

P.E.R.C. NO. 87-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-86-107-76

OLD BRIDGE EDUCATION ASSOCIA-
TION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by the Old Bridge Education Association against the Old Bridge Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it refused to allow the Association to distribute political flyers endorsing candidates running in an election. The Commission, in agreement with a Hearing Examiner, finds that the dispute merely involves a good faith difference over what the contract means rather than a bad faith repudiation of a contractual guarantee. Therefore, the appropriate forum for the resolution of such a controversy is the parties' negotiated grievance procedure.

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Appearances:

For the Respondent, Wilentz, Goldman & Spitzer, Esqs.
(Steven J. Tripp, of counsel)

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, of counsel)

DECISION AND ORDER

On October 31, 1985, the Old Bridge Education Association ("Association") filed an unfair practice charge against the Old Bridge Board of Education ("Board"). The charge alleges that the Board violated subsections 5.4(a)(1), (2), (3), (4) and (5)^{1/} of

^{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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when, on October 29, 1985, principals at two schools refused to allow the Association to distribute political flyers endorsing candidates running in an election on November 4, 1985. The charge specifically asserts that the Board repudiated a provision of its collective negotiations agreement granting the Association the right to reasonable use of the school mailboxes.

The Association requested interim relief at the same time it filed its charge. On October 31, 1985, Commission designee Edward G. Gerber conducted a hearing on this request. At its conclusion, he entered an order restraining the Board from restricting the use of the teacher mailboxes so long as the material to be distributed is placed in envelopes and thus cannot be seen by students. The designee later issued a report explaining his decision. I.R. No. 86-7, 12 NJPER ____ (¶____ 1985).

On November 22, 1985, a Complaint and Notice of Hearing issued. The Board then filed an Answer admitting that it had refused permission to circulate certain political flyers, but denying that this refusal violated the contract or was an unfair

1/ Footnote Continued From Previous Page

complaint or given any information or testimony under this act; and (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."

practice. As affirmative defenses, it asserted that the distribution of political flyers was not a "reasonable use of the school mailboxes" under the parties' contract; that it had a right to prevent students from viewing the political flyers; that it acted in good faith in refusing to distribute political flyers without envelopes; and that this dispute simply involves a good faith dispute over the meaning of a contractual provision, a dispute outside the Commission's unfair practice jurisdiction and within the parties' grievance procedures ending in binding arbitration.

On April 3, 1986, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally. They filed post-hearing briefs by July 18.

On August 11, the Hearing Examiner issued a report recommending that the Complaint be dismissed. H.E. No. 87-12, NJPER (¶ 1986) (copy attached). He found that this dispute primarily involved a question of contract interpretation rather than a repudiation of a contractual commitment.

On September 19, after receiving an extension of time, the Association filed exceptions. It asserts that the Board repudiated the contract by restricting the distribution of political flyers; that the Board's concern about students seeing these flyers was not substantiated; and that under the First Amendment to the United States Constitution, the Board has a burden of proving that it had a compelling reason to limit the Association's communications.

On September 29, the Board filed a response supporting the recommended report.

We have reviewed the record. The Hearing Examiner's findings of fact (pp 3-8) are accurate. We adopt and incorporate them here.

Majority representatives and public employers may negotiate contractual provisions concerning whether and on what terms the majority representative may use the employer's mailboxes to communicate with the employees it represents. Elizabeth Bd. of Ed., P.E.R.C. No. 83-66, 9 NJPER 21 (¶14010 1982); Union County Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976); . See also Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). The parties negotiated such a provision here. Article V.D provides:

The Association shall have the right to reasonable use of the school mailboxes.

