearing held on November 29, 1977 will be cited as III followed by the page number.

3/ On July 1, 1977, a Notice of Hearing was issued by the Director of Represenation Proceedings and the undersigned was appointed the Commission Hearing Officer. (See Exhibit C-6 in evidence.) On July 19, 1977 an order rescheduling the hearing was issed on the clarification of unit petition (see C-7 in evidence) and on September 20, 1977 an additional order rescheduling the hearing was issued (see C-8 in evidence).

silultaneous briefs.[4] The post-hearing brief of the respondent was received in the Commission offices on July 14, and the brief from the charging party was received on July 26, 1978.

An unfair practice charge having been filed with the Commission, a question concerning alleged violations of the Act exists and clarification of unit petition having been filed with the Commission a question concerning the composition of a collective negotiations unit exists and, after hearing and after consideration of briefs by the parties the matter is appropriately before the Commission by its designated hearing examiner, for determination.[5]

Upon the entire record, the hearing examiner makes the following:

FINDINGS OF FACT

(1) The Neptune Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

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

(3) The parties have executed a series of collective negotiations agreements. The contract language of the recognition clause has remained essentially unchanged since the initial contract between the parties was executed for the 1969-70 school year. The recognition clause contained in Article I, Section A of their contract is as follows:

> "The Neptune Township Board of Education hereby recognizes the Neptune Township Association Inc. as the majority representative for collective negotiations concerning the terms and conditions of employment for all certificated educational personnel employed under contract, or on leave, but excluding: Principals, Vice Principals, Asst. Superintendents, Administrative

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4/ On March 27, 1978 the attorney for the charging party advised the undersigned that he had been retained by the charging party to represent them and requested an extension of time until April 28, 1978 in which to examine the transcript and file a brief. The attorney for the respondent advised the Commission that he did not object to the request for the extension of time in which to file briefs and the undersigned granted the requested extension. On April 17, and June 12, and June 29, the charging party requested additional extensions in which to file his brief which requests were consented to by the respondent and granted by the hearing examiner.

5/ While a final decision on a hearing officer's report and recommendation in a representation case is customarily made by the Director of Representation pursuant to N.J.A.C. 19:11-7.4, this recommended report and decision is being submitted directly to the Commission inasmuch as the Director of Unfair Practices consolidated the unfair Practice charge and the representation case for hearing. (See C-1 in evidence.) (N.J.A.C. 19:11-8.8 provides for Commission action in representation cases.)

Directors, Per Diem Teachers."[6]

(4) The collective negotiations agreement between the Board and the Association for 1971-1972 provided that "two (2) unassigned (per diem substitutes) teachers" would be placed in the junior high school and in the senior high school. Four employees have been hired each year by the Board since then.[7]

(5) The parties have entered into joint stipulations of facts. I accept the joint stipulations and incorporate them herein in my findings of fact.[8] Below is a summary of the stipulations:

> These employees in question report for work on a daily basis, for the school calendar, without being called each day. Other per diem substitute teachers are called when work is available for them.[9] (The parties stipulated as to names and dates of employment of all permanent substitutes hired under Article VII-G. See Tr. I-10 to 11. Two of the named people continued to serve as permanent substitutes at the senior high and two additional people who were named continued to serve at the junior high.) These Permanent substitutes were offered Blue Cross/Blue Shield and Major Medical coverage paid by the Board until June 30, 1977. Permanent substitutes received no sick leave, personal business days, or any other temporary or extended leave of absence benefits offered to teachers covered by the collective negotiations

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6/ There have been some slight changes in the recognition clause over the years which changes are not specifically relevant to the matter before the Hearing Examiner. It should be noted however, that the agreement between parties from September 1, 1975 to August 31, 1977 does add the following employees categories: Secretaries for which there is a special addendum to the contract and Internal Attendance Officers for which there is another addendum to the contract.

7/ The per diem substitutes referred to above are the people in question on both the clarification of unit petition and the unfair practice charge. Article VII-G of the contract which provided for this position is as follows: "Beginning with 1971-1972 school year, the Board agrees to establish and hire two (2) unassigned (per diem substitutes) teachers per building who shall be employed to serve in positions to which they may be assigned from day to day by the building administrators (Jr. and Sr. High School). Such teachers may be assigned to fill positions for teachers who are temporarily absent." The 1971-1972 contract and the succeeding three contracts contain this exact language including references to the 1971-32 school year.

8/ Tr. I-9 to 15, II-3 to 4.

