P.E.R.C. NO. 82-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH AMBOY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-170-133

SOUTH AMBOY EDUCATION ASSOCIATION and FRANCES EBEL,

Charging Party.

SYNOPSIS

In an unfair practice charge, it was alleged that the Board had not negotiated in good faith with respect to the salary of a summer teacher when an alleged agreement entered into between the teacher and the Superintendent was not honored by the Board. The Commission found that a Superintendent often does have apparent authority to bind a Board, however, in this case there was no such authority since the Superintendent explicitly stated that any agreement reached between the two was conditioned upon Board approval. It was further found that no agreement had been reached between the teacher and the Superintendent as to the amount of compensation because there had never been a contractual "meeting of the minds."

Additionally, no unfair practice was found when the Board contracted out negotiations unit work without first negotiating with the Association. Citing, State of New Jersey v. Local 195, IFPTE, AFL-CIO, 176 N.J. Super. 85 (1980), the Commission held that subcontracting was deemed to be an illegal subject of negotiations.

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Appearances:
For the Respondent, George J. Otlowski, Jr., Esq.

For the Charging Party, Klausner & Hunter, Esqs.
(Stephen B. Hunter, Of Counsel)

For Frances Ebel, Robert B. Reed, Esquire

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on November 7, 1979 by the South Amboy Education Association and Frances Ebel (the "Charging Party", the "Association" or "Ebel") alleging that the South Amboy Board of Education (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. (the "Act"), in that the Respondent (1) by its Superintendent entered into a binding agreement with the Association and Ebel on June 12, 1979 wherein Ebel was to receive the sum of $8,895.25 for services to be rendered from June 18 through August 31, 1979 and, thereafter, the Superintendent and the Board repudiated this agreement; and (2) on July 1, 1979 without prior negotiations with the Association, entered into a subcontract with Independent Child Study

Teams, Inc., to provide child study team members, notwithstanding the adverse impact upon Ebel; all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.[1/]

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 June 27, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on January 21 and 23, 1981 in Newark, New Jersey before Hearing Examiner Alan R. Howe, at which time the parties were given the opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by March 17, 1981.

On March 25, 1981, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 81-34, 7 NJPER ____ (¶_____ 1981). He concluded that the Respondent's Superintendent, John S. Olexa, did not have apparent authority to bind the Board with respect to the salary to be paid Ebel, and even if there was such authority, no contract had ever been entered into because there had not been a "meeting of the minds" between the parties involved. Additionally, the Examiner concluded that the Board

1/ This subsection prohibits 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."

had not been motivated by any anti-union animus with respect to its treatment of Ebel in not granting to her the salary raise she had requested for services rendered in the Summer of 1979, and that the Board had not violated the Act when it subcontracted unit work during the same summer. He therefore recommended that the Complaint be dismissed in its entirety.

In particular, the facts of this case involve Frances Ebel, who had initially been employed by the Board as a full time Learning Disability Teacher Consultant (LDTC) in 1970-71 and continued in that capacity until the 1977-78 school year when the Board abolished that full time position and created in its place a part time position which Ebel accepted. When employed as a full time LDTC Ebel received approximately $20,000 per year and this salary was tied to the Teachers' Salary Guide. She would work 11 months per year and receive 10% of her 10-month salary for the month of July. Once Ebel's full time position was abolished, she worked two and a half days per week for the 1977-78, 1978-79 and 1979-80 school year, and received $50.00 a day, or approximately $5,000 per year.[2/]

In August 1978 legislation was enacted whereby all evaluations of students with learning disabilities had to be completed within 60 days. An evaluation requires that the LDTC read the student's records and decide on what tests should be administered and, after scoring the tests, interpreting the results to determine the extent and nature of the learning disability.

2/ Ebel initiated litigation before the Commissioner of Education on both the abolishment of her full time position and her reduction of salary to $50 a day. The Commissioner of Education determined that the Board must recalculate her salary and pay her (Continued)

Thereafter, the LDTC confers with the Social Worker and Psychologist and arrives at a "prescription" for the student, which is followed by a conference with the parent or parents. The average time to complete an evaluation is 20 hours. When Ebel was working full time, she could evaluate 77 students in one school year.

In view of the mandate of the August 1978 legislative enactment regarding the time limitation on evaluations, the Superintendent determined that the Child Study Team (LDTC, Social Worker and Psychologist) would have to be hired for the Summer of 1979 in order to complete all of the evaluations.

On May 16, 1979, Ebel and the Superintendent met to discuss her employment during the Summer of 1979 as a full time LDTC, and the work performance responsibilities that she would be expected to undertake.[3/] This meeting was memorialized in writing by both parties the following day and terms of the summer employment were listed. The most important term, for purposes of deciding this matter before us, concerned how Ebel was to be paid. The Superintendent's letter stated, "Your salary will be based on the appropriate step of the teachers' salary guide," while Ebel's letter stated, "I could work...on a full time basis on my appropriate step of the teachers' salary guide which includes the ratio which I have always received."

2/ (Continued) an amount equal to 50% of her full time salary. This decision was appealed by the Board but was upheld by an ALJ on December 3, 1980.

3/ In particular, the Superintendent had told Ebel that she was expected to complete 30 student evaluations by August 31, 1979. This figure was later lowered to between 26-30 by the same date.

On May 21, 1979, another meeting was held between Ebel and Olexa but this time Wayne Dibofsky, an N.J.E.A. Negotiations Consultant, was present. Mr. Dibofsky was in attendance not only to represent Ebel's interests, but also to represent those of the Association's. Issues relating to Ebel's summer employment were discussed but salary was not a focal point in that meeting and the discussion was predominantly directed to the number of students she would have to evaluate.

This meeting, too, was memorialized in a letter sent by Olexa to Ebel which purported to set forth what had been agreed upon. This letter stated in pertinent part, as follows:

> "1. That you will begin full-time work from June 18, 1979, through August 31, 1979.
>
> "2. You will receive full pay in accordance with your step on the present teacher's salary guide...
>
> "4. During the period following employment from June 18th, through August 31st, you will fully complete thirty (30) students; the exception would be if something extremely extraordinary exists...
>
> "7. The Board of Education must agree with these recommendations. However, until the Board has its public meeting on June 25, 1979, I am authorized to put this plan into effect..." (Emphasis supplied).

Both Ebel and Dibofsky disagreed with item 4 and Dibofsky stated in a letter to Olexa that item 4 did not accurately reflect the substance of the conversation and that there should be no specific number of students provided for in the agreement.

A further meeting was scheduled for June 12, 1979. Prior to this meeting Ebel and Dibofsky met to discuss possible positions

that could be taken by Ebel with respect to her summer employment. Dibofsky had prepared a memo concerning her salary for the summer, but those figures were then crossed out and in their place were handwritten figures of almost double Ebel's regular full-time salary in the Teacher's Salary Guide.[4/] Both Ebel and Dibofsky felt that they were in a strong bargaining position and thus believed the higher salary to be appropriate.

