

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MILLBURN BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-287-144

MILLBURN ASSOCIATION OF SUPERVISORS
AND ADMINISTRATORS AND ELLEN ADDIS,

Charging Party.

SYNOPSIS

The Commission dismisses an unfair practice complaint in accord with the recommendation of its Hearing Examiner. Salary for school psychologist Ellen Addis was agreed upon in negotiations and covered in the resultant contract, and so the Board did not violate N.J.S.A. 34:13A-5.4(a)(5) when it reduced her salary in accord with that agreement.

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Charging Party.

Appearances:

For Respondent, McCarter & English, Esqs.
(James A. Woller, of Counsel)

For Charging Party, Mandel, Wysoker, Sherman,
Glassner & Weingartner, Esqs.
(Jack Wysoker, of Counsel)

DECISION AND ORDER

The Millburn Association of Supervisors and Administrators ("MASA") and Ellen Addis filed an unfair labor practice charge with the Public Employment Relations Commission ("Commission") alleging that the Millburn Board of Education ("Board") violated the New Jersey Employer-Employee Relations Act ("Act") by refusing to negotiate the terms and conditions of employment for Addis in contravention of N.J.S.A. 34:13A-5.4(a)(1)(3) and (5).^{1/} It appearing that the allegation, if proved, might constitute an unfair practice within the meaning of the Act, a Complaint was issued and a hearing was held before Commission Hearing Examiner Edmund G. Gerber.

^{1/} No evidence tending to support the (a)(3) allegation was ever presented and this matter is treated by us solely as an (a)(5) and a possible derivative (a)(1).

The Hearing Examiner's Recommended Report and Decision issued on October 30, 1978, designated as H.E. No. 79-22. A copy is appended hereto and made a part hereof. Mr. Gerber recommended that the Complaint be dismissed, finding that the parties had agreed upon Addis' salary in the course of negotiations for a 1976-1981 contract ratified by both sides and subsequently executed. Therefore he concluded that no violation of the Act was committed. Pursuant to N.J.A.C. 19:14-7.3 exceptions were filed by MASA together with a request for oral argument pursuant to N.J.A.C. 19:14-8.2. No submission has been made by the Board in response either to the exceptions or the request for oral argument.

Granting of oral argument is discretionary and upon a full independent review of the record and the exceptions we see no purpose to be served inasmuch as there are no issues that were not argued before the Hearing Examiner or that are in need of further elucidation to permit us to reach our decision. Consequently, we deny that request and herein issue our decision on this matter.

There is no dispute that under prior contracts running through the end of the 1975-76 school year Addis had the title of Senior School Psychologist at a salary higher than the 1.1 ratio paid by the Board once the 1976-81 contract had been ratified.^{2/} In the salary placement notice initially sent to Addis for 1976-77

^{2/} This was her salary for the school year. She continued to receive an additional .1 for one month of summer work.

prior to agreement on a contract, the salary was left blank but she was paid at the old rate until after ratification on December 13. Then, on December 14, she was sent a new notice reflecting a ratio of 1.1 as a School Psychologist^{3/} plus an additional .1 for one month of summer work. This is claimed by MASA to be a unilateral change in a term and condition, a claim rejected by the Hearing Examiner.

Although MASA has enumerated a number of exceptions to the Hearing Examiner's Report, they all really come down to one argument. Addis continued to perform basically the same duties during 1976-77 as she had previously and therefore the contract, although it does eliminate the Senior School Psychologist position, did not do so for 1976-77. No effective date, it is contended, was specified for elimination of the title and by having Ms. Addis perform as before the Board obligated itself to negotiate a salary ratio for the position for 1976-77.

We find no merit to MASA's exceptions and affirm the Hearing Examiner's Report. There can be no doubt that Addis' status was raised a number of times during the course of negotiations and that the Board consistently took the position that it wished to eliminate the Senior School Psychologist title as part of a reduction of the salary ratios for the Special Services Department.

