

I.R. No. 2008-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROXBURY TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2008-154

ROXBURY TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief finding that the Roxbury Township Board of Education violated the Act by unilaterally setting the salary for a unit position above the contractual maximum without first negotiating over the salary with the Association. The Board was restrained from unilaterally setting salaries for unit positions. It was also required to notify the Association that it violated the Act, that it would negotiate with the Association at its discretion over that salary, and that it would cease paying that particular aide over the contractual salary no later than June 30, 2008.

The Designee also found that a dispute existed over whether the job duties of job coach was unit work. Consequently, the application regarding that title was denied.

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Appearances:

For the Respondent, Kenney, Gross, Kovats & Parton,
attorneys (Malachi J. Kenney, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(Randi Doner April and Gail Oxfeld Kanef, of counsel)

INTERLOCUTORY DECISION

On December 7, 2007, the Roxbury Township Education Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Roxbury Township Board of Education (Board) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The charge specifically alleges that 5.4a(1), (3) and (5)^{1/} of the Act were violated when the Board unilaterally

^{1/} These provisions 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 (continued...)"

set the hourly salary for an "ABA Shadow Aide" hired for 2007-2008 above the contractual rate; unilaterally set the hourly rate for a newly hired "Substitute ABA Shadow Aide" at the top of the salary guide; and, unilaterally set the rate of pay for the new position "Service Learning Assistant-Special Services" also referred to as "job coach", which, the Association contends, is in actuality a paraprofessional position which are represented in its unit. The Association seeks to restrain the Board from unilaterally determining salaries in violation of the parties collective agreement. It also seeks an order requiring the Board: to post a notice it violated the Act; to pay all shadow aides the hourly rate unilaterally set by the Board for the new aide; and, to pay the substitute shadow aide and job coaches in accordance with contractual salary guides.

The charge was accompanied by an application for interim relief. An Order to Show Cause was signed on December 18, 2007, scheduling a telephone conference call return date for January 18, 2008. Both parties submitted briefs and/or position statements and argued orally on the return date.

1/ (...continued)
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."

The Board did not dispute that it hired a new ABA Shadow Aide above the contractual rate without first negotiating with the Association, that it hired and unilaterally set the pay rate for a new Substitute ABA Shadow Aide, and that it created the job coach position and unilaterally set the rate of pay for that position. While the Board acknowledged it violated the contract and failed to negotiate regarding the salary for the new shadow aide, and agreed it would not pay that aide or any aide in excess of the parties contract effective June 30, 2008, it argued it not be required to lower the new aide's salary to the contractual rate for the balance of the 2007-2008 academic year because of the potential impact on the needs of a particular student.

The Board also argued that it could not have violated the Act regarding the substitute shadow aide because the Association does not represent substitutes. Finally, the Board disputed the Association's argument regarding the job coach position. It claims the job coach is a new position with defined duties different than existing paraprofessional duties, and that the Association did not demand negotiations over that position.

During the show cause conference call, the Association withdrew the substitute shadow aide position from this application and charge.

The following pertinent facts appear:

The Board and Association are parties to a collective agreement which expired on December 31, 2007, and are in negotiations for a successor agreement. The Association represents paraprofessional employees which include shadow aides. The top salary for those employees is currently \$19.39 per hour. By resolution of June 18, 2007, the Board hired a shadow aide for a particular student with disabilities at the unilaterally established rate of \$35.00 per hour for the 2007-2008 school year.

During the 2006-2007 school year, the student in question was placed in a non-Board school by the Board to adequately address certain disabilities. The other school provided a shadow aide for the student at an hourly rate higher than the Board's rate. Prior to the start of the 2007-2008 school year, the student's parents agreed to enroll the student in a Board school if he could keep the same shadow aide. The Board could only keep that aide with the particular student by paying the aide at the higher rate. The Board believes that if the aide's hourly rate was reduced to \$19.39 per hour she would resign her position.

By resolution of July 16, 2007, the Board created the job coach position and unilaterally set a \$20.80 per hour salary and created a job description. The parties dispute whether the duties of that position are the same as paraprofessional positions. The Board may be willing to include that title in the

unit, but the Association has not requested such inclusion nor requested negotiations over terms and conditions of employment for that position.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

Since the Board has acknowledged that it unilaterally set a salary for the shadow aide above the contractual maximum and should not have done so without first negotiating with the Association over an exception to the collective agreement, I find the Association has established that the Board violated the Act regarding that action.

In its charge, the Association sought an order requiring the Board to pay all shadow aides \$35.00 per hour, the rate it unilaterally set for the particular aide. During oral argument,

it sought an order requiring the Board to lower that aide's salary to the contractual rate.

The Association's request for an order requiring the Board to pay all shadow aide the increased rate is beyond the scope of the appropriate remedy. That result could only be achieved through negotiations. The Association is entitled to an order restraining the Board from unilaterally setting salaries for unit positions and requiring the Board to negotiate over having set the increased rate. An employer normally would also be required to begin paying the employee at the contractual rate.

In balancing the relative harms to the parties, here, however, I decline to require the Board to diminish the particular shadow aide's salary during the balance of the 2007-2008 school year. I believe the harm to the Board/student should the aide need to be replaced at this point in the school year is greater than the harm to the Association in negotiating over a new agreement.

The application is denied regarding the job coach position. A material factual dispute exists over whether the job coach position is the same or substantially similar to the paraprofessional positions, and the Association has not requested negotiations regarding that title which it would normally be required to do upon the creation of a new title.

Accordingly, based upon the above findings and analysis, I issue the following:

ORDER

The Board is restrained from unilaterally determining the rates of pay for titles included in the Association's negotiations unit.

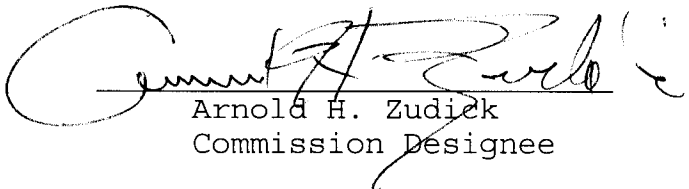
The Board shall notify the Association in writing that it violated the Act by unilaterally setting the salary for the particular shadow aide above the contractual maximum without first negotiating with the Association over an exception to the contractual salary guide for shadow aides, and that it will negotiate with the Association at its discretion regarding that salary.

The Board shall cease paying that shadow aide above the contractual rate no later than June 30, 2008.

The Board shall not unilaterally set the rate of pay for shadow aides and shall seek negotiations with the Association before any future attempt to pay employees performing unit work above the contract rate.

The application is denied regarding the job coach position.

This case will be sent to conference for further processing.


Arnold H. Zudick
Commission Designee

DATED: January 25, 2008
Trenton, New Jersey