The meeting on June 12, 1979 was again devoted primarily to the number of students Ebel would be expected to evaluate, and the discussion concerning salary was brief. Dibofsky and Ebel proposed a total salary of $8,907.75. Olexa made some calculations and told them that he would have to take the figure under advisement and that the Board Secretary would have to check the calculations. Olexa noted a mistake in the figure representing Ebel's salary from June 18 to June 30 and corrected it to be $977.25, thus making the total salary $8,895.25. Olexa initialed this amount and so did Dibofsky. He stated that there did not appear to be any problem with the amount; however, both he and Dibofsky testified that Olexa had not guaranteed Ebel that she would receive that salary amount and that it was conditioned upon Board approval which could not be until June 25, 1979. Olexa did testify, however, that he told Ebel and Dibofsky that he had authority to guarantee her the work at the agreed-upon salary from June 18, to

4/ This memo originally provided that Ebel would receive the following:

For June	18-30 inclusive	a salary of $ 977.25
For July	1-31 inclusive	a salary of $2,149.95
For Aug.	1-31 inclusive	a salary of $2,149.95
		$5,277.15

Upon review by Ebel and Dibofsky the figures were changed respectively, as follows: $989.75, $3,959.00, and $3,959.00 for a total of $8,907.75.

June 25, the date the Board was going to meet to decide on the terms of Ebel's summer employment.

On June 13, 1979, Olexa telephoned Dibofsky and raised a question concerning the salary figures for Ebel. He stated that the Board's secretary had reviewed the figures and found that they were not in line with the Teacher's Salary Guide and that the calculations which had been presented to him on June 12, and which he had initialed, would probably not be the ones he would present to the Board on June 25, for its approval.

Under date of June 20, 1979, Olexa sent a memo to Ebel regarding her salary for the Summer of 1979 (J-8). This memo stated, in pertinent part, as follows:

> "As per our conversation of June 12, 1979, and the agreement that we both signed at that time there is a mathematical error in computation of your salary for the months of July and August.
>
> "As per the meeting it was agreed and should be confirmed by Mr. Wayne Dibofsky, that your salary figure would be checked by the payroll department before it was submitted to the Board of Education for their acceptance at the June 25, 1979 Public Meeting.
>
> "It seems that the salary for July and August should be $1,979.50 for each month instead of $3,959.00. The salary for June ($977.25) is correct and will be honored.
>
> "In essence, you would be getting paid for four months instead of two months in this calculation; also, using this calculation your ten month salary would be $39,590. I am sure that this problem can be rectified easily enough by using the correct calculation..."

Ebel signed this memo; however, she wrote on another piece of paper that her signing of this document did not preclude the agreement that had been signed on June 12, 1979.

At the Board of Education meeting on June 25, 1979, Olexa recommended that the Board approve Ebel's summer employment at the rate of $1,979.50 a month and not at the rate of $3,959.00. The Board adopted this recommendation as well as the one concerning the hiring of an outside contractor, the Independent Child Study Team, Inc., to complete those evaluations which otherwise could not have been made.

Under date of June 28, 1979, the attorney for the Association, on behalf of Ebel, wrote to the Board's attorney, in which he advised that Ebel would work from June to the end of August at a salary of $1,979.50 "with the specific understanding that the acceptance of this amount of money is without prejudice to any rights that Mrs. Ebel might have to litigate her salary before P.E.R.C., the Commissioner of Education, courts or an arbitrator."

The Association has put forth a series of exceptions, as well as has Ebel through her private attorney. These exceptions will be treated seriatim.

The first exception concerns the decision made by the Hearing Examiner to deny Ebel's attorney's request for adjournment on the second day of the hearing when he was unable to remain due to a commitment in another legal matter. Ebel was due to testify at this hearing as well as the Respondent's only witness, Olexa. In denying this request, the Examiner was careful to point out that Ebel's interests could just as well be served by the Association's attorney who was present and who had participated on the first day of the hearing when Dibofsky testified. As was

stated by the Examiner,

> "...there is normally no problem in an Association, a union, as it were, bringing a charge on behalf of itself as the negotiation's representative and any number of employees represented by it for monetary claims, damages or award on behalf of the individuals. There is no inherent conflict between an Association representing itself and individuals where the end result is coterminous and I don't see anything but a coterminous end here...

The Commission agrees with this analysis and finds that both the Association and Ebel shared the same interests and that Ebel's interests were as equally protected in allowing the Association's attorney to directly examine her and to cross examine the Respondent's witness. Perhaps there are instances where an individual would be prejudiced if not allowed to have his/her own attorney present during the hearing, but no prejudice was likely in this case. The interests of both the Association and Ebel were identical regarding her salary in this matter. Both were protesting the fact that the agreement of June 12, 1979 was not honored by the Board and claiming that the Superintendent had apparent authority to bind the Board to that agreement.

N.J.S.A. 34:13A-5.4(c) states in part that, "All cases in which a complaint and notice of hearing on a charge is actually issued by the Commission, shall be prosecuted before the commission or its agent, or both, by the representative of the employee organization or party filing the charge or his authorized representative." Additionally, N.J.S.A. 34:13A-5.3 states in part that "A majority representative of public employees...shall be responsible

for representing the interest of all such employees..." Clearly, these statutes grant the majority representative the right to represent its individual employees, but they also demand that the representative take responsibility for protecting each employee's interests. The Commission, upon review of the exception to the entire record, is satisfied that the Examiner's failure to adjourn the hearing does not warrant a reversal of his findings and this exception is denied.

The second exception related to the Examiner's failure to find that Superintendent Olexa had apparent authority to bind the Board to the terms which were initialed at the June 12, 1979 meeting. The exception stated that past experience had shown that the Board always adopted the recommendations of Olexa and knowledge of this could be relied on to show that he had apparent authority to bind the Board. It was also mentioned in this exception that when Olexa stated to Ebel and Dibofsky that he only had authority to bind the Board up to June 25 and from that point everything discussed was subject to Board approval, this approval was merely pro forma and that there was no reason to believe that any significance should be placed on obtaining this approval.

The law of principal and agent in regard to apparent authority is well established. A principal may be bound for his agent's acts where a third party justifiably presumes that the agent has authority because of a business usage and the nature of the particular business.[5/] Further, a principal is bound by the acts of an agent when he acts within his apparent authority, which

5/ Napolitano v. Eastern Motor Exp., Inc., 246 F.2d 249 (3rd Cir. 1957).

the principal knowingly permits his agent to assume, or which the principal holds him out to the public as possessing. The agent's apparent authority will bind the purported principal only with respect to a third person to whom manifestation of the principal's consent has been made known.[6/] This manifestation need not be as a result of a contractual relationship but can be the result of a principal's actions which somehow mislead a third person into believing that the authority exists[7/] and this action may be found in the principal's adoption of, or acquiescence in similar acts done on other occasions by the agent.[8/]

There have been several cases before this Commission which have been concerned with boards of education and the authority of others to bind those entities. In Long Branch Bd. of Ed., 3 NJPER 300 (1977), it was stated that, "...the passage of a resolution approving a negotiated agreement becomes a ministerial act unless it is specifically stated at the negotiations that the negotiator may only bargain for a proposal that can be taken back to the Board for formal, binding approval." Long Branch at 301. In East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 270 (1976), the Commission concluded that standard agency law provides for a principal to be bound by the conduct of an agent clothed with apparent authority.