^{3/} Under the previous agreement, reference was made both to School Psychologist and Senior School Psychologist. The title School Psychologist was paid a 1.2 ratio for 10 months and Senior School Psychologist was paid a 1.3 ratio for 12 months. Thus, both titles were paid the same for 10 months, the difference resulting from summer work performed only by the Senior School Psychologist. Under the new agreement, the ratio for School Psychologist has been reduced to 1.1 and, as stated, there is no mention of Senior School Psychologist.

Knowing that the Board intended Ms. Addis to be covered under the agreement as a School Psychologist, MASA nevertheless ratified a contract with a salary guide making no mention of the position of Senior School Psychologist. Said contract covered all MASA personnel including Addis for the period 1976-1981 and so MASA's contention about no date having been set for elimination of the position must fail. No specific mention of a date actually militates against MASA's argument as it appears to indicate that all aspects of the contract are effective for the full duration of that document.

Performance by Addis of the same duties is of no avail for MASA's position. It is just as valid for an employer to negotiate a decrease in the salary rates for certain positions as it is for the employee organization to negotiate an increase.^{4/} The Hearing Examiner did not credit Addis' testimony as to her hours of work, and believed Board witnesses who said her duties were different from those of the other School Psychologists rather than greater. We will not tamper with these credibility determinations.

Reliance on Press Co., 121 NLRB No. 116, 42 LRRM 1493 (1958) is misplaced. In that case the employees had been receiving both salary and commission. The contract dealt only with salaries and was totally silent on commissions. The employer announced a unilateral ending of commissions, asserting a management

^{4/} The claim that the duties did not change works against the Association. Addis receives the same pay for 10 months as do the other School Psychologists just as she did the previous year when she was called Senior School Psychologist. Both Addis and the other School Psychologists had their ratios reduced by .1.

prerogative. Despite the union having broached the subject in negotiations and management's rejection of including it in the contract, the NLRB held that mere discussion and contract silence do not allow an employer to act as he sees fit. That is not the case herein. The only term and condition of employment involved is salary, the parties had full negotiations on that topic and the contract is not silent - a salary guide exists for all MASA unit members and there is no basis for saying that Addis' status had been reserved as was the issue of commissions in Press. Specific queries by MASA regarding Addis were answered by the Board in a manner clearly indicating that she was to be on the guide as a School Psychologist, and without further action MASA ratified the proposed contract. The letter from MASA's counsel after ratification can be no more than an after the fact attempt to modify the agreement, and the fact that the contract had not yet been signed is of no moment as MASA at that point had a duty to sign the agreement. N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-5.4(b)(4).

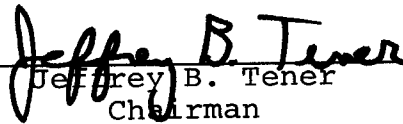
Based upon the entire record and for the foregoing reasons we affirm the Hearing Examiner and dismiss the Complaint in its entirety.^{5/}

^{5/} The exceptions also take issue with the Hearing Examiner's finding of a waiver by MASA. As we have concluded that the subject matter in question was resolved in negotiations we need not reach the issue of waiver and express no opinion as to the Hearing Examiner's comment thereon.

ORDER

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

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Parcels voted for this decision. None opposed. Commissioners Hipp and Schwartz abstained. Commissioner Graves was not present.

DATED: December 14, 1978
Trenton, New Jersey
ISSUED: December 15, 1978

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SYNOPSIS

Ellen Addis was a Senior School Psychologist for the Millburn Board of Education (Board) up until December of 1976. At that time the Board and the Millburn Association of Supervisors and Administrators (Association) entered into a new collective negotiations contract. This new contract did not list the title Senior School Psychologist. The Board claims by virtue of this contract the position of Senior School Psychologist was eliminated and paid Addis as a regular School Psychologist. Addis and the Association brought this action claiming that her reclassification was not negotiated, was a unilateral change in the terms and conditions of employment and, accordingly, was an unfair practice in violation of §(a)(5) of the New Jersey Employer-Employee Relations Act.

