

H.E. NO. 2017-8

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

In the Matter of

ESSEX FELLS BOARD OF EDUCATION,
Respondent,

-and-

Docket No. CO-2016-012

ESSEX FELLS TEACHERS ASSOCIATION,
Charging Party.

SYNOPSIS

A Hearing Examiner grants a Motion for Summary Judgment filed by a public employer based on an unfair practice charge filed by the exclusive representative of teachers, alleging that the Board refused to negotiate over the setting of the teacher work year for 2015-16, violating section 5.4a(5) and (1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. The charge alleged that teachers were never before required to report to work in the month of August.

The Hearing Examiner determined that in the absence of any showing of adverse impact, the case was governed by Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 2014-47, 40 NJPER 337 (¶123 2014), aff'd 42 NJPER 71, 74 (¶18 App. Div. 2015), holding that the Board had the managerial prerogative to determine unilaterally "the dates between which the schools of the district shall be open, in accordance with the law."

The Hearing Examiner recommended the dismissal of the Association's cross-motion for summary judgment.

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.

H.E. NO. 2017-8

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

In the Matter of

ESSEX FELLS BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2016-012

ESSEX FELLS TEACHERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Fogarty & Hara, attorneys
(Stephen R. Fogarty, of counsel)

For the Charging Party
Oxfeld Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

**HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY JUDGMENT**

On July 27, 2015, Essex Fells Teachers Association (Association) filed an unfair practice charge against Essex Fells Board of Education (Board). The charge alleges that the Board, ". . . unilaterally determined to start the teacher work year on August 31, 2015" and that by requiring teachers to start their employment in the month of August, the Board violated a "past practice" and "the concept of ten-month employee." The charge alleges that the Board's unilateral action violates section

5.4a(5) and (1)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. The charge was accompanied by an application for interim relief. On August 14, 2015, a Commission Designee issued an Order, denying the application.

On December 21, 2015, during informal and routine processing of this charge, the parties signed a "joint stipulation of facts."

On August 4, 2016, a Complaint and Notice of Hearing issued. On August 15, 2016, the Board filed an Answer, denying the allegations in the charge and contending that it has a managerial prerogative to establish the school calendar and determine the start date of the school year. The Answer also avers that the 2015-2016 school calendar provides 184 teacher workdays and that Association members received almost 10 months' advanced notice of the calendar, rendering the charge untimely filed.

On October 17, 2016, the Board filed a Motion for Summary Judgment, together with exhibits, a certification and brief. On November 17, 2016, the Association filed a Cross-motion for

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 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."

Summary Judgment, together with a brief and a certification. On November 28, 2016, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8. Briefs and all replies were filed by February 22, 2017.

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The fact-finder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the moving party." If that issue can be resolved in only one way, it is not a genuine issue of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary hearing. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Applying these standards and relying on the parties' submissions, including their "joint stipulation of facts," I make the following:

FINDINGS OF FACT

1. Essex Fells Teachers' Association represents a collective negotiations unit of regularly employed teachers, learning disability specialist(s), librarian(s), speech therapist(s), nursing psychologist(s) and art therapist(s) employed by the Board of Education of the Borough of Essex Fells. The parties' current agreement extends from July 1, 2015 to June 30, 2018.

Article VI (Teacher work year and workday) provides in a pertinent part:

A. Teacher Work Year

1. The school calendar will include one hundred eight-seven (187) days, three (3) days of which will be used for emergency closings or returned to teachers at the end of the year. Therefore, the teachers will work one hundred eight-four (184) days. The work year shall be divided as follows:

- 180 Student days
 - 1 Orientation day (prior to the start of the student year)
 - 3 Staff development days
 - 3 Emergency days

The staff development days will be jointly planned by the administration and the teachers. Every attempt will be made to ensure that these days comply with the State professional development standards and thus count toward State requirements

. . .