The Association asserts that "reasonable use" of the school mailboxes permits it to place flyers endorsing political candidates in school mailboxes without first enclosing them in envelopes. The Board asserts that "reasonable use" permits it to condition the distribution of political flyers upon their being enclosed in envelopes if students may otherwise see them.^{2/} Under all the circumstances of this case, we believe this dispute merely involves

^{2/} We agree with the Hearing Examiner's report (pp. 12-13) that there was some evidence that students might see these flyers in the mailboxes.

a good faith difference of opinion over what the contract means rather than a bad faith repudiation of a contractual guarantee. We decline to perform the task of deciding which opinion is correct. The appropriate forum for the resolution of such a controversy is the parties' negotiated grievance procedure, not this Commission. State of New Jersey (Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984)).^{3/} Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
October 30, 1986
ISSUED: October 31, 1986

^{3/} We, of course, do not endorse either party's interpretation. We also note that under the parties' negotiated grievance procedure, an arbitrator must make that choice. We also do not decide the constitutionality of the restriction imposed. That question is for the courts. Boonton Bd. of Ed., P.E.R.C. No. 84-3, 9 NJPER 472 (¶14198 1983), aff'd 99 N.J. 523 (1985).

H.E. NO. 87-12

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

In the Matter of

OLD BRIDGE BOARD OF EDUCATION

Respondent,

-and-

Docket No. CO-86-107-76

OLD BRIDGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a Complaint based on an unfair practice charge filed by the Old Bridge Education Association against the Old Bridge Board of Education. The charge alleges that the Old Bridge Board of Education repudiated the collective agreement when it refused to allow the Old Bridge Education Association to distribute a political flyer into teachers' mailboxes without the flyers first being placed in envelopes. The Hearing Examiner finds that the Board's action does not repudiate the agreement.

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. 87-12

STATE OF NEW JERSEY
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Appearances:

For the Respondent
Wilentz, Goldman & Spitzer
(Steven J. Tripp, of counsel)

For the Charging Party
Oxford, Cohen & Blunda
(Arnold S. Cohen, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 31, 1985, by the Old Bridge Education Association ("Association") alleging that the Old Bridge Board of Education ("Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). Specifically, the Association alleges that the Board violated

§5.4(a)(1), (2), (3), (4) and (5)^{1/} of the Act when it refused to allow the Association to distribute political flyers on October 29, 1985, regarding the upcoming general election to be conducted on November 5, 1985. The Association contends that the Board's action constitutes a repudiation of the collective agreement.

The charge filed by the Association was accompanied by a request for an Order to Show Cause seeking the imposition of interim restraints pending the final disposition of this matter by the full Commission. The matter was heard by Commission Designee Edmund G. Gerber. On November 8, 1985, the Commission Designee issued an interlocutory decision (I.R. No. 86-7, 12 NJPER 55 (¶ 17020 1985) restraining the Board from prohibiting the use of the teachers' mailboxes so long as the material being distributed by the Association is placed in envelopes so that it could not be seen by students.

^{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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

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 November 22, 1985, and a hearing date was scheduled for February 20, 1986. By agreement of the parties, the hearing was rescheduled to April 3, 1986. In accordance therewith, a hearing was held in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing a briefing schedule was established providing for the Association to file its brief on May 22, 1986 and the Board to file its reply brief on June 12, 1986. The Association's brief was received on June 13, 1986, and pursuant to a request by the Board's attorney on June 20, 1986, I granted the Board an extension of time to file its brief until July 11, 1986. The Board's brief was received on July 18, 1986.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, I make the following:

FINDINGS OF FACT

The Old Bridge Township Board of Education is a public employer within the meaning of the Act and is subject to its

provisions (T-8).^{2/} The Old Bridge Education Association is an employee representative within the meaning of the Act and is subject to its provisions (T-8).

The Association called Glen Johnson as a witness. Johnson is employed by the Board as an eighth grade math teacher (T-13). He has been President of the Association for the last ten years (T-13) and served on the Association's negotiating team for 17 years (T-15).

