

H.E. NO. 94-21

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

In the Matter of

EAST BRUNSWICK TOWNSHIP BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-H-93-260

EAST BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants in part and denies in part a Motion for Summary Judgment on allegations that the East Brunswick Board of Education unilaterally assigned school nurses the extra-curricular duty of sports physicals without negotiating compensation, seniority, equity and rotation of assignments. The Hearing Examiner finds that negotiations over compensation for sports physicals are preempted by clear language in the parties' agreement. The Hearing Examiner denies the balance of the Board's motion which claims that sports physicals are not extra-curricular activities pursuant to N.J.S.A. 34:13A-23 and that it therefore had no obligation to negotiate any other aspects of the nurses' assignment.

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Appearances:

For the Respondent, Martin R. Pachman, attorney
(Lisa A. Sanders, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
attorneys
(Nancy I. Oxfeld, of counsel)

DECISION ON MOTION FOR SUMMARY JUDGMENT

On January 19 and February 18, 1993, the East Brunswick Township Education Association filed an unfair practice charge and amendment with the Public Employment Relations Commission. The Association alleges that the East Brunswick Township Board of Education violated subsections 5.4(a)(1) and (5)^{1/} of the New

^{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.

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. by unilaterally assigning school nurses the extra-curricular activity of sports physicals and refusing to negotiate with the Association over the assignment, including procedures and compensation.

A Complaint and Notice of Hearing issued on September 14, 1993, scheduling the matter for hearing. On September 24, 1993, the Board filed an Answer to the Charge, admitting that it refused to bargain over the assignment of school nurses to perform school physicals, but denying that it unilaterally assigned school nurses to perform the physicals. The Board also denies that school physicals are an extra-curricular activity and that its refusal to negotiate was in violation of the Act. The Board states that the nurses have performed sports physicals since the 1970's and that compensation for such duty was negotiated in the current agreement between the Association and the Board.

On November 5, 1993, the Board filed a motion to dismiss with accompanying letter brief. On November 9, 1993, the Board was informed that the motion was more appropriately characterized as a motion for summary judgment. The Association did not file a response to the motion. N.J.A.C. 19:14-4.8(c). The Chairman has referred the motion to me for disposition.

Summary judgment may be granted "[i]f it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a

matter of law...." N.J.A.C. 19:14-4.8(d). Summary Judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182, 185 (App. Div. 1981); State of N.J., Dept. of Personnel, P.E.R.C. No. 89-67, 15 NJPER 76 (¶20031 1988), aff'd App. Div. Dkt. No. A-3465-88T5 (6/14/90), certif. den. 122 N.J. 395 (1990); AFT Local 481 (Jackson), H.E. No. 87-9, 12 NJPER 628 (¶17237 1986), adopted P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986); Essex Cty. Educ'l Services Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982). In considering Motions for Summary Judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. Additionally, no credibility determinations may be made. The Motion must be denied if material factual issues exist. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954).

In Judson, the court specifically held that:

...if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature ... he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. [17 N.J. at 75.]

See also, City of Atlantic City, H.E. No. 86-36, 12 NJPER 160 (¶17064 1986), adopted P.E.R.C. No. 86-121, 12 NJPER 376 (¶17145

1986); CWA Loc. 1037, AFL-CIO, H.E. No. 86-10, 11 NJPER 621 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985).

The Association's charge alleges that in the fall of 1992, the Board unilaterally assigned school nurses the extra-curricular duty of sports physicals. The Association further states that on December 10, 1992, it demanded to bargain over procedures of the nurses' assignment, including equity, seniority, rotation of assignments and the amount of stipend to be paid for the duty. On January 13, 1993, the Board notified the Association that it would not negotiate concerning the nurses' assignment to school physicals.

The Board contends that bargaining over the nurses' compensation for sports physicals is preempted by the parties' contract. The Board submitted a copy of its current agreement with the Association covering July, 1992 through June 30, 1994. The recognition clause of that agreement includes nurses. Article XIII of the agreement governs salaries. Section A. 11 of the salary article states that:

Employees who conduct sports pre-physical screenings and/or assist medical personnel during sports physicals shall be paid \$27.00 per session in 1992-93, and \$29.00 per session in 1993-94.

An express contract article can act as a clear and unequivocal waiver of a majority representative's right to further negotiations over that issue. An employer can therefore refuse to negotiate over what has already been bargained over and reduced to writing in the agreement. Passaic Cty. Reg HS Dist. No. 1, P.E.R.C.

No. 91-11, 16 NJPER 446 (¶211292 1990). What the Association seeks is tantamount to opening negotiations mid-contract. There is no obligation for the Board to do so. When collective negotiations agreements are reached, they must be reduced to writing. These written agreements set terms and conditions of employment for the life of the contract, unless the parties mutually agree to change them. Middlesex Bd. of Ed., P.E.R.C. No. 94-31, 19 NJPER 544 (¶24257 1993); Passaic.

The parties' contract clearly sets a negotiated stipend of \$27.00 per session for 1992-93 and \$29.00 per session for 1993-94 for school physicals. The Board is not required to reopen negotiations on this issue for the duration of the agreement and its refusal to negotiate this issue is not an unfair practice. Accordingly, the Board's motion is granted with respect to the allegation that it refused to negotiate with the Association concerning nurses' compensation for sports physicals.

The Board also alleges that it had no duty to bargain over the nurses' assignment to the sports physicals or other procedures relating to them. It cites N.J.S.A. 18A:40-4, which requires that Boards of Education conduct physical examinations for "every pupil" and N.J.A.C. 6:29-1.2(b)(1)(i), which provides in pertinent part that:

Under the direction of the school medical inspector and the chief school administrator, the duties of a school nurse shall include, but not be limited to: (1) assisting with physical examinations pursuant to N.J.S.A. 18A:40-4.

However, N.J.S.A. 18A:40-4 contemplates physicals for all students; it does not expressly mention sports physicals, which are given to a discrete group - student athletes. I find that N.J.A.C. 6:29-1.2(b)(1)(i), read together with N.J.S.A. 18A:40-4, does not render the nurses' assistance with sports physicals an illegal subject of negotiations.

The Association characterizes sports physicals as an extra-curricular activity, which may render all aspects of the duty, including the nurses' assignment to it, mandatorily negotiable.

N.J.S.A. 34:13A-23 provides in pertinent part that:

All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations between an employer and a majority representative of the employees in a collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations.

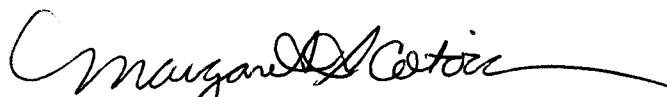
The Board objects to the Association's characterization of sports physicals as extra-curricular activities. However, it is not clear from the charge that the sports physicals are not extra-curricular activities within the meaning of N.J.S.A.

34:13A-23. Accordingly, drawing all inferences in the light most favorable to the party opposing the motion, the balance of the Board's motion must be denied.

CONCLUSION

The Board did not violate N.J.S.A. 34:13A-1 et seq. or N.J.S.A. 34:13A-5.3(a) 1 or 5 by refusing to negotiate with the

Association over compensation for the assignment of school nurses to sports physicals. The Board's Motion for Summary Judgment on the compensation issue is granted. The balance of the Board's motion is denied. A hearing on this matter will be held pursuant to the enclosed order.



Margaret A. Cotoia
Hearing Examiner

DATED: March 28, 1994
Trenton, NJ