H.E. NO. 2014-14

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

In the Matter of

WAYNE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2013-181

WAYNE SUPERVISORS OF CURRICULUM/
INSTRUCTION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the Respondent's motion for summary judgement, finding that although there were material disputed fact as to whether there was a work load increase triggering a duty to negotiate, the Charging Party Association was a defunct labor organizations. Accordingly, the matter was moot. Since the only remedy would be an order to negotiate, the 5.4a(5) and (1) allegations must be dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Machado Law Group, LLC, attorneys
(Paul D Clarke, of counsel)

For the Charging Party,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, of counsel
(Aileen O'Driscoll, of counsel)

HEARING EXAMINER'S DECISION
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

On December 31, 2012 and January 2, 2013 the Wayne Supervisors of Curriculum and Instruction Association (Charging Party or Association) filed an unfair practice charge and amended charge, respectively, alleging that the Wayne Township Board of Education (Respondent or Board) violated 5.4a(1) and (5)[1/] of the

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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; (5) Refusing to negotiate in good faith with a majority representative of (continued...)

New Jersey Employer-Employee Relations Act N.J.S.A. 34:13A et seq.[2/] Specifically, the Association alleges that the Board refused to negotiate upon demand over the impact of an increase in the workload of employees caused by the retirement of a Supervisor of Secondary Special Services, a position that was then left vacant.

A Complaint was issued on August 8, 2013. The Board filed its Answer on August 29, 2013 generally denying that it violated the Act, but admitting that the Supervisor of Secondary Special Services retired in July 2012. The Board also states that all duties resulting from the retirement, with the exception of some staff observations, were assigned to a new position of K-12 Supervisor of Special Services and to the Director of Student Support Services, neither position represented by the Association. Since staff observations are within the Association's unit employees' job descriptions, the Board argues, these are not new or additional duties, triggering a negotiations obligation. It further contends, that it has a managerial

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1/ (...continued)
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 Director of Unfair Practices determined that the alleged violations of 5.4a(3) did not meet the Commission's complaint issuance standards and, therefore, dismissed that alleged violation.

prerogative not to fill vacant positions and to reorganize to further the District's educational goals.

On February 4, 2014, the Board filed a Notice of Motion for Summary Judgment together with a letter brief, certifications of Paula Clark, Esq. and Superintendent Dr. Raymond Gonzalez with attached exhibits. On March 4, 2014, the Association filed a letter brief in opposition to the Board's motion as well as a cross-motion for summary judgment together with certification of former Association President Fred Vafaie with attached exhibits.

On March 27, 2014, the Chair of the Commission referred the motion to me for disposition pursuant to N.J.A.C. 19:14-4.8.

It is well settled law that in considering a motion for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. N.J.A.C. 19:14-4.8(d) provides that summary judgment may be granted only if there are no material facts in dispute and if, as a matter of law, the movant or cross-movant is entitled to its requested relief. The Courts have further cautioned that summary judgment should be granted with extreme caution; the process is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 117 N.J. Super. 182 (App. Div. 1981); Essex County Educational Services Commission, P.E.R.C. No. 83-65 9 NJPER 19 (¶14009 1982); New Jersey Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

The New Jersey Supreme Court determined in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1974) that where the party opposing the motion does not submit any affidavits or documentation contradicting the moving party's affidavits or documents, or offers only facts that are immaterial, the moving party's facts may be considered as true, and there would be no material factual issue. Accordingly, the motion for summary judgment can be granted, if warranted, after applying the law to the undisputed facts.

Upon application of the standards set forth above, and in reliance upon the briefs, certifications and exhibits filed by the parties , I make the following:

FINDINGS OF FACT

1. The Board and Association were parties to a collective negotiations agreement effective from July 1, 2011 through June 30, 2014. The Association was the recognized majority representative of all Supervisors of Curriculum and Instruction and all Supervisors of Middle School Guidance employed by the Board.

2. On or about July 2012 Supervisor of Secondary Special Services Linda Melchiorre retired. Melchiorre's position was not in the Association's bargaining unit. She was responsible for curriculum supervision and program development for the special education programs in the District's middle and high schools.

Prior to September 2012, the Association's members had no responsibility for special education teachers or curriculum.

3. For the 2012-2013 school year, a new position of K-12 Supervisor of Special Services was created. Certain, if not a majority, of Melchiorre's duties were apportioned between the new position and the Director of Student Support Services as part of a reorganization of special services that integrated those services with the general education students and staff. Neither the new position nor the Director's position was represented by the Association.

4. The Association demanded to negotiate the impact of what it characterized as an increase in workload for the 2012-2013 school year for six out of its eight unit members. The Board refused to do so relying on its managerial prerogative to reorganize the delivery of special education services and the minimal, if any, workload increase to the effected employees.

5. As of June 2013, all supervisor positions represented by the Association, in particular the position of Supervisor of Curriculum and Instruction, were eliminated. The Association ceased to exist. The claim regarding any workload increase is confined solely to additional duties performed during the 2012-2013 school year.