On October 29, 1985, the Association tried to distribute a flyer to all employees throughout the school district represented by the Association (T-15). The flyer (CP-2)^{3/} seeks campaign workers to help re-elect William Flynn and Jackie Walker to political office. The method used by the Association to distribute the flyers calls for an Association representative to deliver the flyers to the Central Administration building, addressed to the head Association official at each building. The Central Administration mail carrier delivers the flyers to the various buildings and the Association representative places them in the teachers' mailboxes (T-16-17). The mailboxes are located in the schools' main office^{4/} (T-21). The main office is divided by a counter; on one side is the

^{2/} T-1 refers to the transcript dated April 3, 1986, page 1; T-8 refers to page 8 of the April 3, 1986 transcript, and so forth.

^{3/} The Association's exhibits are cited as CP-1, CP-2 and so forth. The Board's exhibits are cited as R-1 and R-2.

^{4/} In one of the elementary schools, the mailboxes are located in the teachers' room (T-22-23)

secretaries' workplace and the other side is where visitors to the building are received and teachers sign in (T-21; T-38). The mailboxes are on the "public" side of the counter (T-21-22). All the mailboxes are approximately the same size. Johnson measured the mailboxes at the two high schools. At Madison Central High School, the mailboxes measured 5 inches wide, 9.5 inches high and 9.5 inches deep. At Cedar Ridge High School, the mailboxes measured 9.5 inches wide, 3 inches high and 9.5 inches deep (T-23).

While as a matter of official policy, students are not supposed to have access to the teachers' mailboxes (T-24-25), Dr. Peter Delaney, Principal of Madison Central High School, proffered uncontradicted testimony that students do have access to mailboxes (T-39). A teacher may ask a student in his/her class to place something into another teacher's mailbox (T-39). Additionally, during the school day, students assist the secretaries in the main office. When flyers or notices must be distributed to teachers, a secretary will review the notice and decide whether the contents of the document are such so that a secretary must place it in the mailbox or the job can be assigned to a student helper. If a student is assigned to distribute a notice, that student may also view other material in the teacher's mailbox. Consequently, the flyer at issue in this case (CP-2) placed in teachers' mailboxes by the Association building representative can still be viewed by students (T-39; T-48).

Dr. Delaney gave additional testimony during the hearing. Delaney stated that he became aware of the Association's flyer (CP-2) at about 7:30 a.m. on October 29, 1985, when a secretary asked him if it was appropriate for such flyers to be distributed in the teachers' mailboxes (T-38). The flyers had already been placed in the teachers' mailboxes by the Association's building representatives, but a pile of flyers was left on the counter of the main office (T-38).^{5/}

Delaney testified that he was concerned that the distribution of the flyers at the school might violate a Board policy which prohibits involving the schools in political campaigns (R-1; R-2). Delaney was also concerned that students would be exposed to the flyers (T-40). Delaney testified that he felt he needed to make a quick decision regarding the flyers, since the teachers would be coming into the main office to sign-in for the day during the next fifteen minutes. If the flyers were being improperly distributed, once in the hands of the teachers, the violation of policy would be irreparable. Consequently, Delaney decided to remove the flyers from teachers' mailboxes and the office counter and seek further guidance from the Superintendent of Schools. Delaney stated that he acted knowing that if the Superintendent advised him that his concerns were unfounded, he

^{5/} Delaney later ascertained that the flyers were inadvertently left there (T-49).

could always replace the flyers during the day with little harm done (T-40). Delaney contacted Association President Johnson and the building representatives at his school in order to advise them of his actions (T-17-18; T-48). Later, Delaney was advised by Central Administration that the flyers were not to be replaced into the teachers' mailboxes (T-42; T-19).

There are 15 schools in the school district (T-19). Johnson testified that while he did not know whether the Principal at each school was aware of the distribution of the flyer, problems with the flyer's distribution arose at only two places. Flyers were not distributed at Madison Central High School and Madison Park Elementary School (T-19). The flyers were distributed at the central administration building (T-20).

