P.E.R.C. NO. 90-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CRANFORD TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-232

CRANFORD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Cranford Education Association against the Cranford Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it refused to pay its athletic trainer/equipment manager for work performed in August 1988. The Commission finds that the charging party failed to prove an uncompensated increase in work hours.

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Appearances:
For the Respondent, Weinberg & Kaplow, attorneys
(James M. Weinberg, of counsel)

For the Charging Party, Wills, O'Neill & Mellk, attorneys
(Arnold M. Mellk, of counsel)

DECISION AND ORDER

On February 15, 1989, the Cranford Education Association filed an unfair practice charge against the Cranford Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] when it refused to pay Robert Cottingham, its athletic trainer/equipment manager, for work performed in August 1988. Cottingham's extracurricular

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1/ These subsections 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." and "(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."

contract provided for a $1976 stipend and ran from September 1 to November 30, 1988. The charge alleges that Cottingham was paid on a per diem basis for only three of the days he worked in August 1988.

On May 18, 1989, a Complaint and Notice of Hearing issued. The Board relied on an earlier statement of position as its Answer. It claims that during 1986, 1987 and 1988, Cottingham and all assistant coaches began football practice in August and that no grievances had ever been filed contesting that practice.

On September 12, 1989, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally and filed post-hearing briefs.

On December 15, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-29, 16 NJPER 68 (¶21030 1989). He found that the charging party was alleging a mere breach of contract which is not an unfair practice under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

On December 27, 1989, the charging party filed exceptions. It claims that the Board unilaterally altered Cottingham's hours and compensation and therefore violated the Act.

On January 4, 1990, the Board filed a reply urging adoption of the recommended decision.

We have reviewed the record. The Hearing Examiner's finding of fact (H.E. at 3-6) are accurate. We incorporate them here.

We reject the argument that the Board changed Cottingham's hours or compensation. Cottingham worked in August since at least 1986 and did not receive additional compensation beyond his negotiated stipend.[2/] Carlstadt-East Rutherford Reg. Bd. of Ed., P.E.R.C. No. 85-59, 15 NJPER 18 (¶20006 1988), aff'd App. Div. Dkt. No. A-2277-88T1 (10/23/89), certif. den. ___ N.J. ___ (1/23/90) is distinguishable. There, the Board unilaterally extended the coaching season to include tournaments. Here, football practice indisputably begins in August and the athletic trainer/equipment manager historically works in August. Accordingly, we find that the charging party failed to prove an uncompensated increase in work hours.

We have not ignored the fact that Cottingham's individual employment contract specifies a September 1, 1988 starting date. But whether he is contractually entitled to compensation for work performed before September 1 must be resolved through the negotiated grievance procedure. Any aspect of the Complaint alleging a breach of an alleged contractual entitlement is dismissed under Human Services.[3/]

2/ The Board paid Cottingham per diem compensation for three days in August 1988 for helping to give physical examinations.

3/ See Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61, 63 n.5 (¶19020 1987) for a discussion of the distinction between deferral to arbitration and dismissal under Human Services.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained from consideration.

DATED: Trenton, New Jersey
April 25, 1990
ISSUED: April 26, 1990

H.E. NO. 90-29

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

In the Matter of

CRANFORD TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-232

CRANFORD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Sections 5.4(a)(1) or (5) of the New Jersey Employer-Employee Relations Act when it refused the claim of Robert Cottingham, an Athletic Trainer and Equipment Manager, for additional compensation for services performed by him during August 1988. He was paid, however, for three days of services in August 1988, based upon his contract and past practice. The Hearing Examiner concluded that the case was governed by Human Services since the alleged violation of the Act by the Board constituted a grievable matter, which must be deferred to the parties' grievance procedure. The Charging Party's reliance upon Carlstadt-East Rutherford Reg. Bd. of Ed., P.E.R.C. No. 89-59, 15 NJPER 19 (¶20006 1988) was misplaced and, thus, the Complaint was recommended for dismissal.

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.

H.E. NO. 90-29

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Appearances:

For the Respondent, Weinberg & Kaplow, Esqs.
(James M. Weinberg, of counsel)

For the Charging Party, Wills, O'Neill & Mellk, Esqs.
(Arnold M. Mellk, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 15, 1989, by the Cranford Education Association ("Charging Party" or "Association") alleging that the Cranford Township Board of Education ("Respondent" or "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that Robert Cottingham, a teacher, has been "further employed" pursuant to contract as a stipend athletic trainer and has been so employed since 1970; Cottingham's contract has provided that he is to be paid $1,976.00 as a stipend for his athletic trainer duties per year; the contract year is from September 1 through June 30th and is broken

down into three seasons, Fall, Winter and Spring; in August 1988, Cottingham was requested to perform his athletic trainer duties on August 3, 4 and August 8 through 30, 1988, for which he was paid on a per diem basis for the work that he performed on August 3, 4 and 25 but not on the other dates in August; on December 15, 1988, Respondent by its agent Robert Lelli, the Athletic Director, informed Cottingham that he would not be paid for the work that he performed on the unpaid August dates and, following a demand by Cottingham, the Respondent has refused such payment; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 18, 1989. Pursuant to the Complaint and Notice of Hearing, a hearing was held on September 12, 1989, in Cranford, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and filed post-hearing briefs by November 10, 1989.