9/ The clarification of unit question arose in an attempt to clarify whether the "per diem teachers" excluded in the recognition clause of the contract referred only to per diem substitutes who were called in on a daily basis when teachers were absent or whether the substitutes created in the 1971-72 contract were included in the "per diem teacher" exclusion, or whether they were included in the "certified educational personnel employed under contract" of the recognition clause. (For identification purposes in this report references to the employees in question in the clarification of unit petition will be referred to as permanent substitutes. Other substitutes who are called in on a day to day basis to replace teachers who are out will be referred to as per diem substitutes.)

agreement. All permanent substitutes are carried on a payroll form (Extra Employees Pay Form) which is separate and apart from the payroll for regular teachers and their pay period is also different from that of teachers covered by the collective negotiations agreement.

Permanent substitutes employed under Article VII-G of the contract were paid $30.00 for each day worked.10/

No other benefits accrue to these employees, nor did any other benefits accrue to these employees for the 1976-1977 school year. The four employees in question hold certificates issued by the New Jersey State Board of Education and substitute certificates issued by the Monmouth County Superintendent of Schools.

They perform the following type duties: Cover for teachers in the classrooms, cafeteria duty, study halls, homeroom, as needed, assist in library, main office, detention halls, instructional material center, physical education classes and chaperone trips. They assist teachers on a voluntary basis in extra curriculum activities without assignment by Board of Education or building principal. On occasion permanent substitutes would grade papers, grade and evaluate student progress, prepare lessons plans and perform the duties of the classroom teachers. In the event of an extended absence of a regular classroom teacher, the normal practice was to employ either a replacement on a contractual basis, or a per diem substitute teacher with a certicate covering the particular subject taught by the teacher who was absent rather to utilize one of the permanent substitutes. The beginning and ending hours of the school day of permanent substitutes is the same as for other teachers in the two schools. They are required to report their unavailability for work through the usual teacher channels.

The bases for rehiring the permanent substitutes is on the recommendation of the building principal. The Association never included these employees in negotiations prior to the filing of the clarification of unit petition on January 25, 1977. The employees do not sign or receive an employment document.

(6) The Directoryof employees of the school board for the year 1976-77 (CP-2 in evidence) listed the title of Permanent Sustitutes for both the Junior High School and Senior High School and listed the names of two people for each school. The Directory of employees for 1977-78 school year (CP-3 in evidence) contains no listing of permanent substitutes.

10/ For the year 1976-77 regular substitute teachers were paid at the rate of $21.00 per day for first 10 consecutive days of employment, after which the per diem rate was increased to $30.00 per day, provided the substitute remained in the same assignment. In the 1977-78 regular school year substitutes were paid at a rate of $25.00 per day for the first 10 consecutive days of employment after which the per diem rate was increased to $30.00 per day provided the substitute remained in the same assignment.

(7) For the 1977-78 school year the salary for the permanent substitutes was reduced from $30.00 each day commencing the first day of employment to $25.00 per day for the first ten days in the school year and on the eleventh day of employment raised to $30.00 per day. Furthermore, the Blue Cross/Blue Shield Major Medical hospitalization insurance that these employees had been receiving was discontinued.

ISSUES

(1) Should the scope of the collective negotiations unit be clarified to include permanent substitutes?

(2) Did the respondent Board violate subsections (a)(5) and/or (a)(1) of the Act when it unilaterally and without negotiations with the Association changed terms and conditions of employment of permanent substitutes?

DISCUSSION AND ANALYSIS

The Scope of the Collective Negotiations Unit

In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977), the Director of Representation reviewed and analyzed the Commission's procedures when a petition is filed to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act--clarification of unit ("CU") proceedings.

The Director noted that a clarification of unit proceeding would normally be appropriate to determine the possible inclusion in the unit of a new title that may have been created by the employer after the execution of the most recent contract entailing job functions similar to functions already in the unit or to include titles that the parties failed to include in the most recent collective negotiations agreement.

I am satisfied that Article VII-G of the collective negotiations agreement of 1971-72 established a new position that different from the "per diem substitutes" specifically excluded from the recognition clause. This was essentially a new title entailing job functions similar to both "certificated educational personnel under contract" and "per diem substitutes."

It would appear to have been uncertain in 1971 whether or not these employees fell within the scope of the originally intended unit. During the existence of the 1971-72 contract it would have been appropriate for the Association to have filed a clarification of unit petition to determine whether this new

classification should have been included within the scope of the unit. See In re Fair Lawn Board of Education, D.R. 78-22, 3 NJPER 389 (1977).