There shall be one (1) additional day for orientation at the start of the school year for new employees. This shall be in addition

to the orientation day previously scheduled for all employees . . .

Article II (Salaries) C. Salary checks, provides in a pertinent part:

Salary checks shall be issued in accordance with the annual schedule on the 15th and 30th day of each month . . .

Salary checks shall be distributed on a ten-month or a twelve-month basis as determined by the employee's work year and shall be distributed on a bi-monthly basis during the year on the 15th and 30th day of the month.

2. The parties stipulated the following facts:

1. The Board operates a pre-kindergarten through sixth grade school district, which together with Roseland, Fairfield, and North Caldwell, sends its students to the West Essex Regional School District (hereinafter referred to as 'West Essex'), a grade seven through twelve school district.

2. The Board discussed the 2015-2016 school calendar at each of its Board meetings beginning in November 2014 through February 2015. (The Board meeting minutes from November 19, 2014; December 17, 2014; January 21, 2015; and February 4, 2015 are attached hereto as Exhibits 1 through 4, respectively).

3. On February 18, 2015, the Board formally approved the 2015-16 school calendar. (The February 18, 2015 Board meeting minutes and 2015-2016 school calendar are attached hereto as Exhibits 5 and Exhibit 6, respectively).

4. The 2015-2016 school calendar was aligned with West Essex's school calendar, which established August 31, 2015 as the start of the teacher work year and September

2, 2015 as the start of the student school year. (See Exhibit 6; West Essex's 2015-2016 school calendar is attached hereto as Exhibit 7). Roseland, Fairfield, and North Caldwell are the other districts which send their students to West Essex, and all of these districts directed that their staff report on September 1, 2015 for the beginning of their work year, with Fairfield's student school year commencing on September 2, and Roseland and North Caldwell's student school year commencing on September 3.

5. The District's school calendar corresponds with the number of teacher work days allowed under the 2015-2018 collective negotiations agreement between the Board and the Association (hereinafter referred to as the 'CNA'). (The 2015-2018 CNA is attached hereto as Exhibit 8).

6. The CNA does not establish a start or end date for the school year, but provides that the teacher work year shall be one-hundred eight-four (184) days, comprising one-hundred eighty (180) student days, one (1) orientation day (prior to the start of the student school year), and three (3) staff development days. (Exhibit 8). The CNA also does not address when staff development days are to be scheduled. (Exhibit 8).

7. For the 2015-2016 school year, the District scheduled both teacher orientation (as required by the CNA) and a staff development day prior to the start of the student school year, which it has done in the past. (The District's orientation and staff development day schedule is attached hereto as Exhibit 9).

8. A revised 2015-2016 school calendar was approved by the Board on June 17, 2015, which changed the Friday before the Labor Day Holiday from a full-day session to a half-day session. (The June 17, 2015 Board meeting minutes and a revised 2015-2016 school

calendar are attached hereto as Exhibits 10 and 11, respectively).

3. On December 17, 2014, Board Superintendent Michelle Gadaleta presented to the Board during its regular monthly meeting, the 2015-16 West Essex Regional (grades 7-12) school calendar, showing that the students' school year was to commence September 2, 2015 and teachers were to report to work on August 31, 2015. In the three previous school years (2012-13, 2013-14 and 2014-15), the Essex Fells calendars aligned with those of West Essex Regional.

On an unspecified date following the Board meeting, Association members voiced their objection to commencing their work year before September, 2015 (Labor Day that year fell on September 7th). On January 5, 2016, Gadaleta directed a "survey" of parents to determine their 2015-16 calendar "preferences," advising teachers not to respond, in view of the Association's ". . . stand on the subject." Specifically, the Association informed the Superintendent that it did not agree to start the teacher work year before September. On review of survey results, the Board determined in its regular meeting of January 21, 2015, ". . . to align with West Essex Regional's 2015-16 calendar."