6/ N. Rothenberg & Son, Inc. v. Nako, 49 N.J. Super. 372 (1958).
7/ Arthur v. St. Peters Hospital, 149 N.J. Super. 575 (1979).
8/ Kugler v. Romain, 110 N.J. Super. 470, modified, cause remanded 58 N.J. 522 (1970).

It was stated that;

> The test which has been applied by the courts in determining whether apparent authority existed as to a third party who had transacted business with an agent, is whether the principal has, by his voluntary act, placed the agent in such a situation that a person of ordinary prudence, conversant with the business involved, is justified in the presuming that such agent has the authority to perform the particular act in question.
>
> While all authority must derive from the principal, apparent authority may derive from a principal's adoption of or an acquiescence in similar acts done on other occasions by an agent. Acquiescence by a principal in an extension of the authority he gave an agent may be sufficient to create an appearance of authority beyond that actually given said agent.
> East Brunswick at 281.

In East Brunswick the Board was found to have been bound by an agreement reached between its negotiators and the negotiators for the Teachers Association because the Board had neither indicated to an Association representative that the Board's negotiators could not conclude an agreement nor had any of the Board negotiators even qualified their authority to conclude a binding agreement. A similar result was found in Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975) when a memorandum of agreement was held to be binding on the Board because it had not contained any condition precedent to its enforcement. See also In re Black Horse Pike Bd. of Ed., P.E.R.C. No. 78-83, 4 NJPER 249 (¶4126 1978).

The Charging Parties have placed great emphasis on the fact that the Board had consistently accepted Olexa's recommendations relating to personnel and labor relations matters and that the Bord, during the 1978-79 school year, rarely did not approve unanimously the hundreds of personnel, labor relations, hiring, curriculum, and other school district recommendations that Olexa made during the school year. In addition, a great deal of emphasis has been placed on statements made by Ebel in which she said that Olexa told her that there would "be absolutely no problem with any agreements that we have reached," and that he had authority to "bind the Board."

There still, however, is the qualification, when considering a person's apparent authority, that a person of ordinary prudence be justified in presuming that the agent has the authority to perform the act in question. Both Olexa and Dibofsky testified that Olexa conditioned the June 12, 1979 pact on subsequent Board approval and Olexa stated that the only area that he assumed he had authority to bind the Board in was for the period between June 18, 1979 and June 25, 1979, the date of the next Board meeting. Dibofsky acknowledged that "there was no absolute guarantee by Mr. Olexa that there would be final approval" of the terms initialed at the June 12th meeting and that, "He (Olexa) did condition that in that he said he had to go back to the Board with it..." Even prior to this meeting Olexa was very certain to point out that it was necessary for the Board to approve his actions. In the memo which he sent to Ebel and the other members of her evaluating team on May 23, 1979, which purported to set forth the terms agreed upon at the May 21, 1979 meeting with Ebel

and Dibofsky, he stated that, "The Board must agree to these recommendations", and that he was authorized to put the plan into effect only "until the Board has its public meeting on June 25, 1979."

Only Ebel testified that Olexa stated that he was authorized to act for the Board and that his actions could bind it. In view of the testimony which was given by both Olexa and Dibofsky, which was contrary to Ebel's statement, the Hearing Examiner found this aspect of her testimony not to be credible. It is the position of the Commission that it is for the trier of fact to weigh the evidence and testimony presented at a hearing and that we will rarely substitute our second hand reading of the transcript for the Hearing Examiner's judgment, which has been based upon his observation of the witness' demeanor and upon other factors not within our physical grasp.[9/] For this reason, we accept the Examiner's finding on the subject of Olexa's authority to bind the Board.

In view of the fact that the third party must have been placed in a position where he or she could have reasonably relied on an agent having apparent authority to bind the principal, we do not find that either Ebel or Dibofsky were justified in their conclusions. More than once Olexa made it known that his actions were subject to Board approval and both other parties were made aware of this condition. As was mentioned in the East Brunswick, supra, decision, the Board would be bound to agreements reached by its negotiators when it failed to indicate that its negotiators

9/ See Long Branch Bd. of Ed., supra.

could not conclude an agreement or when the negotiators failed to qualify their authority. Olexa qualified his authority to bind the Board and conditioned the June 12th agreement on the Board's approval.

The third exception was that the Hearing Examiner erred in holding that even if Olexa had apparent authority, no contract had been reached because there had never been a meeting of the minds. It is a fundamental concept that the essential element to the valid consummation of a contract is a meeting of the minds between the contracting parties and that until there is such a meeting, no contract exists and either party may withdraw or end negotiations.[10/] Absent this proverbial meeting of the minds, one cannot be said to have obligated himself in law and the purported transaction must be regarded as void. The Hearing Examiner relied on the following factual findings in reaching his conclusion. Ebel had worked in past summers and had been compensated on the basis of 10% of the Teacher's Salary Guide, as the Board compensated her in the instant matter. After the initial meeting with Olexa on May 16, 1979, Ebel sent a memo to him confirming that she had been offered a position for the summer in which she would be compensated on her appropriate steps of the Teacher's Salary Guide; Olexa too in his memorandum confirmed the same compensation. At the meeting on June 12, 1979, all parties admitted that the discussion concerning salary lasted only a couple of minutes and that there had never been any discussion as to what the figures represented; i.e., a rate double to what Ebel would normally be paid.

10/ deVries v. The Evening Journal Assn, 9 N.J. 117 (1952).

Olexa mistakenly assumed that the figures represented 10% of the salary guide and only checked the figure relating to June and found it to be correct. Olexa also stipulated that the figures had to be checked by the Board's secretary and verified by her as well. The following day, after receiving word from the Board secretary, Olexa telephoned Dibofsky and told him that the calculations were not in line with what was based on the teacher's salary guide and at the Board meeting Olexa recommended the Board approve for Ebel a salary of 10% of her step on the Teacher's Salary Guide. Finally, the Examiner noted that the other two members of Ebel's Child Study Team were employed at the 10% rate.