Since the establishment of permanent substitute teachers under the 1971-1972 contract, the parties have negotiated three subsequent contracts. While there have been changes in the recognition clause of the contract since the 1971-72 contract (See n.6 above) the permanent substitute position has not been included or excluded in this claim, while article VII-G establishing the title remains unchanged.

Under the circumstances of the instant petition a clarification of unit proceeding would had been appropriate if it had been filed during the life of the 1971-72 contract. A clarification of unit petition also might well have been appropriately filed during the life of a collective negotiations agreement to seek to include titles whom the parties had previously failed to include in the most recent contract even though, at the time of execution of the contract (1972-73 in this case) such titles existed.

Two two-year contracts have been executed by the parties since the 1972-73 contract.[11/] The clarification of unit petition was not filed unit January 25, 1977. The parties jointly stipulated that the Association never included these employees in negotiations prior to the filing of the CU petition.

By not acting on this matter until 1977, the Association has abandoned its claim to have the scope of the collective negotiations unit clarified to include the title permanent substitute.[12/] (See Fair Lawn, supra, and Remington Rand Division of Sperry Rand Corporation and Local 212 Employees International Union AFL-CIO, 122 NLRB No. 92, 48 LRRM 1478 (1961).

Accordingly, for the aforementioned reasons, I recommend to the Commission that the Clarification of Unit be dismissed.

11/ R-4, R-5 and R-6 in Evidence.

12/ A new category of personnel was created in 1971, a title that the parties have not included in the unit. While the issue of representation is not before the undersigned, the facts in this case appear to present a dispute that concerns a question concerning representation and not a question concerning the language which defines the existing unit In re Clearview Regional High School Board of Education, supra p.8.

The Alleged Violations of the Act

The parties stipulated that the Board reduced the salary of permanent substitutes for the 1977-78 school year and eliminated their hospitalization coverage. The method by which they would be notified to come to work every day was also changed. The charging party contends that this unilateral change was made while the Association was negotiating on behalf of permanent substitutes which constitutes a violation of subsection (a)(5) of the Act.[13/]

The Board argues that they have never negotiated with the Association concerning permanent substitutes, that the only discussions the parties had concerning their terms and conditions of employment were after the CU petition was filed, which discussions were held at the direction of PERC and that it is not a violation of the Act to unilaterally change terms and conditions of employment of employees outside the negotiations unit citing In re Plumsted Township Board of Education, DUP 78-4, 3 NJPER 335 (1977). In Plumsted the Director of Unfair Practices refused to issue an unfair practice complaint pursuant to to N.J.S.A. 34:13A-5.4(c) in an alleged (a)(5) violation. The Director pointed out that this subsection requires an employer to negotiation with the majority representative of employees in an appropriate negotiations unit.[14/]

Since the employees in question herein are not part of the collective negotiations unit represented by the Association, the employer has no duty to negotiate with the Association concerning their terms and conditions of employment.

"Negotiations" between the Board and the Association on behalf of permenent substitutes that were alleged by the Association to have been in progress when the unilateral change occurred, were not negotiationsthat were required of the Board because the Association was the majority representative of the employees in question.

13/ See n. 1 above

14/ Respondent would distinguished refusal to negotiate as found in Plumsted from unilateral change; however, unilateral changes are normally regarded as per se refusals to bargain See NLRB V. Katz, 369 US 7 36. 50 LRRM 2177 (1962). While Plumstead dealt with the duty to bargain with an individual who was not a member of a negotiations unit, the Director points out that the act requires an employer to negotiate with the majority representative of employees in a negotiations unit. N.J.S.A. 34:13A-5.3 provides in part "...A majority representative of public employees in an appropriate unit shall be entitled to act far and to negotiate agreements covering all employees in the unit..."

Therefore, I find that the Board did not violate subsection (a)(5) of the Act when it unilaterally and without negotiations with the Association changed terms and conditions of employment of permanent substitutes.

In the absence of a finding that there has been a violation of a particular subsection of the Act, there can be no finding of a derivative (a)(1) violation based on the theory that any violation of the law tends to interfere with, restrain or coerce employees in the exercise of rights protected under the Act.15/

If the facts indicate however, that particular actions of a respondent directly interfere with restrain or coerce employees in the exercise of rights protected under the Act, a direct (a)(1) violation may be found.