The minutes of that meeting provide in a pertinent part:

Mrs. Gadaleta noted about a 50% response to the calendar survey. The Board reviewed the results and felt that the district should align with the West Essex calendar since Essex Fells is a sending district.

4. On the February 4, 2015 Board "workshop meeting," Gadaleta presented the Board a draft of the 2015-16 Essex Fells school calendar, aligned with that of West Essex Regional. On February 18, 2015, the Board formally adopted that calendar, establishing August 31, 2015 as the start of the teacher work year and September 2, 2015 as commencing the student school year.

5. For at least the past 25 years, the start of the teacher work year in Essex Fells was never in the month of August. On an unspecified date, the Association offered to commence the teacher work year on September 1, 2015 and Board refused. On June 17, 2015, the Board unilaterally revised the adopted 2015-16 calendar to convert the Friday before Labor Day (September 4) from a full school day to an early dismissal day.

ANALYSIS

I first consider whether the July 27, 2015 charge is timely. The Board contends that it is not because it was filed more than six months after a November 19, 2014 Board meeting at which the Superintendent informed the Board that the other "sending" districts planned on starting the 2015-16 school year before Labor Day. It also contends that the charge was filed more than six months after the January 21, 2015 Board meeting at which the Board determined (based on survey results) that Essex Fells' 2015-2016 school calendar shall align with West Essex Regional's for that term. I disagree that the charge is untimely.

N.J.S.A. 34:13A-5.4(c) provides that no complaint shall issue based upon any unfair practice occurring more than six months before the filing of the charge unless the charging party was prevented from filing a charge earlier. The event triggering the running of the limitations period is the implementation or effective date of the disputed personnel action as opposed to notice of the action. State of N.J. (Office of Public Defender), P.E.R.C. No. 2009-32, 34 NJPER 439, 440 (¶137 2008) (preliminary notice of disciplinary action held not to be "operative date" for computing statutory period; final notice held to be "operative event").

In this case, neither precatory remarks at the November, 2014 Board meeting, nor specific intentions (i.e., "notice") articulated at the January 21, 2015 Board meeting comprise an "operative date." The Board's February 18, 2015 "formal approval" of its 2015-2016 calendar is an "effective date" commencing the statutory period, rendering the Association's charge timely. I note parenthetically that in Bethlehem Tp. Bd. of Ed., P.E.R.C. No.2014-47, 40 NJPER 337, 338 (¶123 2014), the Commission rejected the employer's defense that that charge was untimely, finding that the Board's ". . . vote on the full school year calendar occurred within six months of the date that the Association filed its charge."

In N.J.I.T. and Newark Coll. of Engineering Prof. Staff Ass'n, P.E.R.C. No. 80-54, 5 NJPER 491, 493 (¶10251 1979), aff'd NJPER Supp.2d 263, (¶218 App. Div. 1980), the Commission wrote:

This Commission has always maintained a distinction between the teachers' work year or workday and the student year or day. Thus in the Edison cases [i.e., Edison Tp. Bd. of Ed., P.E.R.C. No. 78-53, 4 NJPER 151 (¶4152 1978)] themselves, we concluded that the Board had no obligation to negotiate the calendar change itself because the teachers' calendar was only changed to conform to the student calendar. We specifically pointed out in that decision, relying on past decisions, that:

Thus, it is clear that the Commission has recognized the coexistence of two concepts: 1) the establishment of the school calendar which is not mandatorily negotiable and 2) the determination of employees' work year which is a term and condition of employment and is mandatorily negotiable. However, it has been recognized that negotiations on the work year for teachers will, as a practical matter, recognize the parameters of the school calendar. Thus, the areas of mandatory negotiability of teacher work year must be limited to those days, both as to numbers and scheduling, in excess of the days of attendance of students scheduled by the Board to meet their required educational responsibilities. [Edison Tp. Bd. of Ed., 4 NJPER at 152]