Most important to this particular area is what is revealed in the actual paper that was initialed on June 12, 1979. There is a contradiction on the face of the instrument which leads one to conclude that there was not a meeting of the minds on that date. This document states two different bases upon which Ebel's salary is to be computed. In large typewritten capital letters, paragraph two states, "YOU WILL RECEIVE FULL PAY IN ACCORDANCE WITH YOUR STEP ON THE PRESENT TEACHER'S SALARY GUIDE." In handwriting is the statement, "TOTAL SALARY $8,895.25." Ebel's full pay in accordance with her step on the teacher's salary guide would not have equaled $8,895.25 and has already discussed both Ebel and Dibofsky realized this and upped the figure to $8,895.25 due to their belief in Ebel's bargaining position. In the exceptions, counsel for Ebel stated that evidence was admitted by way of testimony from Olexa to contradict the writing of June 12, 1979 which was signed by Ebel and initialed by Olexa and Dibofsky, and

that this was a violation of the parole evidence rule.

The parol evidence rule provides that where an agreement has been reduced to writing, which the parties intend as the final and complete expression of their agreement, evidence of earlier expressions is not admissible to vary the terms of the writing. 11/ The Hearing Examiner did not find that the parties intended the document to be the final and complete expression of their agreement in light of the statement on the document which read, "THE BOARD OF EDUCATION MUST AGREE WITH THESE RECOMMENDATIONS," and even if he did there are exceptions to the parol evidence rule which would have conformed with this situation. Parol evidence is admissible to show what the parties meant by words used in the writing, and there is ample evidence to show that both parties meant different things concerning Ebel's compensation. More importantly, however, if an agreement is ambiguous on its face, as this document is, parol evidence is admissible to clarify the parties' intent. The Commission finds that the Hearing Examiner was correct in allowing testimony which further explained the terms of the document and also agrees with his conclusion that the document of June 12, 1979 did not represent a binding agreement between the parties in that there was never a meeting of the minds on the important term concerning salary and therefore no enforceable contract was entered into.

The fourth exception is related to the Board's bad faith negotiating when Olexa unilaterally substituted his own recommendations relationg to salary on the day when he met with the Board rather than the higher figure which Dibofsky and Ebel had suggested

11/ Williston on Contracts (3rd Ed. 1961).

at the June 12, 1979 meeting. Olexa admitted that at the meeting before the Board on June 25, 1979 he did not recommend that it accept Ebel as a summer employee at the rate of $3,959.00 per month but did recommend that she be hired for July and August at a salary of $1,979.50. This figure represented Ebel's appropriate step on the teacher's salary guide. The other two members of the Child Study Team were also recommended for hire by Olexa and the same payment scale was used for them in computing their salaries. All of these recommendations were approved by the Board.

The Teacher's Association claims that Olexa's refusal to recommend that the Board accept the terms pertaining to salary, which it alleges were agreed upon between Ebel and Olexa, and Olexa's recommendation that the Board approve a salary of less than that amount, was bad faith negotiations in contradiction of N.J.S.A. 34:13A-5.4(a)(5). Several Commission decisions were cited for the proposition that agents and representatives of a Board of Education that have negotiated a particular agreement with representatives of a teacher's association have the affirmative obligation, without any reservations, to present that agreement or memorandum of understanding to the Board for ratification and to recommend its acceptance. Citing East Brunswick Board of Education, 2 NJPER 279 (1976), the Association claims that refusal on the part of Board representatives to recommend to the Board acceptance of a negotiated agreement is a violation of section 5.4(a)(5). Although there was a violation in that case, it must also be remembered that in that instance the Commission found that the Board was already bound by the agreement made between the representatives because at no time had there been any

qualifications made as to the Board's representative's authority to bind the Board. The East Brunswick case was not supportive of the Association's claim that Olexa had apparent authority to bind the Board nor is it supportive of the Association's contention that Olexa was required to present and recommend that Ebel be compensated at double the rate she would normally have been paid according to the teacher's salary guide.

A case involving the Lower Township Board of Education, 4 NJPER 24 (1978) cited by the Association, concerned a violation of section 5.4(a)(5) when the Board's representative did not present the exact terms of a Memorandum of Understanding reached by the representatives. The memo itself stated that it was subject to Board ratification and that the signatories to the agreement would recommend its acceptance to their principals. Under this agreement, the Board's representatives were obligated to present the memo to the Board for ratification, and recommend its acceptance. A very important aspect of this decision was whether there had been a meeting of the minds between the representatives as to what exactly would be presented to the Board. It was found that there had been and thus there could be no excuse for the Board's representatives in failing to do so.

In the present matter, Olexa did present the salary figure requested by Ebel, to the Board, but did not recommend its adoption. There had been no agreement that Olexa be obligated to recommend its acceptance and further, as has already been discussed, there was no meeting of the minds as to what exactly Olexa would recommend to the Board. The day after the June 12th meeting Olexa telephoned Dibofsky and told him that the figures were wrong

and could not be recommended. This was further evidence that there had not been a meeting of the minds on June 12th since Olexa presumed that Ebel was to be compensated in accordance to her appropriate step on the salary guide and the figures were wrong because they did not match up with that step.

A final case cited by the Association was that of In re Borough of Wood-Ridge, P.E.R.C. No. 81-105, 7 NJPER 149 (¶12066 1981). In that case, the Commission concluded that the Borough had violated section 5.4(a)(5) based upon the actions of a councilman who presented the Borough Council with an altered version of the proposals discussed during the negotiations meeting. This conduct was found to constitute bad faith. If, in fact, Olexa and Ebel had agreed that she was to be paid double for her summer work and Olexa had represented to both Ebel and Dibofsky that he would recommend that figure to the Board for ratification, then in altering this term and recommending to the Board that it grant a salary to Ebel of only her appropriate step on the salary guide, then the Commission might find that this conduct represented bad faith negotiating. This, however, was not the occurence in this case. What Olexa presented to the Bord on June 25th was the salary that he thought he had agreed to on June 12th. Even though there was the figure of $8,895.25 on the document initialed June 12, Olexa at no time verified this figure to be correct and stipulated that the Board secretary first had to check the calculations. Olexa mistakenly assumed the figure to represent Ebel's appropriate step and discovered the next day that it did not. At the Board meeting, Olexa did present Ebel's salary figure; however, he recommended that it be rejected because it was double the regular

salary for a full time LDTC. At the very least then, it can be said that Olexa did present Ebel's salary proposal to the Board but did not recommend that it be accepted. From all of the evidence before this Commission, we cannot find that the Board negotiated in bad faith when Olexa failed to recommend that the Board accept the salary proposal of Ebel and then recommended the Board accept a salary figure based upon what he had indicated was the correct calculation.

Another exception filed by the Association was that the Board had violated sections (a)(3) and derivatively (a)(1) when it repudiated the salary figure proposed by Ebel in retaliation for Ebel's initiation of a series of legal challenges against the Board relating to her terms and conditions of employment. The Commission finds this exception to be without merit. No evidence was introduced to show that the Board acted with any anti-union animus in not compensating Ebel at double the regular salary. Ebel had instituted legal proceedings with the Commissioner of Education alleging that the Board had improperly abolished her full time LDTC position when it reorganized its child study team and offered her a part time position at less than one-half the salary. Hearings were conducted before an Administrative Law Judge, and Ebel was awarded an increase in her pay. No connection has been made between this incident and several others instituted by Ebel and the Board's rejection of the salary figure alleged to have been agreed upon between Olexa and Ebel.

