H.E. NO. 2001-12

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

In the Matter of

WEST ESSEX REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-98-444

WEST ESSEX SECRETARIES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Schwartz, Simon, Edelstein, Celso & Kessler, attorneys
(Stephen J. Edelstein, of counsel)

For the Charging Party
Balk Oxfeld, attorneys
(Nancy I. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 5, 1998, the West Essex Secretaries Association filed an unfair practice charge against the West Essex Regional School District Board of Education. The charge alleges that a "past practice" of the parties provided health benefits to secretaries working 20 hours or more per week. It alleges that part-time secretaries are entitled to health benefits under Article 4 of the expired contract. Specifically, the charge alleges that in May 1997, secretary Rita Hibo, working 20 hours per week, was informed

that she would not receive health benefits. Secretaries Deborah Restaino and Robyn Gerstenmeier "currently work [ ] 35 and 30 hours, respectively [and] neither receive health insurance." The charge also alleges that Hibo's work hours were reduced to 19 per week in retaliation against an NJEA representative's protest about Hibo's benefits to the Board business administrator. Finally, the charge alleges that the Board retaliated against Hibo and Restaino for "joining a lawsuit regarding an improper reduction in force." The Board's actions allegedly violate section 5.4a(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On October 21, 1999, a Complaint and Notice of Hearing issued. On January 11, 2000, the Board filed an Answer, admitting some allegations, denying others and asserting that the charge is barred by the statute of limitations, and by the doctrines of waiver, laches and estoppel. The Board also asserts that it exercised a managerial prerogative and made no unilateral change requiring negotiations.

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 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."

On July 12, 2000, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by October 11, 2000.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. The West Essex Secretaries Association represents "all full-time and part-time contractual employees who are secretarial, clerical or other staff members..." (C-3).[2/] Article 4A7-"Employee Rights" of the 1994-97 collective agreement provides: "Part-time secretaries are entitled to all benefits and rights of full-time secretaries when any required eligibility criteria existing for those benefits can be met by the part-time secretary" (C-3). Article 8C enumerates various "health care protections" underwritten by "Connecticut General Traditional Indemnity" (C-3). Article 2C states: "This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties" (C-3). Article 3 sets forth a grievance procedure ending in advisory arbitration (C-3).

2. In 1990, the Board provided identical health benefits to non-unit and unit employees, including the secretarial unit, through the State Health Benefits Plan (T54-T56). Full-time

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2/ "C" represents Commission exhibits; "CP" represents charging party exhibits; and "R" represents respondent exhibits. "T" represents the transcript of the hearing, followed by the page number.

secretarial unit employees work 8-hour days, have 1 hour for lunch and 30 minutes for a break, including travel time, and are considered 40-hour per week employees (T81). Part-time secretarial unit employees work less than 40-hour weeks; typically, they have worked from 7:30 a.m. to 1 p.m., receive an hourly wage and one sick day per month (T82; T66-T67; T72). No evidence shows that the Board employed part-time secretarial unit employees from 1990 through 1993 (T81).[3/]

3. In 1993, the Board withdrew from the State Health Benefits Plan and contracted with CIGNA Insurance to provide health benefits to its employees (T27; T56). Benefit levels to employees under the CIGNA plan were uniform (T57). The CIGNA policy had an "eligibility" provision, effective November 1, 1994:

> ELIGIBILITY - EFFECTIVE DATE
>
> Eligibility For Employee Insurance
>
> You will become eligible for insurance on the day you complete the waiting period if:
>
> - you are in a Class of Eligible Employees; and
>
> - you are a permanent, full-time Employee; and
>
> - you normally work at least 20 hours a week.
>
> If you were previously insured and your insurance ceased, you must satisfy the New Employee Group Waiting Period to become insured again. If your insurance ceased because you were no longer employed

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3/ In 1992, the Board created a copy machine operator position, which was included in the secretarial unit on an undisclosed date (T69-T70). Nothing suggests that the position was filled in 1992 or 1993.