In N.J.I.T., the Commission noted that the quoted portion from Edison Tp. Bd. of Ed. was "dictated" by a portion of our Supreme Court's decision in Burlington Cty. College Fac. Ass'n v. Bd. of

Trustees, 64 N.J. 10, 12 (1973). ("While the calendar undoubtedly fixes when the college is open with courses available to students, it does not in itself fix the days and hours of work by individual faculty members or their work loads or their compensation. These matters, the defendant readily acknowledges, are mandatorily negotiable under the Act, though negotiations are to be conducted in the light of the calendar"). The Commission also noted that the context of N.J.I.T. and Burlington Cty. College Fac. Ass'n, ". . . deals with a college setting rather than a board of education." N.J.I.T., 5 NJPER at 493.

Also in N.J.I.T., teachers were ordered to be available for conferences and meetings seven days before students' classes began. Classes beginning August 30th meant that teachers had to report to work on August 23rd, ". . . earlier than any prior year," requiring them to "cut short their summer vacations, jobs, etc." N.J.I.T., 5 NJPER at 493. The Commission observed that the teachers could have (lawfully) demanded that the seven day preparation period be reduced to require that they report no earlier than in past years as long as they were there when the students' calendar began. Id.

In this case, the Association does not contest the Board's unilateral setting of the start of the "student school year" calendar to September 2, 2015, conforming to that of West Essex Regional. It objects to the Board's unilateral setting of August

31, 2015 as the first reporting day for all teachers (also conforming to West Essex Regional's). Although the Association did not allege that teachers consequently cut short their vacations, jobs or were otherwise impacted, they were never before required to report to work in August.

The Board relies on Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 2014-47, 40 NJPER 337 (¶123 2014), aff'd 42 NJPER 71 (¶18 App. Div. 2015). In that case, the charge alleged that the public employer Board violated section 5.4a(5) and (1) of the Act by unilaterally setting the 2011-12 school year to start for students on August 25th and for teachers on August 24th to match the calendar of the regional high school where its students matriculate for grades nine through twelve. The charge alleged that the Board acted without negotiating the schedule change or the impact of the change on unit employees. The start dates were not negotiated, though the Association was consulted. The applicable contract provision specified:

The school calendar shall be established by the Board upon the recommendation of the Superintendent after his/her consultation with representatives of the Association . . .

The Commission held that, ". . . the change in start date was not subject to the Act's negotiations obligation as the adoption of the school calendar is a managerial prerogative." Id., 40 NJPER at 338. In a footnote to its holding, the Commission disputed that Burlington Cty. College Fac. Assn.

supported, ". . . the Association's claim that while a district may open schools in August it must negotiate if it wants teachers to be present," writing: "Public schools operate differently than colleges, where 'full-time' faculty do not work every day that students are present. In a public school, when students are present, all full-time teachers normally work . . ." Bethlehem Bd. of Ed., 40 NJPER at 339. The Commission then dismissed an allegation that the employer was obligated to negotiate over the "impact" of the calendar change by distinguishing the facts from those in Piscataway Tp. Ed. Ass'n v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263 (App. Div. 1998), certif. den. 156 N.J. 385 (1998). It found that the facts were more similar to those in Sayreville Bd. of Ed., P.E.R.C. No. 78-41, 4 NJPER 70 (¶034 1978), aff'd NJPR Supp.2d 58 (¶38 App. Div. 1979), where the calendar change, under the terms of the collective negotiations agreement, required of the parties "consultation," but not "negotiations." Id. at 339. The Commission also noted that other than delayed receipt of the first paycheck for 10-month employees, the Association did not identify any, ". . . specific impacts on the work and welfare of its members were occasioned by the calendar change." Id. at 339.

The Appellate Division affirmed, observing that the record showed that, ". . . the [Bethlehem] Board's dominant reason for changing the start of the school year was to achieve the

educational goal of mitigating the hardship endured by families who have children in two separate school districts." 42 NJPER at 74.