1/ These subsections 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."

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument and the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Cranford Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Cranford Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The current collective negotiations agreement between the parties is effective during the term July 1, 1988 through June 30, 1990 (J-1).

4. Robert Cottingham has been employed by the Board as an Industrial Arts Teacher since 1969 for grades nine through 12 (Tr 11). Also, since 1970, Cottingham has performed stipend services as an Athletic Trainer/Equipment Manager under a series of individual "Contract(s) of Employment for Extra Services," the most recent of which, and the subject of the instant proceeding, was effective during the term September 1, 1988 and ending November 30,

1988, at a salary rate of $1,805.00 (J-2; Tr 5, 12).[2/] This contract between the Board and Cottingham was authorized by the Board on June 20, 1988 (R-1; R-2, p. 3) and Cottingham accepted his contract on June 24, 1988 (J-2; Tr 12).

5. Robert L. Lelli has been the Board's Athletic Director for eleven years and his duties clearly embrace the supervision of Cottingham (Tr 31, 32). Lelli testified without contradiction that Cottingham's duties consisted of providing medical assistance to athletes when the need arose and the making of recommendations for outside medical help when necessary. Also, Cottingham assisted coaches with the issuing of equipment, particularly, in the Fall when the major need arose. [2 Tr 32, 33]. Cottingham has been the sole individual providing these services for the Board (Tr 33).

6. Cottingham testified that in June 1988, Charles Ferrara, the Assistant Athletic Director and Head Football Coach, directed Cottingham to report on August 8, 1988, to issue football equipment (Tr 12). Cottingham actually reported on August 3, 1988 "for physicals" and also performed like duty on August 4 and August 25, 1988 (Tr 13). Lelli confirmed that Cottingham was called upon "to assist the physicals" on the above three dates and that he was paid on a per diem basis (Tr 36-39).

2/ The sum of $1805.00 was adjusted upward to $1967.00 as a result of the execution of the 1988-1990 collective negotiations agreement for the Fall segment of the stipend year, which also includes a stipend of $1967.00 for both Winter and Spring (J-1, Schedule "B"; Tr 54).

7. Cottingham also testified that he worked from August 8, 1988 through the end of the month (August 30th), on Mondays through Saturdays, and that his primary duty was to stand by in case someone was injured. He also issued equipment and repaired or serviced the "football kicker machine." [Tr 13, 14]. Lelli acknowledged that he might not have been present between August 3rd and August 30th during the period that Cottingham claimed he performed additional duties (Tr 40, 41). Thus, the Hearing Examiner credits Cottingham that he performed services during this period.

8. On September 15, 1988, Cottingham received a check which compensated him for the dates of the physicals on August 3, 4 and 25, 1988 (Tr 14, 41). Also, Cottingham testified without contradiction that he made a request to Lelli for payment pursuant to the stipend for the additional days in August, supra (Tr 14). Lelli responded by advising Cottingham that he should fill out the time sheet showing the dates and time that he provided services (Tr 15). Cottingham complied with this request, indicating that he was entitled to be compensated for approximately 120 hours (Tr 15). On October 15 and November 15, 1988, Cottingham questioned Lelli regarding payment and Lelli indicated that "...things were in the coffers to be taken care of..." (Tr 16). However, on December 15, 1988, Lelli advised Cottingham that he would not be receiving any additional compensation (Tr 16, 17).

9. Cottingham testified that notwithstanding that his contract (J-2) stated that it was effective during the term

September 1 through November 30, 1988, he was entitled to compensation for the days worked in August 1988 (Tr 18). Cottingham acknowledged that in 1986, under a like contract, he performed services from August 27 through August 29, 1986, and did not receive compensation for the August dates (Tr 20-22). The same was true in 1987 (Tr 22, 23). Cottingham acknowledged that his contract for 1988 was September through November and that in August 1988, he worked as Athletic Trainer just as he had in 1986 and 1987 and, after requesting compensation for working those days in 1988, he was not paid (Tr 23, 24). Cottingham never filed a grievance with respect to 1988 (Tr 25, 26).