In New Jersey College of Medicine and Dentistry, P.E.R.C 79-11, 4 NJPER ¶4189 (1978) the Commission set out the following standard to be applied in determining whether N.J.S.A. 34:13A-5.4(a)(1) has been violated:

> "It shall be an unfair practice for are employer to engage in activities which, regardless of direct proof of anti-union bias tend to interfere with, restrain or to coerce a reasonable employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial "business" justification If an employer, pursuant to the above standard, does establish such justification, no unfair practice will be found under Section 5.4(a)(1) unless the charging party proves anti-union motivation for the employer's actions."

A clarification of unit petition was filed by the Association on January 25, 1977.16/ While this petition was pending the Respondent unilaterally changed terms and conditions of employment of the petitioned-for employees. No business justification for this action was proferred by the Board. The unfair practice charge alleges that the Board's actions constitute coercion on the part of the Board.

15/ For a discussion of the Commission's analysis of derivative (a)(1) violations see In re Galloway Township Board of Education, PERC 77-3, 2 NJPER 254 (1976) 157 N.J. Super 74 (App. Div. 1978).

16/ N.J.S.A. 34:13A-5.3 provides that public employees shall be protected in the exercise of the right to "form, join and assist any employee organization." I find the filing of a CU petition to be a protected activity.

In order to reach a decision as to whether or not the respondent violated subsection (a)(1) by reducing permanent substitutes' salaries and eliminating their hospitalization coverage during the pendency of the CU, it is not necessary to determine whether the Board actually was or was not negotiating over terms and conditions of employment of these employees as the Association alleges when the changes were made.[17/] Since no business justification was offered to explain the Board's actions, the sequence of events, i.e., filing of the CU petition followed by reduction of salary and elimination of hospitalization coverage meets the above test adopted by the Commission in (a)(1) cases and tends to interfere with and have a chilling effect on rights protected under the Act.[18/]

* * * *

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

CONCLUSION OF LAW

(1) The clarification of unit petition is not appropriate at this time to add permanent substitutes to the collective negotiations unit.

(2) The Respondent violated Subsection (a)(1) of the Act when it reduced the salary and eliminated hospitalization coverage of permanent substitutes.

THE REMEDY

Having found the Respondent to have violated N.J.S.A. 34:13A-5.4(a)(1) I will recommend that Respondent cease and desist therefrom and take certain affirmative action. I shall recommend that the Respondent be ordered to make the permanent substitutes whole for any loss of pay they may have suffered as a result of the Respondents having reduced their salary.

17/ Since the extent of the changes of the method of notifying employees to report to work is unclear from the testimony, I will not recommend any affirmative action in this matter.

18/ While the individuals did not file charges with the Commission on their own behalf alleging that the Board violated subsection (a)(3) by discriminating in regard to their terms and conditions of employment because they exercised rights protected under the act or alleging that the Board discriminated against them because they filed a petition under the Act which is protected under (a)(4), I find the facts support an (a)(1) violation consistent with the standard set out in New Jersey College of Medicine and Dentistry, supra.

I will further recommend that the Board immediately offer to all permanent substitutes currently employed by the Board hospitalization coverage that was previously offered these employees.[19/]

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the clarification of unit petition be dismissed.[20/]

B. That the Respondent cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guranteed to them by the Act.

C. Take the following affirmative action which is necessary to effectuate the policies of the Act:

1. Reimburse all permanent substitutes for all lost salary at the salary level they would have received had the Board not reduced their salary.

2. Offer all permanent substitutes currently employed by the Board hospitalization coverage that was previously offered these employees.

3. 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 by the Respondent immediately upon receipt thereof after being signed by Respondent's representative, and shall be maintained by it for a period at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by other material.

4. Notify the Director of Unfair Practices within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

D. That the allegation of a violation of Subsection (a)(5) in the Complaint be dismissed in its entirety.

Joan Kane Josephson
Hearing Examiner

DATED: December 28, 1978
Trenton, New Jersey

19/ Since the extent of the damages the employees may have suffered because of the elimination of hospitalization coverage was not litigated before the Hearing Examiner, the remedy must be limited to prospective application.

20/ See N. 5 above.

APPENDIX "A"

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 NOT interfere with restrain or coerce our employees in the exercise of the rights guaranteed them by the Act.

WE WILL reimburse all permanent substitutes for all lost salary at the salary level they would have received had we not reduced their salary.

WE WILL offer all permanent substitutes currently employed by us hospitalization coverage previously offered these employees.

WE WILL post in a prominent place where employer notices customarily posted copies of this notice for a period of sixty (60) days.

_____
(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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780