Furthermore, the Board was under no obligation to grant to Ebel a greater salary than was given to her and it is significant also to consider that the other summer members of Ebel's child study team were granted monthly salaries representing 10% of their full years salary, substantially equivalent to that of Ebel.

The final Association exception was that the Board violated sections 5.4(a)(5) and derivatively (a)(1) when it failed to negotiate the issue of contracting out negotiations unit work with the Association. The Hearing Examiner concluded that subcontracting was an illegal subject of collective negotiations and that no violation could be found in the Boards having subcontracted unit work of the Child Study Team during the summer of 1979. It was held in State of New Jersey v. Local 195, IFPTE, AFL-CIO, 176 N.J. Super. 85 (1980), appeal pending, Supreme Court Docket No. 17,828 that subcontracting is an illegal subject of negotiations. Given the present state of the law and the lack of any basis herein to distinguish Local 195, the Commission is compelled to adopt the Hearing Examiner's finding of no violation of section 5.4(a)(5) and derivatively (a)(1) in the Board's subcontracting out unit work without first negotiating with the Association.

Upon a review of the entire record in this matter, we hereby adopt the findings of fact and conclusions of law made in H.E. No. 81-34. We find that the Board's actions did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) and we adopt the Hearing Examiner's recommendation that the Complaint be dismissed in its entirety.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcells and Suskin voted for this decision. None opposed. Commissioners Graves, Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
July 21, 1981
ISSUED: July 22, 1981

H. E. No. 81-34

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

In the Matter of

SOUTH AMBOY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-170-133

SOUTH AMBOY EDUCATION ASSOCIATION &
FRANCES EBEL,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board did not violate Subsections 5.4 (a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act. The Association failed to prove by a preponderance of the evidence that the Board's Superintendent had apparent authority to bind the Board with respect to the salary paid to Frances Ebel for services rendered in the Summer of 1979. Even assuming arguendo that the Superintendent had such authority, the Charging Party failed to prove by a preponderance of the evidence that there was a "meeting of the minds" as to the amount of salary to be paid to Frances Ebel. Further, the Board did not retaliate against Ebel on account of litigation instituted by her against the Board with respect to her terms and conditions of employment. Finally, the issue of subcontracting of unit work raised by the Association is, under the present state of the law, an illegal subject for negotiation.

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.

H. E. No. 81-34

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

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SOUTH AMBOY EDUCATION ASSOCIATION &
FRANCES EBEL,

Charging Party.

Appearances:

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

For the South Amboy Education Association
Klausner & Hunter, Esqs.
(Stephen B. Hunter, Esq.)

For Frances Ebel, Individually
Robert B. Reed, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on November 7, 1979 by the South Amboy Education Association and Frances Ebel (hereinafter the "Charging Party", the "Association" or "Ebel") 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 Relation Act, as amended, N.J.S.A. 34;13A-1 et seq. (hereinafter the "Act"), in that the Respondent (1) by its Superintendent entered into a binding agreement with the Association and Ebel on June 12, 1979 wherein Ebel was to receive the sum of $8,895.25 for services

to be rendered from June 18 through August 31, 1979 and, thereafter, the Superintendent and the Board repudiated this agreement; and (2) on July 1, 1979 without prior negotiations with the Association entered into a subcontract with Independent Child Study Teams, Inc., to provide child study team members, notwithstanding the adverse impact upon Ebel; all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act. 1/

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 June 27, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on January 21, and 23, 1981 2/ in Newark New Jersey, at which time the parties were given the opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by March 17, 1981.

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.

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.

"(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."

2/ The matter was orginally assigned to Dennis J. Alessi for hearing. Alessi resigned from the Commission in October 1980 and the case was reassigned to the undersigned. The hearing was scheduled thereafter to the first mutually available dates following the illness of the undersigned in November 1980.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

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.

3. Frances Ebel is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. The pertinent collective negotiations agreement between the parties was effective during the term July 1, 1978 through June 30, 1980 (J-1).

5. Ebel was for several years employed as a full-time Learning Disability Teacher Consultant (LDTC) 3/ by the Respondent and her salary of approximately $20,000 per yer was tied to the Teachers' Salary Guide. When employed as a full-time LDTC Ebel worked 11 months per year and received 10% of her 10-month salary for the month of July.

6. In March 1977 the Board passed a resolution abolishing the full-time LDTC and creating in its place a part-time LDTC. Thereafter in the 1978-1979 school year Ebel worked two and one-half days per week, for which she received $50.00 a day or approximately $5,000 per year.

7. In August 1978 legislation was enacted whereby all evaluations of students with learning disabilities had to be completed within 60 days. An evaluation requires that the LDTC read the student's records and decide on what tests should be administered and, after scoring the tests, interpreting the results to determine the extent and nature of the learning disability. Thereafter the LDTC confers with the Social Worker and Psychologist and arrives at a "prescription" for the student, which is followed by a conference with the parent or parents.

3/ An LDTC is part of a Child Study Team, which includes a Social Worker and a Psychologist. The Team together evaluates students with learning disabilities.

The average time to complete an evaluation is 20 hours. When Ebel was working full time she could evaluate approximately 77 students in one school year.

8. In view of the mandate of the August 1978 legislative enactment regarding the time limitation on evaluations, supra, the Superintendent, John S. Olexa, determined that the Child Study Team (LDTC, Social Worker and Psychologist) would have to be hired for the Summer of 1979 in order to complete all of the evaluations. This resulted from Ebel having only worked part time during the 1978-79 school year. 4/

9. On May 16, 1979 Ebel met with Olexa regarding her employment as a LDTC during the months of July and August 1979 on a full-time basis. At this meeting Olexa indicated to Ebel that the Social Worker and the Psychologist had agreed to complete the evaluations of 30 students during July and August 1979. Olexa said that he would likewise expect Ebel to complete 30 student evaluations during July and August. Olexa further indicated to Ebel that she would be paid on a full-time basis on the appropriate step of the Teachers' Salary Guide including .."the ratio which I have always received." 5/

10. Between May 17 and May 21, 1979 Ebel telephoned Wayne Dibofsky, the NJEA consultant to the Association, and apprised him of her meeting with Olexa on May 16, 1979. Ebel expressed a deep concern over the requested number of students to be evaluated, namely, thirty (30). Ebel requested Dibofsky to attend the meeting with Olexa on May 21, 1979 and he agreed to do so.

4/ Ebel testified credibly that if she had worked full time during the 1978-79 school year all of the evaluations could have been completed by June 1979.

5/ This quotation is taken from J-2, which is Ebel's May 17, 1979 written confirmation of her conversation with Olexa on May 16, 1979. Olexa likewise confirmed his conversation with Ebel of May 16, 1979 in a memo to Ebel also dated May 17, 1979 (J-3). Olexa's memo (J-3) substantially confirmed what Ebel had placed in her memo to him (J-2).