ANALYSIS

The parties disagree as to whether the assignment of additional duties to the Supervisors of Curriculum and Instruction for the 2012-2013 school year constituted a workload increase triggering a negotiations obligation. The Board contends that only seven or less staff observations were apportioned among the eight unit members, an insignificant increase. It asserts that in any event, staff observations are part of their regular job duties. The Board also contends it has a managerial prerogative to reorganize how it delivers its educational services to special education and regular students as well as its decision to create the new position of K-12 Supervisor of Special Services.

The Association does not challenge the reorganization or the creation of the new position. Rather it contends that the duties of the retired Supervisor of Secondary Special Services caused a substantial workload increase to some of its members during 2012-2013, and that the Board's refusal to negotiate the impact of that increase upon demand violates 5.4a(5) and (1) of the Act. It specifically disagrees that the additional duties constituted a de minimus increase in workload. The Association asserts that its members had no previous responsibility for special education students or staff, and that, as a result, additional time was required for lesson plan review, observations and evaluations,

attendance at extra departmental and professional development meetings, and duties related to conflict resolution between special education teachers and subject matter teachers.

Both the Association and Board mostly cite case law accurately to support their legal positions in this regard. The cases cited support that workload increases are generally negotiable, but not if they are a result of a reduction in force. Further, in Irvington Bd. of Ed., P.E.R.C. No. 95-64, 21 NJPER 125 (¶26077 1995), the Commission dismissed a complaint contending that the Board violated its duty to negotiate when it did not fill a summer position and split the duties between assistant principals without additional compensation. It determined that even if an assignment of duties creates a workload increase, it only creates a negotiations obligation upon demand if the increase is significant and measurable.

Here, there are disputed and material facts as to whether there was indeed a workload increase triggering a negotiations obligation, and, thus, a plenary hearing would be required to resolve this issue. Although the Board may be correct in its assessment of the quality of the Association's proofs as to the workload increase, if any, "[t]he standard on summary judgment is not to weigh the credibility or preponderance of the evidence." Tomeo v. Thomas Whitesell Constr. Co., 176 N.J. 366, 370 (2003).

See generally, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

However, the Board's motion must be granted, and the Association's cross-motion dismissed, for another reason; as the Board contends, this matter is moot. In deciding whether a matter is moot, the Commission has found that it is within its, not the Charging Party's, discretion to determine on a case-by-case basis whether the circumstances warrant such a result. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). The Commission will not exercise its judgment when a dispute is moot. Delran Tp. Bd. of Ed., P.E.R.C. No. 95-17, 20 NJPER 379 (¶25191 1994).

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. The employer's duty to negotiate in good faith runs exclusively to the majority representative[3/]. N.J. Turnpike Authority, P.E.R.C. 81-64, 6 NJPER 560 (¶11284 1980), aff'd App. Div Dkt No. A-1263-80T3 (10/31/81).

Here, the Association is no longer a viable organization. As the majority representative, it is defunct, having been

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3/ Individual employees only have standing to assert a violation of 5.4a(5) where the employee is also asserting a viable claim of a breach of a duty of fair representation against the majority representative. Jersey City State College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike Auth., D.U.P. No. 80-10 5 NJPER 518 (¶10268 1979). Such is not the case here.

dissolved at the end of the 2012-2013 school year when all of the supervisor positions it represented were eliminated. Even if the Association were to prevail at the end of a plenary hearing in proving that the Board had a duty to negotiate upon demand the impact of the alleged workload increase in 2012-2013, the only remedy would be an order to negotiate. The remedy is moot, because I could not order the employer to negotiate with a defunct labor organization. Since the employer would have no obligation to negotiate with a defunct labor organization, all allegations relating to a refusal to negotiate in good faith related to the 5.4a(5) and (1) must be dismissed. See generally, Borough of Belmar, H.E. No. 2000-6, 26 NJPER 137 (¶31054 2000) (allegations related to 5.4a(5) dismissed where charging parties no longer viable labor organizations)[4/].

CONCLUSIONS OF LAW

1. The 5.4a(5) and (1) allegations are moot and must be dismissed, since the Association Charging Party is a defunct

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4/ Although the Charging Party disagrees that this matter is moot, it provides no legal support for its contention and argues generally that the employees it formally represented were entitled to additional compensation for the extra duties in the 2012-2013 school year. However, even if the Association were currently a viable majority representative and it were to prevail on its allegations that the Board had a duty to negotiate, that determination does not entitle it automatically to additional compensation, only to the right to sit down with the employer and negotiate something in exchange for the additional workload.

labor organization. No negotiations obligation, therefore, exists.

2. The Charging Party's cross-motion for summary judgment is denied.

3. The Respondent's motion for summary judgment is granted.

RECOMMENDED ORDER

I recommend that the Commission **ORDER** that the complaint be dismissed.

/s/ Wendy L. Young
Wendy L. Young
Hearing Examiner

DATED: June 2, 2014
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by June 12, 2014.