> in a Class of Eligible Employees, you are not required to satisfy any Waiting Period if you again become a member of a Class of Eligible Employees within one year after your insurance ceased.
>
> Initial Employee Group: You are in the Initial Employee Group if you are employed in a class of employees on the date that class of employees becomes a Class of Eligible employees as determined by your Employer.
>
> New Employee Group: You are in the New Employee Group if you are not in the initial Employee Group.
>
> [CP-1]

The provision and "master [CIGNA] agreement" were in effect from about 1994 through the summer of 1997 (T56; T58; T63).

4. In 1993 or 1994, the parties negotiated an hourly wage and sick day allotment for the copy machine operator position but did not negotiate health benefits (T70-T72). In September 1994, the Board hired Deborah Restaino as a part-time, hourly-paid copy machine operator included in the secretaries' unit (T67; T80). The Board informed Restaino at that time that she would not receive health benefits (T69; T72). I infer that the Board did not inform the Association that Restaino would not receive health benefits (T72). In 1996, Restaino asked a Board representative, possibly the business administrator, about health benefits (T76). Restaino did not receive health insurance benefits until November 1999, when she transferred to the position, "twelve-month full-time secretary" in the special services department (T77; T68; T80).

5. In the summer of 1997, the Board changed its health insurance provider from CIGNA to Blue Cross/Blue Shield (T58). The

level of benefits for employees remained constant, except for co-pay amounts and lists of participating physicians (T59). Secretarial unit employees were "moved" to the new provider before negotiations on the successor collective agreement were concluded (T60). The employees were "upset" by the change and health benefits was a subject of negotiations (T61).

6. On July 17, 1997, the West Essex Education Association filed an unfair practice charge (Docket No. CO-98-21) against the Board. The WEEA represents full-time and part-time certificated personnel and special education associates, who assist special education teachers (R-1; T20). The charge alleges in a pertinent part that part-time teachers and part-time associates working 20 hours or more per week "were not being covered by health insurance" and that the Board "unilaterally and without negotiations withheld coverage" to these employees.

On the same date, the WEEA filed a grievance "regarding health benefits for staff working 20 hours or more" (CP-2; T42). The grievance states that WEEA "believes that [the Board] must provide medical benefits to individuals working 20 hours or longer."

7. On November 11, 1997, the Board sent a letter to the WEEA president confirming an agreement to resolve the unfair practice charge (CO-98-21) (R-2). The agreement required the Board to reimburse specified medical expenses of two special education associates in exchange for withdrawal of the charge (R-2).

Sue Leonard was the WEEA president during the entire processing of the charge and grievance. She testified credibly that the grievance was "unsuccessful" and that at least some special education associates' work hours were reduced to less than 20 hours per week (T42; T45).

8. Pamela Niles is an NJEA field representative and assists the WEEA in negotiations. In 1996 or 1997, she assigned a consultant to assist the Secretaries Association in their negotiations (T89; T92). Working on health insurance matters for both groups, Niles testified that teacher and secretarial unit health plans were "identical" (T96). I credit this testimony, inasmuch as no facts suggest otherwise.

Niles also testified that secretarial unit employee Hibo called her "sometime mid-year 1997-1998", advising that some part-time unit members did not receive health insurance (T97). Niles asked Hibo if she asked Board Business Administrator Borgo about the problem. Hibo reported that Borgo advised that she was ineligible for the benefits (T99). Niles asked Borgo about the problem and he replied, "Since we are no longer in the State Plan, we can have any number of hours we want for eligibility" (T100).

On cross-examination, Niles was asked if she had spoken with Hibo in May 1997 (as the complaint alleges). She answered, "If that's what it says, then maybe that's right. I told you I didn't recall" (T108). Referring to the "Hibo" paragraph of the complaint, Niles testified, "I would tend to think this is accurate and that I

was probably inaccurate because this was fresh then and it is not so fresh now" (T109).