11. On May 21, 1979 Olexa, Dibofsky and Ebel met for approximately one to one-and-one half hours. The focus of the meeting was on the number of students to be evaluated by Ebel in July and August 1979. 6/ There was some discussion about working conditions but salary was apparently not the focal point of the meeting.

12. Under date of May 23, 1979 Olexa sent a joint memo to Ebel, the Social Worker and the Psychologist, which purports to set forth what was agreed to at the meeting with Ebel and Dibofsky on May 21st (J-5). This memo stated, in pertinent part, as follows:

> "1. That you will begin full-time work from June 18, 1979, through August 31, 1979.
>
> "2. You will receive full pay in accordance with your step on the present teacher's salary guide ...
>
> "4. During the period following employment from June 18th, through August 31st, you will fully complete thirty (30) students; the exception would be if something extremely extraordinary exists...
>
> "7. The Board of Education must agree with these recommendations. However, until the Board has its public meeting on June 25, 1979, I am authorized to put this plan into effect..." (Emphasis supplied).

13. Dibofsky also obtained a copy of J-5, supra, from Ebel. Based upon the mutual agreement between Dibofsky and Ebel that paragraph 4 of J-5 did not accurately reflect what transpired at the meeting of May 21st, Dibofsky wrote a letter to Olexa under date of May 27, 1979, the conclusion of which was that there should be no specific number of students provided for in the agreement of Ebel to perform the evaluations during July and August 1979 (J-6).

6/ Olexa testified that by May 16, 1979 the matter of completing the learning disability student evaluations was an "emergency situation." He also testified that at the May 21st meeting he mentioned the necessity of resorting to an outside contractor to complete the evaluations by the end of August 1979. The cost to the Board for an outside contractor was estimated to be $350 per student. The issue of the subcontracting of evaluation services will be discussed further hereinafter (Finding of Fact No. 21, infra).

14. A second meeting involving Olexa, Dibofsky and Ebel was scheduled for June 12, 1979. Shortly prior to this meeting Dibofsky and Ebel met and reviewed R-1, a typewritten memo which Dibofsky had prepared. This memo originally provided in paragraph 2 that Ebel would receive the "following stipends on salary:"

"For June 18-30 inclusive a salary of $ 977.25

"For July 1-31 inclusive a salary of 2,149.95

"For August 1-31 inclusive a salary of 2,149.95

$5,277.15" 7/

15. The meeting of June 12th between Olexa, Dibofsky and Ebel was duly convened and continued for about one to one-and-one-half hours. The major portion of the meeting was again devoted to the numbers of students which Ebel would have to evaluate during the Summer of 1979. Dibofsky said that he thought that 20-25 students was sufficient. It was finally agreed that Ebel would evaluate 26-30 students. The meeting then turned briefly to a discussion of conditions, followed by a discussion of salary. Dibofsky and Ebel proposed a total salary figure of $8,907.75 in accordance with Dibofsky's notations on R-1, supra. Olexa did some calculations and said that he would have to take the figure under advisement but that there appeared to be no real problem. 8/

7/ As a result of the review of R-1 by Ebel, the figures for June 18 through August 31 were changed by Dibofsky on R-1 in heavy black ink to read, respectively, as follows: $989.75, $3,959.00 and $3,959.00 for a total of $8,907.75. This document (R-1) was taken by Dibofsky and Ebel to the June 12th meeting with Olexa. Ebel testified without contradiction both she and Dibofsky felt that Ebel was in a good bargaining position for summer salary and that this was the reason for the increase in the figures, which represented about double Ebel's regular full-time salary on the Teachers' Salary Guide.

8/ It was not disputed that Olexa also stated to Dibofsky and Ebel on June 12th that he would have to have Ann Hill, the Board Secretary, check the calculations. Olexa acknowledged that on June 13, 1979 he wrote on the right margin of R-1 the figures: $977.25, $3,959 and $3,959, which totalled $8,895.25 and this total was confirmed additionally by notations that Olexa placed on copy of J-5, supra, on June 12th, which was received in evidence as J-7B. This latter exhibit indicates that the total salary from June 18 through August 31, 1979 was to be $8,895.25, and this figure was initialled by Dibofsky and Olexa and dated "6/12/79" (see para. 2). Dibofsky and Olexa also initialled a change in paragraph 4 of J-7B, indicating that the number

16. On June 13, 1979 Olexa telephoned Dibofsky and raised a question regarding Ebel's total salary for the Summer of 1979, stating that the computations had been checked by Ann Hill and that they were not in line with the Teachers' Salary Guide. However, Olexa did not indicate that he made any mistake in initialling the $8,895.25 figure, J-7B, supra, at the meeting on June 12th.

17. Under date of June 20, 1979 Olexa sent a memo to Ebel regarding her salary for the Summer of 1979 (J-8). This memo stated, in pertinent part, as follows:

> "As per our conversation of June 12, 1979, and the agreement that we both signed at that time there is a mathematical error in computation of your salary for the months of July and August.
>
> "As per the meeting it was agreed and should be confirmed by Mr. Wayne Dibofsky, that your salary figure would be checked by the payroll department before it was submitted to the Board of Education for their acceptance at the June 25, 1979 Public Meeting.
>
> "It seems that the salary for July and August should be $1,979.50 for each month instead of $3,959.00. The salary for June ($977.25) is correct and will be honored.
>
> "In essence, you would be getting paid for four months instead of two months in this calculation; also, using this calculation your ten month salary would be $39,590. I am sure that this problem can be rectified easily enough by using the correct calculation..."

18. On June 21, 1979 Ebel responded to J-8 by placing the following typewritten notation on a separate document (see J-9): "I have read the above memo but my signature at your request does not preclude the agreement (regarding salary for summer months "79") which we both signed in good faith on June 12, 1979." Ebel thereafter signed her name. 9/

8/ (continuation from pg. 6) of students to be evaluated would be "26-30." The notations on both paragraphs 2 and 4 of J-7B were written by Olexa.

9/ Under dates of June 22, 1979 and June 23, 1979 Ebel and the Board's attorney corresponded with respect to her monthly salary for July and August 1979 (see J-10 and J-11).

19. The Superintendent's Report and Recommendations to the June 25, 1979 Public Meeting of the Board provided in paragraph 5: "Recommend the Board of Education reject Mrs. Ebel for summer employment as L.D.T.C. at a salary of $3,959.00 (explain)." (J-13). 10/ The Board approved the Superintendent's recommendations with respect to Ebel, the Psychologist and the Social Worker (J-14). Further, the Board then approved the hiring of Ebel for July and August at a salary of $1,979.50 per month (J-14).