A Hearing Examiner of the Public Employment Relations Commission, however, finds that the change in Addis' title and the concurrent changes in her duties and salary were in fact negotiated between the parties and such negotiations were reflected in the collective negotiations agreement.

The Hearing Examiner therefore recommends to the Commission that the Complaint in this matter be dismissed.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the Respondent
McCarter & English, Esqs.
(Gerald C. Harvey, Esq.)

For the Charging Party
Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold, Esqs.
(Jack Wysoker, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On April 5, 1977, the Millburn Association of Supervisors and Administrators (Association) and Ellen Addis filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the Millburn Board of Education (Board) has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (Act), as amended, N.J.S.A. 34:13A-1 et seq. Specifically, the Association claims that the Board violated § 5.4(a)(5) ^{1/} ~~that the Association alleges that the Board has refused to~~ negotiate these changes while the Board claims that the changes were in fact negotiated.

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice

1/ This section of the Act provides that employers, their representatives or agents are prohibited from 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 by unilaterally adjusting the salary and title of Ellen Addis during the 1976-1977 academic year.

of Hearing was issued on July 6, 1977. Pursuant to the Complaint and Notice of Hearing, hearings were held on September 30, 1977, November 9, 1977 and January 30, 1978. ^{2/}

It is undisputed that Ellen Addis was the only Senior School Psychologist in the district. She was so employed from September 1972 until the spring of 1976. Under the terms of the contract between the Board and the Association, Senior School Psychologist Addis received a salary based upon a 1.3 ratio. That is, she received .3 or 30% more than the maximum step on the Teacher Salary Guide. As Senior School Psychologist, Addis worked on a 12-month basis. Whereas a regular School Psychologist received a salary based upon a 1.2 ratio but worked on a 10-month basis.

This contract expired on June 30, 1976. On May 7, 1976, before the expiration of the old contract, Addis received a salary replacement notice for the 1976-1977 school year. Said notice did not specify a salary or length of appointment (i.e. 10 months vs. 12 months) but listed her position as a Senior School Psychologist.

When school commenced again in September there still was not a new contract and Addis resumed her duties as Senior School Psychologist.

In December, a new five-year contract was signed and ratified by the parties. This new contract does not list Senior School Psychologist as a separate title, and on December 14, 1976, Addis received a second salary placement notice which listed Addis' position simply as School Psychologist and the salary stated was at a 1.1 ratio for a 10% pay differential for a 10-month school year and an additional .1 or 10% for summer school. The salary and work year listed is consistent with the title of School Psychologist under the new contract.

The Board maintains that they negotiated Addis' change in title in good faith. The Association claims that Mrs. Addis' title was discussed during negotiations but said discussions did not constitute good faith negotiations since Addis performed the duties of a Senior Psychologist until July 1, 1977. Accordingly, Addis' change in title was a unilateral change in the terms and conditions of employment. Much of the testimony at the hearing concerned the negotiations for the new agreement.

^{2/} Both parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were submitted by both parties and were received at the Commission offices by March 17, 1978.

It should be noted that there is no dispute concerning Addis' title after July 1, 1977. The instant controversy concerns her title and corresponding salary for the 1976-1977 school year only.

At a preliminary negotiations meeting in the spring of 1976 the Board's negotiating team indicated to the Association that they wanted to make a downwards adjustment of the salaries of the employees in the Special Services Department. Psychologists are included in this department. Meaningful negotiations did not take place however until the fall of 1976.

Joseph Spector, chairman of the Board's negotiating committee, testified that at a September 1976 negotiations session the Board again told the Association that it wanted to lower the ratios of the salaries of the Special Services Department. The Board felt that a reduction in the ratios would give it more discretion regarding summer work and it intended to reduce the ratios of all Psychologists by .1 Reich, a member of the Board negotiating team, said the Association objected to the Board reduction of all the Psychologists, including Addis as Senior Psychologist by .1.

Spector testified that the Board, at a September meeting, "listed a table of organization of 12-month and 10-month members; the position of Senior Psychologist was not listed. There was a discussion as to why it wasn't there, and the Board proposed the elimination of the position of Senior Psychologist. A discussion went on back and forth as to why the elimination wasn't there, and the Board proposed the elimination of the position of Senior Psychologist."^{3/} Spector said the elimination of the position was discussed again at the November meeting but couldn't remember what was specifically stated.