Johnson testified regarding examples of flyers placed in teachers' mailboxes prior to October 29, 1985. A flyer urging employees to vote in favor of the school budget for 1985 (CP-3) was prepared by the Association and distributed through the central administration mail system to Association building representatives who placed it in teachers' mailboxes (T-27). Two Association-prepared "News Update" flyers (CP-4 and CP-5) were distributed in the same manner as the school budget flyer (T-29-30). Both "News Update" flyers make reference to upcoming political elections and name candidates endorsed by the Association. The Board has never taken exception to placing CP-3, CP-4 or CP-5 in teachers' mailboxes, unobscured from students' view

(T-29-30). Johnson's testimony also indicates that an advertisement for magazines at discount prices (CP-6) was also distributed through the central mail system and placed in teachers' mailboxes, however, it is unclear whether the distribution of the advertisement was authorized by Central Administration (T-31; T 33-35).

Johnson stated that in addition to distributing flyers like CP-2 and CP-3 through the school mail system, such flyers are also posted by Association building representatives on bulletin boards located in the faculty lounges at the various schools (T 27-28). Delaney testified that while students should not have access to the faculty lounge and their presence there is the exception rather than the norm, students do enter the lounge and could view a flyer which had been posted on the bulletin board (T-47-48).

The collective agreement constitutes Board policy for the term of the agreement (CP-1, Art. XXXVI). Additionally, it appears that there is no dispute over the fact that Board policies cannot be in conflict with the collective agreement (T-52).

ANALYSIS

Article V.D. of the Parties' collective agreement (CP-1) states the following:

The Association shall have the right to reasonable use of the school mailboxes.

The Association takes the position that the Board's refusal to allow it to distribute a political flyer to its membership on October 29, 1985 violated Article V.D. of the agreement. The Association contends that this act on the part of the Board

constitutes a blatant repudiation of the collective agreement in violation of the Act.

The Board takes the position that in fulfilling its obligation to maintain an appropriate environment for its students, its refusal to allow the distribution of unobscured political flyers was reasonable under the collective agreement and the law. The Board asserts that the Commission Designee's interlocutory order requiring that the flyers be put in envelopes before they are placed into the teachers' mailboxes is reasonable and accommodates both the Association's interest in communicating with its membership regarding political matters and the Board's obligations to its students and the general public.

First I will discuss what this case is not about. This case does not put in issue the question of whether the Association has the right to distribute material through the school mail system for its ultimate placement into the teachers' mailboxes. Nor does this case place in issue the question of whether the Association may communicate with its membership regarding its political agenda by using the school mail system. The attorney for the Board stated twice on the record -- once in the opening remarks and once in the closing argument -- that the Board is not attempting to prevent the Association from sending political flyers to its membership (T-12; T-56). The facts demonstrate that the Association has repeatedly sent flyers involving political issues (CP-3, CP-4, CP-5) through the school mail and placed them in teachers' mailboxes without contest from the Board.

What is at issue in this case is whether the Board's refusal to allow the Association to distribute the political flyers on October 29, 1985 constitutes a repudiation of the collective agreement in violation of the Act. On the basis of the particular facts found to exist in this case, I find that the Board did not violate the Act.

While it is not the function of the Commission nor its Hearing Examiner to interpret language of a collective agreement, in order to determine whether the Board has repudiated the agreement, it is necessary to focus upon and understand the meaning of the express language of the clause alleged to have been violated. See, State of New Jersey, H.E. No. 85-30, 11 NJPER 179 (¶ 16079 1985), aff'd. PERC No. 86-64, 11 NJPER 723 (¶ 16254 1985); Spotswood Board of Education, H.E. No. 85-43, 11 NJPER 382 (¶ 16139 1985), aff'd. PERC No. 86-34, 11 NJPER 591 (¶ 16208 1985). In this case the critical clause is Article V.D., set forth above. Article V.D. provides the Association with reasonable use of school mailboxes. If the Association wishes to make reasonable use of the mailboxes, and the Board disallows such use, the Board would appear to be repudiating the express language of the agreement and potentially violating §5.4(a)(5) of the Act. However, if the Board refuses to allow the Association use of the mailboxes, but such use is determined to be unreasonable, the Board cannot be said to have violated the agreement since, under Article V.D., it has retained its right to prohibit unreasonable use of the mailboxes. Certainly,