20. Under date of June 28, 1979 the attorney for the Association, on behalf of Ebel, wrote to the Board's attorney, in which he advised that Ebel would work from June to the end of August at a salary of $1,979.50 "with the specific understanding that the acceptance of this amount of money is without prejudice to any rights that Mrs. Ebel might have to litigate her salary before P.E.R.C., the Commissioner of Education, courts or an arbritrator." (J-16).

21. Under the circumstance of no notice to the Association other than Olexa's brief mention to Dibofsky and Ebel on June 12, 1979 regarding the employment of an outside contractor for evaluations, Superintendent Olexa made the following recommendation to the Board at its June 25, 1979 Public Meeting: "1. Recommend the Board approve the 'Independent Child Study Team, Inc.' of Bound Brook, N.J. be employed to evaluate twenty (20) children for study classification. The cost per student would amount to $350.00." (J-13). The Board approved this recommendation at the Public Meeting of June 25, 1979 (J-14). 11/

10/ The Superintendent also recommended summer employment for the Psychologist and the Social Worker, the other two members of the Child Study Team, at the rate of 10% of salary (see paras. 3 & 4 of J-13).

11/ Olexa testified that no representative of the Association or Dibofsky ever demanded negotiations with respect to the outside contracting of evaluations. Dibofsky testified that he advised the Association to negotiate with the Board on this subject but did not know if negotiations ever took place.

Under date of October 8, 1979 payment to Independent Child Study Teams, Inc. of the sum of $6,650.00 was authorized by the Board for the evaluation of 19 students (J-17).

THE ISSUES

1. Did the Respondent's Superintendent have "apparent authority" to bind the Board with respect to the salary to be paid to Frances Ebel for services rendered as an LDTC in June, July and August 1979?

2. Assuming that Respondent's Superintendent had the authority to bind the Board with respect to the salary of Frances Ebel was there a "meeting of the minds" regarding the amount to be paid?

3. Did the Respondent Board violate Subsections (a)(1) and (3) of the Act when it refused to remunerate Frances Ebel at the salary she requested for services rendered in the Summer of 1979, i.e., did the Respondent Board retaliate against Ebel because of legal proceedings instituted by her against the Respondent Board with respect to her terms and conditions of employment?

4. Did the Respondent Board violate Subsections (a)(1) and (5) of the Act when without negotiations with the Association it subcontracted the unit work of the Child Study Team during the Summer of 1979?

DISCUSSION AND ANALYSIS

The Respondent's Superintendent Did Not Have "Apparent Authority" To Bind The Board With Respect To The Salary To be Paid to Frances Ebel For Services Rendered as A LDTC In The Summer Of 1979

The Hearing Examiner finds and concludes that the Charging Party has failed to prove by a preponderance of the evidence that the Respondent's Superintendent, John S. Olexa, was vested with "apparent authority" to bind

the Board with respect to the salary to be paid to Frances Ebel for services rendered as an LDTC in the Summer of 1979.

The Charging Party has cited a host of decisions of the courts and the Commission involving the law of agency (see Association Brief, pp. 14, 15). Unfortunately for the Charging Party, each case necessarily turns on the facts as to whether or not an agent is vested with apparent authority to bind his principal. An examination of the record follows.

The critical meeting of the parties occurred on June 12, 1979 in the Superintendent's office. Present were the Superintendent, Frances Ebel and Wayne Dibofsky, a representative of the Association. At this meeting the parties had before them a copy of Olexa's memo of May 23, 1979 (J-5), which, after being marked up by the parties, was received in evidence as Exhibit J-7B. Paragraph 7 of this memo states clearly that the "Board of Education must agree with these recommendations", the pertinent recommendations involving the salary to be paid and the number of students to be evaluated (see J-5, paragraphs 2 and 4). Further, paragraph 7 stated additionally that "until the Board has its public meeting on June 25, 1979, I am authorized to put this plan into effect." The Hearing Examiner finds this latter language of the May 23, 1979 memo, supra, most persuasive and corroborative of the testimony that the Superintendent only had authority to implement the recommendations until the Board's meeting on June 25, 1979.

Dibofsky testified that the Superintendent indicated that there would be no Board meeting until June 25th and that there should be no overriding problem with starting the work "...and commencing payment at that point and it would be up to the Board to accept his recommendations at that time..." (1 Tr. 40). Dibofsky testified further, on cross-examination, that at the June 12th

meeting the Superintendent said he would go back to the Board for approval "...but he did not see any problems..." (1 Tr. 88). Dibofsky then acknowledged that "...there was no absolute guaranty by Mr. Olexa that there would be final approval of that. He did condition that in that he said he had to go back to the Board with it..." (1 Tr. 88). 12/

The Hearing Examiner is fortified in his conclusion that Olexa did not have apparent authority to bind the Board beyond June 25, 1979 by reference to Olexa's memo of May 23, 1979, supra. It is noted that this memo was addressed jointly to Ebel and the other two members of the Child Study Team, Dr. Sweetman and M.Bratus. As previously indicated, paragraph 2 of the memo stated that each of the three members of the Child Study Team "...will receive full pay in accordance with your step on the present Teacher's Salary Guide." Sweetman and Bratus were subsequently hired for the Summer of 1979 and were paid in accordance with their step on the Salary Guide (see J-13, paras. 3 and 4; and J-14, p.3). Thus, the conduct of the Superintendent and the Board with respect to Sweetman and Bratus is consistent with the May 23, 1979 memo (J-5) and the ultimate recommendation of the Superintendent and the decision of the Board to employ Ebel on the same basis.

It is also clear to the Hearing Examiner that, from the outset of discussions between Ebel and Olexa regarding Summer employment in 1979, the Superintendent's position was that Ebel would be paid on the basis of her appropriate step on the Teacher's Salary Guide (see J-2). Dibofsky apparently had the same understanding regarding the amount of compensation to be paid to Ebel as evidenced by Exhibit R-1, which he prepared for the meeting of June 12, 1979 with Olexa and Ebel.

12/ Olexa testified to the same effect (2 Tr. 107, 108). Only Ebel testified to the contrary, stating that Olexa said, in response to a question by Dibofsky as to whether or not Olexa was authorized to act, "Yes, I am. I can bind the Board. The Board will give me whatever I ask for " (2 Tr. 40). In view of the testimony of Dibofsky and Olexa, supra, the Hearing Examiner does not credit Ebel's contrary testimony just quoted.

Having credited the testimony of Dibofsky and Olexa that Olexa was not vested with authority to bind the Board after June 25, 1979, with respect to the salary to be paid to Ebel, the Hearing Examiner must dismiss allegations to the contrary in the Unfair Practice Charge.

Assuming That The Respondent's Superintendent Had The Authority To Bind The Board With Respect To the Salary of Frances Ebel There Was No "Meeting Of The Minds" Regarding The Amount To Be Paid

The Hearing Examiner finds and concludes that even assuming arguendo that Respondent's Superintendent Olexa had the authority to bind the Board with respect to the salary of Frances Ebel there was no "meeting of the minds" regarding the amount to be paid.