10. Anthony J. Terregino, a retired Assistant Superintendent of the District, testified that he participated in the collective negotiations leading up to J-1 and that Schedule "B" contains an array of stipends to be paid to coaching personnel, etc. (Tr 43-45). By way of clarifying what the references in J-2 and R-3 mean with respect to Fall, Winter and Spring, Terregino testified that "Fall" covers services rendered in August, September, October and November as to "Athletic Trainer" (Cottingham) and that this "understanding" as to this interpretation went back as many years as he could remember, probably 41 years, but at least since 1981 (Tr 59, 60).

DISCUSSION AND ANALYSIS

The Association's Unfair Practice Charge Was Not Untimely Filed Under The Act Since The Operative Event Occurred on December 15, 1988, When Robert Cottingham Learned That He Would Not Be Paid For The Several Days And Weeks In August 1988.

The instant Unfair Practice Charge was filed on February 15, 1989. The key operative event occurred on December 15, 1988 when Cottingham failed to receive compensation for the claimed days in August 1988 (Tr 16, 17). Although N.J.S.A. 34:13A-5.4(c) provides that no complaint shall issue upon an unfair practice occurring more than six (6) months prior to the filing of the charge, this subsection also provides further "...unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented..."

The Hearing Examiner, reading the entire relevant portions of Section 5.4(c) of the Act, supra, concludes that there was no reason for Cottingham or the Association to conclude that an unfair practice had been committed by the Board until the Board failed to make payment to Cottingham of the monies due for his alleged uncompensated days in August 1988. This, necessarily, could not have occurred until the Board failed to make payment to him on or about December 15, 1988.

Although not necessarily germane to disposing of the Respondent's Motion to Dismiss, the Charging Party has correctly noted that the New Jersey Supreme Court in Kaczmarek v. N. J. Turnpike Auth., 77 N.J. 329 (1978) observed that the Court noted that the Legislature "...evinced a purpose to permit equitable

considerations to be brought to bear..." if necessary, in construing Section 5.4(c) of our Act (77 N.J. at 339, 340). In Kaczmarek the Court concluded that the plaintiff had not "slept on his rights." [77 N.J. at 340, 341]. See also, Zaccardi v. Becker, 88 N.J. 245, 256 (1982).

In Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 78-69, 4 NJPER 188 (¶4094 1978) the Board had decided to undertake split sessions at a meeting in February 1976 but did not implement its decision until September 1976. The Hearing Examiner, in deciding that the unfair practice charge was untimely filed, had calculated the six-month limitation from February 1976 rather than September 1976. Although the unfair practice charge was deemed untimely by calculation from either February or September 1976, the Commission disagreed with the Hearing Examiner that the operative date was February, at the time the Board's decision was made rather than September 1976 when implementation occurred.

The Hearing Examiner in the instant case finds the Warren Hills decision relevant since the failure of the instant Board to have paid Cottingham as of December 15, 1988, was analogous to the September 1976 "implementation" decision date in Warren Hills. Thus, as this Hearing Examiner analyzes the factual situation herein, there would have been no basis or reason for the Association or Cottingham to have filed an Unfair Practice Charge until the failure of the Board to have compensated him for his August 1988 services on or about December 15, 1988.

The Charging Party's citation Sparta Bd. of Ed., H.E. No. 89-29, 15 NJPER 210 (¶20089 1989), adopted P.E.R.C. No. 90-2, 15 NJPER 488 (¶20199 1989) is apposite. In Sparta the Commission concurred with the Hearing Examiner that once the Association in that case became aware of a change in the compensation of certain employees, it filed its unfair practice charge and, thus, it was timely. The Hearing Examiner rejected the Board's contention in Sparta that Hunterdon[3/] supported its argument that the unfair practice charge was untimely filed. The Hearing Examiner in Sparta distinguished Hunterdon since in the latter case the Association knew about a particular change in October 1983 but did not file a charge until May 1984, well beyond the six-month limitation period. That, however, was not the case in Sparta nor is it the case in this proceeding.[4/]

The Respondent Board Did Not Violate Sections 5.4(a)(1) Or (5) Of The Act When It Refused To Recognize The Claim Of Robert Cottingham For Additional Compensation For Services In August 1988 Because This Subject Matter Is Deferrable To The Parties' Grievance Procedure Under Applicable Commission Precedent.

The Association first refers to the decision of the Hearing Examiner in Carlstadt-East Rutherford Reg. Bd. of Ed., H.E.

3/ See Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-138, 13 NJPER 481 (¶18176 1987), adopting H.E. No. 87-55, 13 NJPER 305 (¶18128 1987).