On re-direct examination, Niles testified that "it's very possible that the date, [i.e., May 1997] is a typographical error" and that her conversation with Hibo was "sometime in the 1997-98 school year" (T110-T111). On re-cross examination, Niles conceded that she read the charge for accuracy before it was filed (T115).

The complaint alleges, "In May 1997, Rita Hibo was informed that she would not receive health benefits although she worked 20 hours per week" (C-1). Niles's vacillations and equivocations regarding the date Hibo complained to her temporarily obscures the fact alleged in the complaint. I find that in May 1997, Hibo was informed that she was ineligible to receive health benefits.

9. Secretarial unit employee Robin Gerstenmeier was employed by the Board from December 15, 1997 through at least June 26, 1998 (T78). She did not receive health insurance benefits, and was so informed at the time she was employed (T79-T80).

Business Administrator Borgo testified that from the date the Board left the State Health Benefits Plan - about 1993 - through June 1998, part-time secretarial employees were not regarded as "full-time" and none received health insurance benefits (T83). He also testified that all 15 full-time secretarial unit employees receive health insurance benefits (T85). Finally, he testified that from 1995 through June 1998, no changes were implemented regarding health insurance benefits for part-time secretaries. This testimony is unrebutted and I credit it.

10. On July 27, 1998, Rita Hibo signed a "release and settlement agreement" releasing the Board from general administrative actions, including "unfair practice charge docket no. CO-98-444." The agreement was notarized by an attorney in the firm representing the West Essex Secretaries Association in this litigation (R-3). In opening remarks, Association counsel withdrew any request for relief for employee Hibo (T7).

ANALYSIS

N.J.S.A. 34:13A-5.3 requires that mandatorily negotiable employment conditions be negotiated before they are implemented or changed. Unilateral implementation violates the obligation to negotiate in good faith. N.J.S.A. 34:13A-5.4. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). To prove a violation of section 5.3, a charging party must show that a working condition was changed or instituted without negotiations. Hunterdon Cty. Freeholders Bd. and CWA, 116 N.J. 322 (1989).

Health insurance benefits are mandatorily negotiable unless preempted. West Orange Bd. of Ed., P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp. 2d 291 (¶232 App. Div. 1993); Tenafly Bd. of Ed., P.E.R.C. No. 93-83, 19 NJPER 210 (¶24100 1993). Unilateral changes of those benefits violate the Act. Tp. of

Pennsauken, P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987);[4/] Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984).

The Association alleges that the Board agreed to provide health benefits to secretarial unit employees working 20 hours or more per week by both express contractual commitment (Article 4A7) and by an implied contractual commitment ("past practice") based on an established practice. I agree with the Association's interpretation of the contract but disagree that the parties have an established practice of providing health benefits to secretarial unit employees working 20 hours or more per week. Most important, the Association has not proved a unilateral change in a term and condition of employment.

Article 4A7 of the agreement provides the condition for considering part-time secretaries "entitled to all benefits and rights of full-time secretaries" -- that they meet "any required

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4/ The Commission noted in Pennsauken that cases involving unilateral changes in health benefits are deferrable when the charge alleges a violation of section 5.4a(5) interrelated with a breach of contract. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). The Commission has deferred such cases. See, e.g., Hazlet Bd. of Ed., P.E.R.C. No. 95-78, 21 NJPER 164 (¶26101 1995); Morris Cty., P.E.R.C. No. 94-103, 20 NJPER 227 (¶25111 1994).

Cases involving health benefits changes are not deferred when the parties' agreement does not provide for binding arbitration of grievances. See, e.g., Boonton Tp. Bd. of Ed., D.U.P. No. 98-22, 23 NJPER 639 (¶28313 1997).