In Mt. Olive Township Board of Education, P.E.R.C. No. 78-25, 3 NJPER 382 (1977) the Commission affirmed the instant Hearing Examiner in his conclusion that the Charging Party failed to prove by a preponderance of the evidence "...that the parties had reached a meeting of the minds" with respect to a disputed salary provision in a memorandum of understanding. So, too, does the Hearing Examiner find herein that there was no "meeting of the minds" within the meaning of applicable principles of contract law regarding the amount of salary to be paid to Ebelfor services rendered as an LDTC during the summer of 1979.

In so finding and concluding, the Hearing Examiner relies upon the following record evidence:

1. Ebel had worked as an LDTC during Summers previous to 1979 and had been compensated on the basis of 10% of the Teacher's Salary Guide without deviation (2 Tr. 53).

2. As indicated previously, Ebel, in a letter to Olexa dated May 17, 1979, confirmed that Olexa had offered her Summer employment for 1979 "..on

a full-time basis on my appropriate step of the teacher's salary guide..." (J-2). Also, as indicated previously, Dibofsky obtained the same understanding from Ebel and confirmed it by the preparation of Exhibit R-1.

3. Olexa in his May 23, 1979 memo to Ebel and the other two members of the Child Study Team stated in paragraph 2 that each was to "receive full pay in accordance with your step on the present Teacher's Salary Guide." (J-5)

4. Immediately prior to the meeting of June 12, 1979, Dibofsky and Ebel had agreed that they would ask that Ebel be paid at double the rate that she would otherwise have received based upon the present Teacher's Salary Guide, namely a total of $8,907.75 (see R-1). After discussions at the meeting there a correction was made as to the sum requested for June 1979 and a revised figure of $8,895.25 was placed on a copy of Exhibit J-5 and initialled by Olexa and Dibofsky (see J-7B). Dibofsky testified, regarding the aforesaid figures, that "...the Superintendent...made a quick calculation on his machine and requested that he would have to take this under advisement" (1 Tr. 36). Olexa testifed that he believed that the figures presented to him represented 10% of the salary guide and stated that "...there was always stipulation that Mrs. Hill (the Board Secretary) would check the figures and of course with the Board's approval" (2 Tr. 105, 105). Dibofsky acknowledged, on cross-examination, that Olexa let it be known that the actual figure had to be verified by Mrs. Hill (1 Tr. 89). Ebel also testified that Olexa stated that he would have to check the calculations with Mrs. Hill (2 Tr. 39).

5. The following day, June 13, 1979, Olexa telephoned Dibofsky and advised him, with respect the computations of the day before, that "... there would probably be a concern with his recommendations before the Board... and said there was concern in the computations by Mrs. Hill..." (1 Tr. 90, 91).

6. There was no further communication between Olexa and Dibofsky prior to the Board's meeting on June 25, 1979 where the Superintendent presented a recommendation that the Board reject a salary for Ebel in excess of 10% of her step on the Teacher's Salary Guide (J-13).

7. It is again noted that Sweetman and Bratus, the other two members of the Child Study Team, were employed at the rate of 10% of their salary on the Teacher's Salary Guide.

From all of the foregoing references to the record, the Hearing Examiner concludes that there was no "meeting of the minds" between Olexa, Dibofsky and Ebel regarding the specific salary to be paid to Ebel as an LDTC in the Summer of 1979. Accordingly, the Hearing Examiner will recommend dismissal of allegations in the Unfair Practice Charge to the contrary.

The Respondent Board Did Not Retaliate Against Frances Ebel Because of Legal Proceedings Instituted By Her Against The Board With Respect To Her Terms And Conditions Of Employment And Did Not, Therefore, Violate Subsections (a) (1) and (3) Of The Act.

Briefly, the Hearing Examiner finds and concludes that the Charging Party failed to prove by a preponderance of the evidence that there was any causal connection between Ebel's institution of legal proceedings against the Respondent Board and the Board's refusal to remunerate Ebel at the salary she requested for services rendered in the Summer of 1979. Admittedly, Ebel instituted litigation against the Board in April 1977 for the abolition of her position as a full-time LDTC and being placed on a part-time basis at a per diem rate of $50 (2 Tr. 49). Further, there was an arbitration case in May 1979 with respect to the Board's hiring of a speech therapist (2 Tr. 50, 51).

The Hearing Examiner concludes that any contention that the Board's actions with respect to Ebel's Summer employment as an LDTC in the Summer of

1979 was in retaliation for her instituting court litigation and being involved in an arbitration proceeding would be purely speculative. Therefore, the Hearing Examiner will recommend dismissal of allegations that the Board violated Subsection (a)(3), and derivatively Subsection (a)(1), of the Act.

The Respondent Board Did Not Violate Subsections (a)(1) And (5) Of The Act When Without Negotiations With The Association It Subcontracted Unit Work Of The Child Study Team During The Summer Of 1979

The Hearing Examiner finds and concludes that the Respondent Board did not violate Subsections (a)(1) and (5) of the Act when without negotiations with the Association it subcontracted unit work of The Child Study Team during the Summer of 1979. Initially, it is noted that the Board subcontracted only a part of the work of the Child Study Team since three regular full-time members of the Child Study Team were hired during the Summer of 1979. Of course, the subcontracting of any portion of unit work could be contended as a violation of the Act.

The Hearing Examiner is constrained to follow the decision of the Appellate Division in State of New Jersey v. Local 195, IFPTE, AFL-CIO, 176 N.J. Super. 85 (1980), pet. for certif. pending, Supreme Court Docket No. 17,828. In that case the majority held that subcontracting was an illegal subject of collective negotiations. On the facts, it was a classic case of the subcontracting out of the job duties of unit employees to a third party. 13/

Accordingly, subcontracting being an illegal subject of negotiations under the present state of the law, the Hearing Examiner will recommend dismissal of the Subsection (a)(5), and derivatively the Subsection (a)(1) allegations in the Unfair Practice Charge.

13/ The cases cited by the Association (see Brief p. 35) do not persuade the Hearing Examiner that a different conclusion should be reached. None of the cited cases present a holding which squarely decides the negotiability of the classic subcontracting of work duties to a third party as in the State of New Jersey v. 195 case, supra.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent's Superintendent did not have "apparent authority" to bind the Board with respect to the salary to be paid to Frances Ebel for services rendered in the Summer of 1979.

2. Assuming that the Respondent's Superintendent had the authority to bind the Board with respect to the salary of Frances Ebel there was no "meeting of the minds" regarding the amount to be paid.

3. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) by refusing to remunerate Frances Ebel at the salary level she requested for services rendered in the Summer of 1979.

4. The Respondent Board did not violate N.J.S.A. 34:13A-5.4 (a)(1) and (5) when without negotiations with the Association it subcontracted unit work of the Child Study Team during the Summer of 1979.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

DATED: March 25, 1981
Trenton, New Jersey

Alan R. Howe
Hearing Examiner