Zuckerman, a member of the Association negotiating committee, testified that they wanted to negotiate the position of Senior Psychologist, but the Board said the position was going to be eliminated so there was no need to negotiate it.^{4/} At the second meeting the Association told the Board that Addis was still performing the duties of a Senior Psychologist, although the Board said the position was going to be eliminated.^{5/} The issue of the Senior Psychologist was raised again at the third meeting, which was a rather heated

^{3/} Vol. III, pp. 6 and 7.

^{4/} Vol. I, pp. 71 and 72.

^{5/} Vol. I, p. 83.

meeting, although Zuckerman cannot remember the specifics of any discussions.

Addis testified that she raised the question of her status regularly at internal Association meetings because she felt the Board was trying to eliminate her position even though her responsibilities were the same. She testified that every negotiator had indicated to her that they had raised the question of her status with the Board.

On November 24, 1976, Timothy Dyan, the president of the Association, wrote to Spector asking that a number of issues be clarified prior to their accepting a contract, including "a clearer explanation of the status of Mrs. Addis and Mrs. Fielding in a new contract. This arises due to their ten month position and their summer pay."

On December 9, 1976, the Association ratified a proposed contract in which no mention was made of the position of Senior Psychologist. At this same meeting, however, a Mr. Conover made a motion for the Association to support Addis in her attempt to resolve the issue of her status; the motion was carried. The Board ratified the proposed contract on December 13th and the contract was executed January 1977.

As noted above, on December 14th Rossi, the Superintendent of Schools, sent a salary placement notice to Addis listing her as a Psychologist with a 1.1 ratio. The Association's attorney then sent a letter to the Board requesting a meeting to resolve this matter, for he claimed Addis was still a Senior Psychologist. The Board refused to further negotiate this question. Addis claims that she continued to perform the duties of Senior Psychologist until July 1, 1977, and that because of this her ratio should be higher than the other Psychologists. She further claims that she had a workload the equivalent of two full-time jobs and worked sixteen hours a day during 1976-1977; she spent 75% of her time as Child Study Team Coordinator and 25% of her time as a Psychologist. Now as a full-time Psychologist she worked 10 to 12 hours a day and there is no longer a team coordinator.

Addis was unaware of any formal job description of a Senior Psychologist and there are no documents in evidence defining the difference between a Senior Psychologist and a Psychologist. When the Association told the Board during the negotiations that Addis was performing duties over and above the

other Psycholigists, the Board asked Superintendent Rossi if this was true. Rossi said that each of the Psychologists was doing an equal amount of work, although it might be in different areas.

Rossi, after discussing Addis' duties, stated, "We did not feel that this job was one of a supervisory nature or of additional responsibility, but rather was one of a different responsibility from that which the other two Psychologists held. ^{6/} Spector testified that he didn't know that Addis' duties were different from those of the other two Psychologists. Spector claims that the Board didn't negotiate specific duties; they negotiated a table of organization and positions. This table did not include the position of Senior Psychologist.

Analysis

To prevail the Association has to show that Addis' status was not negotiated and the Board unilaterally changed her title and salary on December 14th. There is no question that the Board refused to negotiate after this date with regard to Mrs. Addis. The five-year agreement which was ratified by both parties, by December 13, did not expressly state Addis' title or salary. Therefore it is argued Addis' status was not covered by the agreement. The undersigned finds this argument without merit.

It is not disputed that an employer can take a firm position on a given item in negotiations. See, City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977). More to the point, the Association was fully aware that, although the contract included a salary schedule listing all titles within the unit except that of Senior Psychologist, and, knowing of the Board's firm position that this very same title was going to be eliminated, they went ahead and signed and then ratified the contract. Under the circumstances, a clear and plain meaning of the contract can be found.