The Court also observed that the Association did not present evidence showing that, ". . . [c]hanging the start date of the school year [was] significantly tied to the relationship of the annual rate of pay to the number of days worked." Id., 42 NJPER at 74. The Court cited Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980), for its articulation of the concern that must be weighed to maintain a "viable bargaining process:"

Where the condition of employment is significantly tied to the relationship of the annual rate of pay to the number of days worked, then negotiation would be proper even though the cost may have a significant effect on a managerial decision to keep the schools open more than 180 days.

The Court's quotation from Woodstown-Pilesgrove was taken from Judge Long's decision in Piscataway Tp. Ed. Ass'n, a [previously-referenced] case concerning the "impact" of the employer's unilateral decision to make up for lost inclement weather days by using long-scheduled holiday days and adding days to the end of the school year.

It appears to me that the Commission's holding in Bethlehem Tp. Bd. of Ed. in part conflates "teacher work year" and "student school year" under the prerogative, ". . . adoption of the school

calendar." (The Commission also held that the Board met its negotiations obligation under the parties' agreement). The footnote confirms only that when students are "present," teachers are "working," begging the (abstract) question of what duty to negotiate existed, if any, on August 24, 2011, the day before students were "present." (As a practical matter, it would be unsurprising that in a school district, a teacher work year starts one or more days immediately before students arrive for classes).

The Appellate Division affirmance goes further, I believe, holding that in the absence of a demonstrable impact, ". . . the Board has the exclusive managerial prerogative to determine unilaterally 'the dates between which the schools of the district shall be open in accordance with the law.' N.J.S.A. 18A:36-2." I believe it must be inferred that August 24, 2011 was a date that the school district was "open." Regarding the impact, the Appellate Division found that, "changing the start of the school year [was] not significantly tied to the relationship of the annual rate of pay to the number of days worked." Id., 42 NJPER at 74.

Like the Bethlehem Board, the Essex Fells Board sought and obtained by survey parental confirmation that the "sending school" should conform its school calendar to the respective regional's high school calendar. The only appreciable

differences in the cases are: 1) the Bethlehem Board required teachers to report to work one day before students reported and the Essex Fells Board required teachers to report two days before students reported [one of the two days was contractually mandated]; 2) the collective negotiations agreement in Essex Fells does not specify a negotiations or consultation obligation regarding the "start or end date for the school year," unlike the Bethlehem Board/Association agreement; and 3) in Essex Fells, the parties contractually agreed on specific numbers of days that teachers will work, and report for "orientation" and "staff development." I do not believe that any or all of these differences dictate a different outcome than Bethlehem Tp. Bd. of Ed. See also, West Morris Reg. H.S. Bd. of Ed., P.E.R.C. No. 2017-29, 43 NJPER 225 (¶68 2016).

The Association has not alleged (and nor do the facts show) that the change in the work year or the "start date" was tied (let alone, "significantly tied") to the relationship of the teachers' annual rates of pay to the number of days worked. The parties' stipulated that in 2015-16, the Board scheduled, ". . . both teacher orientation (as required by the CNA) and a staff development day prior to the start of the student school year, which it has done in the past" (emphasis added). In the absence of any showing of adverse impact, I find that the Board's unilateral decision to start the teachers' work year on August

31, 2015 fails to allege a change in a term and condition of employment. Cf. Irvington Bd. of Ed., P.E.R.C. No. 98-21, 21 NJPER 500 (¶28242 1997) (alleged unilateral calendar change fails to show increase in administrators' work year when number of days worked fell within historical range of days worked).

For these reasons, I grant the Board's motion for summary judgment and deny the Association's cross-motion.

RECOMMENDATION

I recommend that the Complaint be dismissed.

/s/Jonathan Roth

Jonathan Roth
Hearing Examiner

DATED: April 10, 2017
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 April 20, 2017.