4/ The several cases cited by the Board in its post-hearing brief (pp. 4, 5) do not change the opinion of this Hearing Examiner as to the timeliness of the Association's filing of its Unfair Practice Charge on February 15, 1989.

No. 89-5, 14 NJPER 585, (¶19249 1988) where the well-settled rule was stated that for a violation of Section 5.4(a)(5) to be established, it must be shown by a preponderance of the evidence that: (a) there was a change; (b) in terms and conditions of employment; (c) and that this change was made without negotiations with the majority representative (14 NJPER at 587). It must be noted that the Hearing Examiner's recommendation in Carlstadt that the complaint be dismissed was reversed by the Commission in P.E.R.C. No. 85-59, 15 NJPER 19 (¶20006 1988), the holding of which does not appear material to the resolution of the instant dispute. Carlstadt involved, inter alia, whether certain coaches were covered by the recognition clause of the parties' agreement and whether during collective negotiations the Board in that case unilaterally changed the employment contract of its coaches. Clearly, in Carlstadt the board did violate Section 5.4(a)(5) of the Act when it increased the workload of its coaches without additional compensation and without collective negotiations with the Association: Local 195, IFPTE v. State, 88 N.J. 393 (1982) and other like cases cited by the Commission at 15 NJPER 20.

The Hearing Examiner has no difficulty in concluding that the facts in Carlstadt bear no meaningful relationship to those in the case at bar. We are not dealing here with this Board having sought unilaterally to change the terms and conditions of employment of its Athletic Trainer. Rather, we are concerned with the claim of Cottingham that the Board violated the terms and conditions of his

employment by failing to compensate him for the several additional days in August 1988, supra. Clearly, the instant Association agrees that this is the issue, this being evident from a careful reading of the Association's post-hearing brief (pp. 3-7).

The Board in its post-hearing brief argues persuasively that the instant dispute between the parties involves one of contract interpretation, which necessarily includes the terms of J-1 and the relevant past practice of the parties with respect to the compensation afforded Cottingham over the years for his services rendered in August. Evidence was adduced both through Cottingham and Lelli that there was a prior practice of non-payment to Cottingham for additional services rendered in August for at least the years 1986 and 1987. The Hearing Examiner might also conclude that the practice of non-payment preceded 1986 since Terregino testified that this practice has obtained at least since 1981 (Tr 60). However, the Hearing Examiner is not basing his decision in this case on whether or not there was a past practice which antedated 1986.

The evidence adduced by the parties indicates that there is a probable ambiguity in the meaning of the term "Fall" when one attempts to interpret the Schedule "B" provisions in the parties' agreement (J-1). This ambiguity is highlighted by the provisions in Cottingham's individual employment contract (J-2), which speak in terms of September 1, 1988 through November 30, 1988, when the claim of Cottingham for additional compensation is for August 1988. [See Board's post-hearing brief at p. 7].

Finally, the Hearing Examiner is compelled to find and conclude that this case is governed by the landmark decision of the Commission in State of N.J. (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) where the Commission set to rest the thorny problem as to when an unfair practice charge constitutes a substantive violation of Section 5.4(a)(5) of the Act as opposed to when an unfair practice charge merely alleges a breach of the parties' collective negotiations agreement. In the latter case the charge should properly be deferred to the negotiated grievance procedure under the agreement. The Commission set forth several illustrative instances of what would constitute a violation of the Act, namely, a repudiation of an established term and condition in the parties' agreement or a unilateral change in terms and conditions of employment that is so clear as to create an inference of "bad faith" by the employer (10 NJPER at 422, 423). See also, Perth Amboy Bd. of Ed., P.E.R.C. No. 87-29, 12 NJPER 759 (¶17287 1986); Newark Bd. of Ed., D.U.P. No. 87-18, 13 NJPER 515 (¶18193 1987); Boro of Tenafly, P.E.R.C. No. 88-92, 14 NJPER 274 (¶19102 1988); and Garwood Bd. of Ed., D.U.P. No. 88-20, 14 NJPER 445 (¶19182 1988).

Since the Hearing Examiner is convinced that the Board herein did not in this case repudiate an established term and condition of Cottingham's employment and that there is no evidence whatever of "bad faith," the Hearing Examiner must recommend dismissal of the Complaint under Human Services. The dispute

between the parties involving Cottingham's claim for additional compensation for services rendered in August 1988 appears clearly to be a grievable matter, which must be deferred to the parties' grievance procedure (J-1, pp. 3-6).

* * * *

Based upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) or (5) when it refused to compensate Robert Cottingham for claimed additional services rendered in August 1988 as an Athletic Trainer and Equipment Manager.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: December 15, 1989
Trenton, New Jersey