whether the Association's distribution of CP-2 actually constitutes reasonable use of school mailboxes must be decided by an arbitrator. See, State of New Jersey (Department of Human Services), PERC No. 84-148, 10 NJPER 419 (¶ 15191 1984); Matawan-Aberdeen Regional Board of Education, H.E. No. 86-61, 12 NJPER 458 (¶ 17174 1986), aff'd. PERC No. 87-1, 12 NJPER ____ (¶ ____ 1986). However, I find that under the particular facts of this case a reasonable argument may be made that placement of the political flyers on October 29, 1985, unobscured from the students' view, may constitute an unreasonable use of school mailboxes.

The Board cites two policies that pertain to the distribution of material related to political activity (R-1 and R-2). The Association takes the position that these policies are irrelevant to the issue raised in this matter because they conflict with the terms of the collective agreement, specifically Article V.D., and, the agreement prevails over conflicting policies. I disagree with the Association's position. I do not find that the policies are necessarily in conflict with Article V.D. Moreover, it is often precisely such policies, when analyzed in a negotiation context, which help give definition to language contained in a collective agreement.

The Association argues that it has previously distributed flyers concerning political matters in mailboxes without having to put such flyers in envelopes. However, the Board argues that the political flyers distributed by the Association prior to October 29,

1985, (CP-3, CP-4, and CP-5) are distinguishable from CP-2 and the circumstance surrounding the distribution of CP-2 on October 29, 1985. First, while it was inadvertent, a pile of flyers (CP-2) was left on the counter of the main office in full view of students and the public. Second, CP-2 was printed in large bold black type and pertained to partisan politics. While CP-3 was also printed in large bold black type, it pertained to passage of the school budget, not the election of a partisan political candidate. CP-4 and CP-5 named political candidates supported by the Association but such information was set forth in the body of the letter and was not shown in bold type so as to attract immediate notice.

The Association points to the fact that CP-2 was posted in the faculty lounge in full view of any student who entered the room. The Association argues that while the Board knows students enter the faculty lounge, it did not take exception to the flyer being posted there. While it is clear that some students may be exposed to the flyer in the faculty lounge, I find that the number of students involved is de minimis. The faculty lounge is for faculty not for students or the public. This is not the case in terms of the main office where students work and where the public is directed to wait for appointments with school personnel.

The Association argues that the mailboxes are sufficiently small so that the contents contained therein cannot be viewed by students. However, I believe that the facts do not support this

contention. At Madison Central High School the mailboxes are 5 inches wide and 9.5 inches high; at Cedar Ridge High School the boxes are 9.5 inches wide and 3 inches high. In either case material contained in the mailbox may be viewed by students without much difficulty. It is this unobscured view of these political flyers which, in this case, may constitute an unreasonable use of the mailboxes.

Consequently, since the Board's contention that the distribution of the political flyer by the Association on October 29, 1985 may constitute an unreasonable use of school mailboxes represents a viable argument raised in good faith, I find that the Association has failed to prove by a preponderance of the evidence that the collective agreement has been repudiated.

Accordingly, based upon the entire record and the analysis set forth above, I make the following:

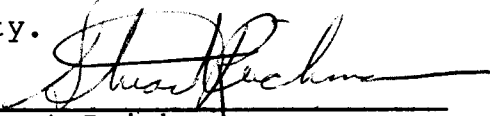
CONCLUSIONS OF LAW

1. The Old Bridge Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(5) when it refused to allow the Old Bridge Education Association to distribute a political flyer into teachers' mailboxes unless the flyers were enclosed in envelopes.

2. The Old Bridge Education Association did not prove, by a preponderance of the evidence, that the Old Bridge Board of Education violated any other section of the Act as alleged in its unfair practice charge.

RECOMMENDED ORDER

I recommend that the Commission ORDER the complaint issued in this matter be dismissed in its entirety.



Stuart Reichman
Hearing Examiner

DATED: August 11, 1986
Trenton, New Jersey