~~The Association argues~~ that extrinsic testimony ~~shall~~ not be considered pursuant to the parol evidence rule. Here there is an ambiguity in the language. Was the absence of the title 'Senior Psychologist' intentional? Was it contemplated by the parties that Addis was included in the contract under the title

^{6/} Vol. II, pp. 72 and 73.

Psychologist? In the Matter of Lower Township, P.E.R.C. No. 78-30, 4 NJPER ____ (¶ , 1978), the Commission stated it will consider extrinsic evidence, i.e., the situation of the parties, surrounding circumstances and parol evidence where there is a contention that such evidence supports a party's interpretation of disputed language, and here the language in the contract is definitely in dispute. And the extrinsic evidence shows that the title of Senior School Psychologist was knowingly eliminated from the contract.

The Association claims that Addis relied in good faith upon the salary placement notice of May 7, 1976, which designated her as a Senior School Psychologist, and that she performed the duties and responsibilities of this position expecting the corresponding salary. It argues that the Board is thus unable to change her title and rate of pay for the 1976-1977 school year, especially since she'd already worked half the year. However, the placement notice stated that the salary was to be determined at a later date; the Association knew in the spring of 1976 that the Board wanted to adjust the ratio of the Special Services Department downward. The Board never promised to pay Addis at a 1.3 ratio for the 1976-1977 school year and Addis was never promised any specific salary. It should be noted that the Board was unable to reduce her ratio during the course of negotiations for a successor agreement for the action would be a unilateral change which would alter the status quo and would be violative of §(a)(5). In re Union County, P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007, 1977); In re Willingboro, P.E.R.C. No. 78-20, 3 NJPER 124 (1977).

The Association argues that a condition precedent had to be satisfied before Addis received a 1.1 ratio. This condition being a change in her duties to those of a School Psychologist. Since duties were not changed until July 1, 1977, the 1.1 ratio is not applicable to her until that time. However, even assuming that the duties did not change until July 1, 1977, there was absolutely no evidence that the parties intended or agreed upon this condition precedent. Quite simply the parties, via the negotiations process, agreed upon a salary for Addis. Any discrepancies had to be worked out before the contract was signed.

The Association also argues that it was unjust to pay Addis the same ratio as the other Psychologists when she was performing additional duties and responsibilities. However, even assuming that she performed additional duties and not merely different ones, the Association overlooks the fact that during the ten-month 1975-1976 school year, both Addis and the other two Psychologists

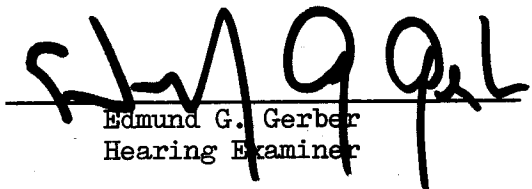
were paid at the same salary rate, a 1.2 ratio. Addis was paid a 1.3 ratio but the additional point was for the time she worked during the summer. For 1976 Addis and the other Psychologists were paid a 1.1 ratio and hence Addis' position to the regular Psychologists remains unchanged for Addis again received an additional .1 for summer work. Addis' ratio was reduced by the same amount as the ratio for the other Psychologists and this decrease was clearly negotiated. Further, the elimination of her "Senior Psychologist" title change had no effect upon her ratio or salary. It should be noted that the nature of Addis' duties is a management prerogative. Ridgefield Park Board of Education, ___ N.J. ___ (1978). The undersigned cannot credit Addis' testimony that she worked 16 hours a day and finds the Board's witnesses far more credible when they say that the nature of her work as a Senior Psychologist was different and not more.

The Association ratified the agreement knowing that it did not include the position of Senior Psychologist and knowing that the Board fully intended to eliminate the position. Having consciously signed such an agreement they clearly waived any right to negotiations concerning Addis' position. Accordingly it is recommended that the Commission find that the .1 reduction in Addis' salary ratio for the 1976-1977 year was negotiated in good faith as was the elimination of her title.

Accordingly, it is hereby recommended that the Commission issue the following order.

Recommended Order

The Complaint in this matter is to be dismissed.


Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
October 30, 1978