This case is not deferrable because the Board and the Secretaries Association have a grievance procedure ending in advisory arbitration.

eligibility criteria existing for those benefits." Necessarily read together with the (now-expired and/or lapsed) CIGNA "eligibility" criteria -- that such employees "normally work at least 20 hours per week", I believe that the 20 hour or more per week unit employees were entitled to health benefits.

The Board has not argued a contrary interpretation. The business administrator testified that the Board never considered part-time secretaries (nor part-time special education associates, for that matter) to be "full-time" as that phrase is used in the CIGNA eligibility provision. I believe such an interpretation renders Article 4A7 meaningless and that the Board was not empowered to unilaterally define that phrase to exclude part-timers working the requisite number of hours.[5/] See Frankford Tp. Bd. of Ed., P.E.R.C. No. 98-60, 23 NJPER 625 (¶28304 1997). But the Association did not allege that the Board repudiated the contract.

In Human Services, the Commission advised that a "mere breach of contract does not warrant the exercise of the Commission's unfair practice jurisdiction" and at the same time cautioned that "if the contract claim is sufficiently related to specific allegations that an employer has violated its obligation to negotiate in good faith, we would certainly have the authority to remedy that violation under subsection a(5)." Id. at 10 NJPER 422.

5/ What concern(s) prompted the reduction of work hours to less than 20 per week for part-time education associates at a time proximate to an "unsuccessful" grievance filed on their behalf by the WEEA (see finding #7)?

Determining whether charges are predominantly related to section 5.4a(5)'s obligation to negotiate in good faith or is an unrelated breach of contract claim which does not implicate obligations arising under the Act requires a "close look at the nature of the charge and the attendant circumstances." One example given of situations in which the Commission "would entertain unfair practice proceedings" is a claim of repudiation of an existing term and condition of employment. Specifically,

> a claim of repudiation may [ ] be supported, depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause. [Id. at 10 NJPER 423]

Another example given was charges in which "the policies of [the] Act, rather than a mere breach of contract claim, may be at stake" Id. at 423. In City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984), the Commission found that the Act's policies were implicated because,

> a charge which alleges a unilateral reduction in insurance protection (which would affect every member of the negotiations unit) is akin to an employer's decision to reduce wages unilaterally. This would, if proved, amount to a statutory violation. [Id. at 10 NJPER 512]

Article 4A7 is not "so clear" that it may be understood directly; it requires an inference drawn from the eligibility provision of CIGNA policy, which may or may not have been superceded by an eligibility provision in the 1997 Blue Cross/Blue Shield

policy. Despite my understanding of the contract provision, I am not persuaded that bad faith necessarily arises from the Board's apparently contrary view. Nor has the Association proved that the Board changed a "past and consistent practice" of providing the benefits to part-time employees. To prove an implied commitment, the representative must show that the practice has been 1) unequivocal, 2) clearly enunciated and acted upon, and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Hill and Sinicropi, Management Rights, 23-24 (1986); Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997[8]), aff'd __ N.J. Super. ___ (App. Div. 1999), aff'd __ N.J. ___ (2000). The Association did not prove that any part-time Board employee, in either the secretaries or teachers unit, received health benefits. The record shows that from 1994 through 1998, the disputed part-time secretarial unit employees were advised at the time they were hired that they would not receive such benefits. And none ever did (while employed part-time).

These facts also show that no existing working condition was changed. Middletown Tp. and Middletown PBA Local 124; Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). Without showing a change in a term and condition of employment, the Association cannot prove that policies of the Act are implicated. City of South Amboy.

RECOMMENDATION

Finding that the Association's case concerns only a breach of contract claim described in Human Services, I recommend that the Commission dismiss the Complaint.[6/]

Jonathon Roth
Hearing Examiner

DATED: November 29, 2000
Trenton, New Jersey

6/ No facts show that the Board retaliated against unit employees, thereby violating section 5.4a(1) and (3) of the Act. I recommend that these allegations be dismissed.